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E. Probyn.
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A

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General Abridgment

OF

LAW and EQUITY

Alphabetically digeſted under proper TITLES

WITH

NOTES and REFERENCES

to the WHOLE.

By CHARLES VINER, *Eſq;*

Favente Deo.

ALDERSHOT *in* Hampſhire *near* Farnham *in* Surry:

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FH
MVSEVM
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A

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(O. b) What Thing will *help* an Error.

In what Caſe a *Verdict will* help it.

[In Actions wherein *Baron and Feme* are Parties.]

1. IN an Action againſt Baron and Feme, if the Plaintiff declares that they dixerunt of the Plaintiff certain ſcandalous Words ſuch a Day and Year; if the Defendants plead Not Guilty, and the Jury find the Baron Guilty, but find the Feme Not Guilty; in this Caſe the Plaintiff ſhall have Judgment; for though the Words by the Baron and Feme could not be jointly ſpoke, inaſmuch as they have two Mouths, and the ſpeaking of one is not the ſpeaking of the other, ſo that it ſhall be intended that they (*) ſpoke the Words ſeverally at the ſame Time, in which Caſe the Action ought not to have been brought againſt both, inaſmuch as if they had been both found Guilty, there ought to have been two Judgments, ſcilicet, One againſt the Baron and Feme, and the other againſt the Baron only, which is not to be ſuffered upon one Writ; and therefore if the Plaintiff had demurred upon this Declaration, this had not been good, yet when the Feme is found Not Guilty there need be but one Judgment, ſcilicet, againſt the Baron, and therefore the Verdict hath made this good, and ſo the Plaintiff ſhall have Judgment againſt the Baron. Sty. 349. Mich. 1652. Burcher v. Orchard, S. P. adjudged, and ſeems to be S. C. * Fol. 782.

2. In an Action of Battery by Baron and Feme for the Battery of the Baron and Feme, and upon Not Guilty pleaded the Defendants are found Guilty of the Battery of both, and ſeveral Damages aſſeſſed; in this Caſe the Writ ſhall abate as to the Battery of the Baron, becauſe the Feme cannot join with her Husband for the Battery of the Husband, but the Baron and Feme ſhall have Judgment for the Battery of the Feme, for it is but one Judgment. 9 E. 4 51. b. adjudged per Cur. Br. Brief, pl. 448. cites S. C. —— Br. Baron and Feme, pl. 54. cites S. C. —— Br. Treſpaſs, pl. 190. cites S. C. —— Fitzh. Brief, pl. 177. cites S. C. —— S. C. cited 2 Vent. 29. per Curiam, Paſch. 28 Car. 2 C. B. and Judgment accordingly

3. *Treſpaſs* for *Aſſault and Battery, and wounding of the Baron and Feme.* Upon Not Guilty pleaded the *Verdict was, as to the Wife, Guilty, & quoad reſiduum Not Guilty.* It was moved in Arreſt of Judgment, That the Baron and Feme could not join in an Action of Treſpaſs for beating them both; that there is nothing found as to the beating of the Husband, and ſo an imperfect Verdict; for the *quoad reſiduum* ſhall extend only to the other Treſpaſſes done to the Wife which goes to both Points. But the whole Court were of an Opinion, That the *Verdict cured this Miſtake in the Action.* 2 Vent. 29. Hockett v. Stegold. 2 Mod. 66. S. C. ruled accordingly, and Judgment for the Plaintiff.

(P. b) What Things will *help* an Error.

Pleading.

Br. Error, pl. 34. cites S. C. — Per Holt Ch. J. Show. 170 in Caſe of Coan v. Bowles. And Ibid. 171. cites 48 E. 3. Waſte againſt a Guardian, and pending the Plea he ſhews that the Plaintiff was an Infant. Reſolved it was too late. So when one of Age appears by Guardian, and the other Party admits him ſo to appear, he is thereby concluded, becauſe he has admitted him ſo to appear cites 17 E. 3. 20.

1. A Man ſhall never have a Writ of Error for ſuch Thing of which he might have had Advantage by Plea in the Action, and did not take it, if it does not appear of Record. 3 H. 4. 6. b.

Br. Error, pl. 34. cites S. C. and ſo if he had impannelled the Brother of the Plaintiff; Per Rede.

2. As if the Sheriff who returns the Panel in an Aſſiſe was Brother to him againſt whom the Aſſiſe paſſed, if he does not challenge the Array, no Writ of Error lies for this. 3 H. 4. 6. b.

Br Error, pl. 34. cites S. C & S. P. by Freilby.

3. The ſame Law if no Hundredor was in the Panel. 3 H. 4. 6. b.

Br. Error, pl. 34. cites S. C. — Fitzh. Error, pl. 58. cites S. C.

4. So if an Action be brought in three Vills, and the Bailiff of the Franchiſe returns the whole Panel where the Sheriff ought to have returned Part, ſcilicet, out of one Town; if the Party does not challenge the Array, for this Cauſe he ſhall never have a Writ of Error thereupon. 3 H. 4. 6. b. nor ſhall he in Reverſion have it by the Statute.

5. If a Man loſes in an Action in the Court of Ancient Demeſne, he cannot aſſign it for Error that it was Frankfee againſt his Affirmance of the Jurisdiction by pleading there. 18 H. 6. 28. b.

6. If an Alien brings a real Action as Heir to J. S. againſt another, and recovers, the Defendant cannot aſſign for Error that he was an Alien born, inaſmuch as he did not take this Exception in the firſt Action. 18 E. 1. lib. Par. 23. b. 24. adjudged.

7. Where the Court Ex Officio ought to abate a Writ without Motion of the Party, as for falſe Latin in the Original, if the Party does not take Exception to the Writ, yet he may have a Writ of Error; but otherwiſe it is if the Court ought not to abate the Writ without Exception of the Party. 3 H. 4. 7.

For Matters in and before the Writ, if not pleaded in Abatement, no Advantage can be taken of it by Error; but otherwiſe where it is after the Writ, ſuch Things may be aſſigned for Error; Per Eyre J. Show. 169. Trin. 2 W. & M. Coan v. Bowles.

8. If a Writ be abateable and the Defendant does not take Advantage thereof, but plead to the Action, and after Judgment is given againſt him he ſhall not have a Writ of Error thereof, for he hath affirmed the Writ by his Plea. 29 Aſſ. 35.

Br. Error, pl. 125. cites S. C.

9. As in a Raviſhment of Ward at Common Law, if the Writ be that he rapuit the Ward, where it ought to be cepit & abduxit, and the Defendant pleads to the Action, and after Judgment is given againſt him he ſhall not have a Writ of Error, for he hath affirmed the Writ by his Plea. 29 Aſſ. 35. adjudged.

10. If

10. If a Woman brings a Writ, and pending this takes Husband, and after (*) hath Judgment againſt the Defendant, who did not plead this in Abatement, he ſhall not have a Writ of Error thereof, becauſe the Writ was but abateable, and he might have pleaded it, and therefore he hath † paſſed the Advantage. 19 Aſſ. 8. * Fol. 783. Br. Error, pl. 117. cites S. C. —— † Carth. 123. in Caſe of Coan v. Bowles. —— If a Feme Covert brings Action as Feme ſole, and Defendant pleads in Bar, he ſhall never aſſign this for Error. If ſhe makes Attorney this will not be aſſigned for Error; Per Holt Ch. J. Show. 171. Trin. 2 W. & M.

11. In a Writ of Entry ſur Diſſeiſin, if the Original Writ wants theſe Words Quam clamat eſſe jus & hæreditatem ſuam, and the Tenant admits the Writ, and pleads to the Action, and loſes, he ſhall not aſſign this Fault in the Writ for Error, becauſe he admits the Writ good by his Plea. Fitzh. Natura Brevium, 21 E. F N. B. 21. (E) Marg. in the Engliſh Edition, cites 20 Aſſ. pl. 3 21 E. 3. Fitzh. Error 4. 7 H. 6 39. Matter in Fact muſt be pleaded, and ſhall not be aſſigned for Error. 8 E. 4. 19. By Pigot and Choke in Jointenancy, General Tenancy, Miſnoſmer, taking of Husband pendant the Writ, and the like, which prove the Writ abateable, there if the Party plead other Matter, and admits the Writ, he ſhall not have Error; Contra of Death or other Thing, which proves the Writ abated.

12. So in a Writ of Detinue of Charters concerning Land, if the Plaintiff in the Count does not ſhew the Certainty of the Land, if the Defendant admits the Count good, and pleads to the Action, and loſes, he ſhall not aſſign it for Error, becauſe he admits the Count good. Fitzh. Natura Brevium 21. but Quære. See (M. b) ſupra, pl. 1.

13. In an Aſſiſe againſt A they plead ſeveral Pleas, and accept ſeveral Tenancies, and the Demandant accepts B. for his Tenant; if it be inquired of the Pleas before it be inquired of the Tenancies, the Demandant may aſſign it for Error notwithſtanding his own Acceptance. 11 H. 4. 68. Br. Error, pl. 52. cites S. C. —— Fitzh. Aſſiſe, pl. 48. cites S. C.

14. A Man may aſſign for Error, that after a Juror was drawn upon his Challenge, that the ſame Juror was after ſworn upon the Tales, yet he might have ouſted him by Chalenge at the Trial. Vide for this 12 H. 4. 24. Br. Error, pl. 53. cites 12 H. 4. 24. contra, that where a Juror is drawn out upon Venire Facias, and returned again upon a Tales, that this is not Error, by the beſt Opinion, if the Jury paſſes without Challenge.

15. If a Writ be abated in Law by a Matter of Fact, and the Party might have abated it by Plea and does not, but Judgment paſſes againſt him, yet he may aſſign it for Error. 19 Aſſ. 8. Br. Error, pl. 117. cites S. C.

16. As if a Writ be brought againſt two Jointenants, and after one dies, and after Judgment is given againſt them, though the Survivor might have abated the Writ by the Death of his Companion, yet it is Error and not helped by this, becauſe the Writ was abated in Fact by his Death. 19 Aſſ. 8. Br. Error, pl. 117. cites S. C.

17. If a Writ of Meſne is brought againſt two Coparceners of one Meſnalty, and after one dies, and after Judgment is given againſt them, the Non-pleader of the Death by the Survivor ſhall not help the Error, but he and the Heir of the other which is dead may aſſign it for Error, becauſe the Writ was abated in Fact by his Death. 19 Aſſ. 8. adjudged. Br. Error, pl. 17. cites S. C. —— See (S) ſupra, pl. 3. S. C.

18. Error of a *Judgment in a Quare Impedit*, becauſe it is brought *againſt the Biſhop and the Incumbent without naming the Patron in the Writ, who was averred to be alive*; It was ſaid that this peradventure had been a good Plea, if it had been pleaded in Abatement of the Writ, for nothing ſhall be aſſigned for Error but that which proves it to be abated in facto, but *in regard the Defendant had pleaded over in Bar, he* 2 Roll Rep. 239. S. C. adjudged that the Writ ſhall not be abated by the Judges Ex

Officio without Argument.—— Palm 306. 311. S. C. adjudged.

he has relinquiſhed his Plea to the Writ, and ſhall not now take Advantage of the ſame. Cro. J. 650. pl. 20. Mich. 20 Jac. B. R. Sir Geo. Savil v. Thornton.

19. There is a Diverſity, *when it appears to the Court that the Writ itſelf is vicious*, there *it is ipſo facto void*, and the Judgment given thereupon is erroneous; *but if the Court ought to be aſcertained by Matter dehors* that it is ill, *and the Defendant does not inform the Court, but* paſſes it over and *pleads in Bar*, this is not Error, ſaid Arguendo, Palm. 309. in Caſe of Thornton v. Savil, cites 16 E. 4. 4. 22 E. 4. 54. or 6. and 11 Rep. 52. For the Court regards the Concluſion of the Party if it be to the Writ, or in Bar, and cites 36 H. 6. 17. 40 E. 3. 9.

20. Writ of Error from the Court of Ely of a Judgment in Treſpaſs; the Record certify'd ſet forth a *Summons* ſuch a Day, *returnable the ſame Day generally*; and a Return the ſame Day of a Summoneri; and thereupon an Attachment and a Return the ſame Day of a Nil, and then a *Capias returnable the ſame Day*; and thereupon the Defendant *brought in in Cuſtody*, *Declaration Plea*, *Demurrer* and Judgment, Writ of Enquiry executed and returned, *and Judgment final*, *all in a Day*. It was reſolved the omitting to take Advantage of it then, but *pleading over*, cured it; for he might have demanded Judgment whether he ought to be put to Anſwer upon the Capias, the *Return of the Pone being not yet out*. 12 Mod. 523. Trin. 13 W. 3. Bidolph v. Veal.

21. One ſhall never take Advantage of an *Error in Fact*, where he had an Opportunity of pleading it; that is, if it be ſuch an Error in Fact *as does abate the Writ*; and *if it be* ſuch an Error in Fact as does *happen after the Time of Pleading is out*, then the Way is to bring an *Audita Querela*; Per Holt Ch. J. 12 Mod. 689. Hill. 13 W. 3. in Caſe of the City of London v. Wood.

(Q. b) What Thing will *help* an Error.

Relation.

1. IF at the Grand Cape returned the Tenant wages his Law by Attorney who hath no Warrant of Attorney, and at the Day when he ought to do his Law he makes Default, and Judgment is given, yet the want of the Warrant of Attorney continues an Error, becauſe it is a Diſcontinuance. 11 H. 4. 88. b.

2. But if the Tenant for Life makes Default after Default, and he in the Reverſion is received, and after he appears by Attorney that hath no Warrant, and after makes Default, the want of the Warrant of Attorney ſhall not be aſſigned for Error, becauſe the Judgment is given upon Default of the Leſſee. 11 H. 4. 88. b.

See Tit. Trial, (G. g) pl. 15. 16. S. C. and * Fol. 784. the Notes there.

3. If a Verdict be quaſhable for the Misbehaviour of the Jury, as for the receiving Evidence of one Part after Departure from the Bar, which was not given in Evidence at the Bar, if this be not ſhewed in Arreſt of Judgment no Advantage can be taken thereof in a Writ of Error, for (*) this ſhall not be examined after Judgment. Mich. 40, 41 El. B. R. between *Groves and Short* adjudged.

4. Error

4. Error on a *Judgment in an Inferior Court, in Indebitatus Aſſumpſit for* 400 *l. the Jury find Damages to* 300 *l.* and *Judgment is* accordingly *quod recuperet* 300 *l. and no eat ſine Die, as to the reſt*; non allocatur; becauſe *in Caſe*; otherwiſe if it had been *Debt.* 2 Show. 92. pl. 86. Hill. 31 & 32 Car. 2. B. R. Holton v. Croft.

(R. b) Releaſe of that which will make Error.

[*Damages.*]

1. IN a Writ of Annuity the Parties are at Iſſue, and it is found for the Plaintiff, but the Jury did not aſſeſs any Damages or Coſts, and after the Plaintiff releaſed the Damages and Coſts, and upon this had Judgment, this Judgment is not erroneous becauſe the Plaintiff hath releaſed his Damages and Coſts, which is for the Benefit of the Defendant. Co. 11. *Bentham* 56. adjudged. 2 Bulſt. 279. Marſh v. Bentham, S. C. and Judgment affirmed, and ſays, that ſo is 8 Rep. Beecher's Caſe. —— Roll Rep. 81. pl. 40. Bent v. Marſh, S. C and Judgment affirmed. —— Jenk. 286. pl. 20 cites S. C. The Plaintiff ſhall have Judgment for the Annuity for two Reaſons; this Releaſe ſhall be underſtood to be before the Verdict, and a Writ of Error does not lie for the Defendant in this Caſe; for the Releaſe is for his Advantage Adjudged and affirmed in Error. —— If this Releaſe had not been, the Court Ex Officio ſhould reverſe the Judgment on a Writ of Error brought by the Defendant; for Damages and Coſts are due as well as the Annuity. Ibid. —— See infra, pl. 7. S. C.

2. In a Writ of Debt for 100 l. againſt an Executor, if the Plaintiff counts upon an Obligation for 99 l. and upon a Mutuatus by the Teſtator for 20 s. and upon the Iſſue the Jury find for the Plaintiff in the Whole, and aſſeſs Damages intire, where it appeared no Action lay againſt the Executor upon the Mutuatus of the Teſtator; yet if the Plaintiff releaſes the 20 s. and all the Damages, and hath Judgment for the Reſidue, this Judgment is not erroneous. Paſch. 37 El. B. *Aſkford's Caſe*, per Curiam. See Saund. 282. Trin. 21 Car. 2. Duppa v. Mayo, and the Arguments there.

3. In Treſpaſs, if the Plaintiff counts of Damages to 40 l. and the Jury tax Damages to 49 l. if the Plaintiff releaſes the Overplus, ſcilicet, the 9 l. and hath Judgment for the Reſidue, the Judgment is not erroneous. Co. 10. *Robert Pilford*, 115 b. adjudged. Jenk. 288. pl. 22. S. C. adjudged and affirmed in Error.

4. In an Ejectione Firmæ of Land & de Libertate Piſcariæ for free Fiſhery, which is not good for that; if the Jury find for the Plaintiff and tax Damages intire, and after the Plaintiff releaſes all the Damages and hath Judgment for the Land only; this Judgment is not erroneous, though he cannot properly releaſe the Damages for the Fiſhery where there are none, for he may as well pray Judgment for the Reſidue, and not for this, and relinquiſh the Damages. Hill. 4 Jac. B. R. between *Fretzville and Mulleneux*, adjudged. S C. cited Cro. J. 146. at the End of pl. 4. —— Ibid. 144. pl. 4. Hill. 4 Jac. B. R. Molineux v. Molineux, S P. adjudged in an Ejectment of an Houſe and Lands, and of a free Fiſhery.

5. So in an Ejectione Cuſtodiæ & hæredis, where it does not lie of the Cuſtody of the Heir, but of the Land only, and the Jury found for the Plaintiff, and gave Damages intire; yet the Plaintiff may relinquiſh the Damages and Coſts and have Judgment of the S. C. cited by Doderidge J. 2 Roll Rep. 272. ——

S C. cited 10 Rep. 130. b. —— 11 Rep. 56. a cites S. C. —— S. C. cited by Doderidge J. 2 Bulst. 28. —— See (U. b) pl. 2. S. C.

Land only, and this shall not be erroneous. D. 22 El. 369. adjudged *Clifford's* Case.

2 Bulst. 28. S. C. adjudged. —— See (U. b) infra, pl 3 S. C.

6. So in an Ejectione Firmæ of a Messuage, Cottage, and Tenement; if it be found for the Plaintiff, and one intire Penny Damage given to the Plaintiff for the Whole, because the Ejectment does not lie of a Tenement, the Plaintiff may release all the Damages, for that it is intire, and have Judgment for all the Land saving the Tenement, and this shall not be erroneous. Hill. 10 Jac. B. R. between *Retorick and Chappel*, it was done by Advice.

See pl. 1. supra S. C. and the Notes there.

7. In a Writ of Annuity if the Plaintiff recovers by Verdict, but the Jury do not find any Damages to the Plaintiff, the Plaintiff may before Judgment release the Damages, and have Judgment to recover the Annuity and this Release of the Damages, though none were found, shall help the Error. Mich. 12 Jac. B. R. between *Bent and Marsh* adjudged; but there they seemed also that this would not make the Judgment erroneous without the Release; Quære this.

Roll Rep. 363. pl. 17. S. C. adjornatur. —— Ibid. 397. pl 24 S C. adjudged. —— 3 Bulst. 174. S. C. and Judgment affirmed. —— Jenk. 324. pl. 36.

8. In a Quare Impedit, if the Jury gave Damages and Costs where no Costs ought to be given, for that the Statute did not give them, and after Judgment is entred quod nullo habito respectu of the Costs, the Court awards that he shall recover the Damages; this special Entry, without any release of the Costs, shall help the Error. Pasch. 14 Jac. B. R. between *Grange and Denny* adjudged in a Writ of Error.

Fol. 785. Hob. 178. pl. 205. Andrews v. Delahay, S. C. adjudged accordingly; for tho' the Bill were an

9. If a Bill of Debt be brought against an Attorney upon three several Obligations, and upon Demand of Oyer, it appears by the Condition of one of the Obligations, that the Day of Payment thereof is not yet come; after a Verdict for the Plaintiff upon Conditions performed pleaded, and Costs and Damages given, though the Plaintiff cannot have Judgment for this Obligation, of which the Day of Payment is not yet come, yet upon his Release of Costs and Damages, he shall have Judgment for the other Obligations. Hob. 240. It seems he need not release the Costs.

intire Sum, yet by the Count it appears that they were as several Demands, so the whole Suit is not falsified by the Plaintiff himself; for it is as several Demands and Suits; Tamen Quære if it had been so by Original —— S.C. cited Arg. Saund. 286. —— S. C. cited Arg. 5 Mod. 213. —— S. C. cited per Holt Ch. J. 2 Salk. 659.

10. Quare Impedit *against the Bishop and two others*; the *Bishop appeared*, and the *other two not*, and the Plaintiff prayed Writ to the Bishop against them by their Default; et non allocatur without making Title; by which he *counted against the Bishop, which serv'd for Title against the other two*, Quod Nota; and the *Bishop pleaded that he did not claim any thing* in the Patronage, *only as Ordinary*, and demanded Judgment if without special Disturbance &c. by which the *Plaintiff would have released his Damages and had Execution, and could not have it, for no Damages are taxed in certain*; by which it was *recorded, that he would not have Damages*; upon which the Plaintiff had Writ to the Bishop. Br. Brief al Evesque, pl. 23. cites 10 H. 6. 4.

11. In *Dower* the *Jury assessed Damages*, As in Case where the *Husband died seised*, the *which dying seised is not found by the Verdict*; in

in which caſe it was ſaid by the Court, that the *Demandant might pray Judgment of the Lands and releaſe Damages*, or the Demandant *may aver that the Husband died ſeiſed, and have a Writ to enquire of the Damages*; Quod omnes Pregnotar' conceſſerunt. Le. 92. pl. 118. Mich. 29 & 30 Eliz. C. B. Butler v. Ayres.

12. In *Replevin* the Defendant *avowed for Rent, but was intitled to two Parts only thereof*, and the *Jurors aſſeſſed Damages for all* the Rent; the Court held that the Avowant cannot have Judgment unleſs he releaſe the Damages. Mo. 281. pl. 434. Mich. 31 & 32 Eliz. C. B. the 9th Point, in the Caſe of Battey v. Trevillian.

13. *Ejectione Firmæ*; The Declaration was *de uno Meſſuagio ſive Tenemento, and four Acres of Land to the ſame belonging*; It was held, that although it was uncertain for the Meſſuage or Tenement, and that Land cannot properly be ſaid to belong to an Houſe, yet it was good for the four Acres, and the Plaintiff releaſed his Damages, and had Judgment for the four Acres. Cro. E. 186. pl. 8. Trin. 32 Eliz. B. R. Wood v. Payne. 3 Le. 228. pl. 306 S. C adjudged accordingly.

14. An Action of *Ejectment* brought, *and alſo a Battery in one Writ*; and after Verdict it was moved in Arreſt of Judgment, becauſe the Battery was joined with the Ejectment. The *Damages were found ſeverally*, and the Plaintiff had *releaſed the Damages for the Battery*, and prayed Judgment for the Ejectment; Winch held the Writ naught, but Judgment was given for the Plaintiff notwithſtanding. Brownl. 235. Hill. 16 Jac. Bide v. Snelling.

15. Upon a Verdict given for the Plaintiff in an Ejectione Firmæ it was moved in Arreſt of Judgment that the *Ejectment is laid* to be *of three Meſſuages or Tenements, and a Toft*, which as to the Meſſuages or Tenements is uncertain. Roll Ch. J. ſaid, you move too ſoon, for it may be the Plaintiff will *releaſe the Damages as to the Meſſuages or Tenements, and take his Judgment only for the Toft*, and the Action lies well enough for that. Sty. 364. Hill. 1652. Aſhworth v. Sir Thomas Stanley.

16. In *Ejectment for* 3000 *Acres of Waſte inter alia*, after a Verdict for the Plaintiff, it was *moved* in Arreſt of Judgment, *that an Ejectment does not lie for Waſte for the Uncertainty* what it means; And of that Opinion was the Court; and afterwards the Plaintiff *releaſed the Waſte and Damages and took Judgment of the Reſidue*. Hardr. 57. pl. 3. Paſch. 1656. Hancock v. Price.

17. *Treſpaſs Vi et Armis for taking the Mare ipſius querentis, nec non Bona & Catalla ſequentia*, viz. and ſums them up, but does *not ſay they were the Goods ipſius querentis*; and thereupon the Defendant demurs; and reſolved the Plaintiff may have Judgment for the Mare, and releaſe the Action for the Reſidue. Raym 395. Trin. 32 Car. 2. B. R. Cutforthay v. Taylor.

18. Where the Sum demanded *depends on the Deed itſelf*, and on nothing extrinſical, as in Caſe of *Debt or Covenant to pay* 20 *l.* there can be no Remittitur; for the Variance which is made is inconſiſtent with the Deed on which the Duty demanded entirely depends; otherwiſe where it may be more or leſs by Matter *extrinſick*, As in *Debt for Rent*, or Covenant to pay ſo much per Load for every Load of Wood, and that he delivered ſo many Loads and an half, and reckons for the half Load; in ſuch Caſe, if more be demanded than is due it may be remitted; for the *Variance is not inconſiſtent with the Deed*, and as the Plaintiff is to recover on Trial what appears on Evidence to be due, ſo on Demurrer he is to have Judgment for no more than he ought to recover, and may remit the reſt; Per Holt Ch. J. 2 Salk. 659 pl. 3. Mich. 1 Ann. B. R. in Caſe of Incledon v. Crips.

(S b) What Thing &c.

Releaſe of that which will make Error *and Special Entry* nullo habitu reſpectu &c.

Sty. 175. S. C. adjudged Niſi by 3 Judges, contra Jermyn. —— Hale Ch. J. ſaid, that no Judgment was given Saund. 286. in Caſe of Duppa v Mayo, Trin. 21 Car. 2 where the like Point upon Demurrer was argued and debated, but no Judgment given.

1. IN an Action of Debt for 10 l. if the Plaintiff declares upon a Leaſe for Years, rendering Rent at certain Feaſts, and concludes & quia 10 l. of the ſaid Rent for ſuch a Time, ending at ſuch a Feaſt &c. he brought this Action, where it appears by the Declaration itſelf, that there was 4 s. wanting of the 10 l. ſo that the Rent in Arrear amounted but to 9 l. 16 s. and thereupon the Defendant pleads Nil debet; and upon this there is a Verdict for the Plaintiff, and Damages and Coſts given, though the Demand be intire, ſcilicet, of 10 l. and it appears by the Plaintiff's own ſhewing that he had no Cauſe of Action for the Whole; yet the Plaintiff may releaſe the 4 s. and Damages, and take Judgment for the reſt. Mich. 1649. between *Barber and Pomrey* adjudged per Curiam, præter Juſtice Jermin, this being moved in Arreſt of Judgment. Intratur Hill. 24 Car. Rot. 595. B. R.

S. C. cited 5 Mod. 214. Arg. and ſays it is true my Ld. Hale ſaid, that Judgment was never given in this Caſe, but obſerves, that Ld. Roll cites the Number-Roll and the Term, when it was entred. —— 12 Mod. 93. S. C. cited by Holt Ch. J. and ſaid to be good Law. —— 7 Mod. 88. Mich. 1 Ann. B. R. ſays the Roll of the Caſe of Barber v. Pomeroy was produced in Court, and the Judgment appeared to be entred for the Plaintiff, and that the Roll is Hill. 24 Car. 1. Rot. 951. —— And S. P. adjudg'd accordingly in the principal Caſe in 12 Mod. 93. and 5 Mod. 212. Paſch. 8 W. 3. B. R. Thwaites v. Lady Aſhfield. —— Comb. 365. S. C. and the Court conceived that the Plaintiff might enter Non Pros for the Surpluſage, and take Judgment for what was right. —— S. P. accordingly, Vent. 49. Mich. 21 Car. 2. B. R. Anon.

See Judgment (G. 2) —See Releaſe.

(T. b) *What* Thing will *help* an Error.

Releaſe of that which will make an Error.

1. IN an Action of Aſſault and Battery againſt four for two Treſpaſſes ſuppoſed to be done at two ſeveral Days, if one Defendant pleads Not Guilty to both Treſpaſſes, and another Defendant pleads Not Guilty to the firſt Treſpaſs, and juſtifies the ſecond Treſpaſs by the Aſſault of the Plaintiff himſelf, and the other two Defendants plead Not Guilty as to the firſt Treſpaſs, and Judgment is given againſt them by Non ſum Informatus for the ſecond Treſpaſs; and upon theſe ſeveral Pleas, ſeveral Iſſues being joined, and all found for the Plaintiff; and the Jury gave 40 s. Damages for all, againſt all the Defendants, and alſo taxed 1 d. Damages for the Treſpaſs againſt the two, againſt whom Judgment was given by Non ſum informatus, which is not good; yet if the Plaintiff releaſes 1 d. Damages, and takes Judgment againſt all the four Defendants for 40 s. Damages, and for the

the Costs assessed by the Jury; this has helped the Verdict, and by this the Judgment is good and not erroneous. Mich. 9 Car. B. R. between *Eastcot and others*, Plaintiffs, against *Edwards* adjudged in a Writ of Error upon a Judgment in Banco. Intratur Pasch. 9 Car. Rot. ultimo.

2. In Trespass for an Assault, Battery, and taking his Grain, if the Defendant pleads a Justification of the Battery in Defence of his Corn, upon which it is demurred, and Not Guilty to the Corn, upon which Issue is joined, and it is found for the Plaintiff, and Damages taxed for the Corn, but none for the Battery, for which there is a Demurrer pending, as there ought to be; yet the Plaintiff may relinquish the Demurrer, and pray Judgment for the Corn, and this will not be Error. Pasch. 11 Car. B. R. between *Vashman and Rowe*, per Curiam, and this was so accordingly. Hill. 23 Car. B. R. between *Linton and Turnor* adjudged. In an Assault, Battery and Wounding, and Not Guilty pleaded to all besides the Assault, and upon this a Demurrer and Issue was found for the Plaintiff, and Damages taxed for this only, and not for the Assault, nor any Warrant by the Writ to enquire thereof, but only of the Issue, yet the Plaintiff shall have Judgment relinquishing the Demurrer, Intratur Mich. 22. Rot. 659.

3. In Trespass for a Battery against two, if one pleads Not Guilty, and the other pleads a Special Plea, and upon this a Demurrer is made by the Plaintiff, and it is adjudged for the Plaintiff, he may relinquish his Action against the other, and have his Writ to inquire of the Damages against him. Pasch. 11 Car. B. R. between *Starr and Cuckow* adjudged in a Writ of Error upon such a Judgment in Banco, and this affirmed per Curiam. Intratur Mich. 10 Car. Rot. 514.

4. In an Action of Trespass, if there be three Issues joined, scilicet, one Not Guilty to Part, the Second upon a Prescription for Common, the Third whether the Beasts raptim momorderunt, in going to take the Common, and the Jury find the first Issue for the Plaintiff, and the second Issue for the Defendant, but did not inquire of the third Issue; the Plaintiff relinquishing the third Issue, may pray Judgment for the first Issue, and this shall prevent any Error. Mich. 13 Car. B. R. between *Brown and Stephens* adjudged.

(U. b) *What* will *help* an Error.

Release of that which will help the Error.

[In Ejectment.]

1. IN an Ejectione Firmæ if Part of the Things demanded be well demanded, and Part of the Things demanded not well demanded, and a Verdict given for the Plaintiff for the Whole, and intire Damages given; the Plaintiff may release all the Damages in that which is not well demanded, and pray Judgment for Residue, and this helps the Error, if Judgment be given accordingly. Trin. 11 Car. B. R. between *Clive and Vere*. Rot. 1378.

Cro. C. 450. pl. 23. Cleve v. Veer, S. C. adjornatur. —— Ibid. 457. pl 3. S. C. adjudged for the Plaintiff.

See (R. b) pl. 5. S. C.

2. **In an Ejectione** Cuſtodiæ terræ & hæredis **if a** Verdict **be given** for the Plaintiff, the Iſſue being upon the Tenure, and intire Damages given and Coſts, **the Plaintiff may** relinquiſh the Damages and Coſts, **and have Judgment of the Ejectment of the Land only, for that ſuch Writ does not lie for the Body.** Dier 22 El. 309. 56. **adjudged.**

So where Ejectment was brought de uno Croſto, and ſeveral Acres of Land, the Court doubted whether an

3. **In an Ejectione** Firmæ de uno Tenemento, and ſeveral Acres of Land, **upon Not Guilty pleaded, if a** Verdict **be given** for the Plaintiff, and intire Damages **found; where the Action does not lie for the Tenement for the uncertainty, the Plaintiff may** relinquiſh his Damages, **and have Judgment for the Lands only, without Error. By Reports.** 10 **Jac. between** *Rhetorick and Chappel* **adjudged.**

Ejectment lies of a Croft, whereupon the Plaintiff moved for a ſpecial Judgment for the reſt of the Land contained in the Declaration, and prayed that he might releaſe his Damages as to the Croft, which the Court granted Sty. 30. Trin. 23 Car. B. R. Anon —— See (R. b) pl. 6. S. C.

(X. b) *What* Thing will *help* an Error.

Relinquiſhing that which will make Error.

[Omiſſions in Writs of Inquiry of Waſte.]

Cro. C. 414. pl. 1. King v. Fitch, * Fol. 787. S. C. adjornatur. —— Ibid. 452. pl. 24. S. C. but dubitatur.

1. **In an Action of Waſte, if the Plaintiff aſſign the** Waſte in three Meſſuages and ſix Gardens, viz. for cutting in uno Pomario 6 Piros & 10 Pomos, in aliis Pomariis 7 Piros & 10 Pomos, **and** upon Default (*) of the Defendant a Writ of Inquiry of Waſte, according to the Statute, is awarded to the Sheriff, **who** found **by Inquiſition the** Waſte in three Meſſuages, and in cutting down in uno Pomario 2 Piros & 2 Pomos & in præd' al' Pomar' 2 Piros & 2 Pomos ad damnum 50 l. but did not inquire of the Waſte in the Reſidue de Piris & Pomis, **and Judgment is given thereupon for that which is found without any Special Entry of the Relinquiſhment of the Reſidue, yet this is not Error, becauſe the Plaintiff might** abridge his Demand, **as this Caſe is, for that the Waſte is found in every Pomario, though not in cutting down ſo many Trees as he declares, though if the Jury had found him Not Guilty of the Reſidue, he ought to have been amerced for them as the Precedents are. Paſch. 11 Car. B. R. between** *Fitz and King*, **dubitatur among the Juſtices, and after the Matter was ended by Agreement. Intratur Trin. 9 Rot. 213.**

2. **But note, That in the Debate of this Caſe two Precedents were ſhewed, by which it appeared to be good. Mich. 22 E. 3. b. Rot. 220. in Dorſo in Scaccario. H. 21. El. Rot. 232. in Scaccario.**

Fitzh. Waſte, pl. 12. cites S. C.

3. 22 E. 3. 1. b. Waſte aſſigned in Land and Wood, **and an** Inquiry made only of the Waſte in the Land, **yet for that the** Plaintiff praying his Judgment of that which was found **he had Judgment without a new Inquiry made.**

4. But

4. **But vide 14 E. 3. Waſte 27. per Cur. e contra, for that if the Jury had found the Defendant Not Guilty of the Reſidue the Plaintiff ſhould have been amerced.**

5. By Aſſent of Parties a *longer Day may be given than is preſcribed by the Statute of Marlbridge, but that Aſſent muſt be entred of Record*; And it is to be obſerved, that by the Common Law great Delays are diſallowed in 4 Kinds of Actions, viz. in all Writs of Dower, Quare Impedit, Aſſiſe of Darrein Preſentment, and Aſſiſe of Novel Diſſeiſin, and therefore no Protection ſhall be allowed, or Eſſoine de Servitio Regis ſhall be caſt. 2 Inſt. 124.

6. *Dower of* 300 *Acres of Land*, 200 Acres *of Paſture*, 100 Acres *of Meadow*; The Tenant pleaded Nontenure; The *Jury found* him Tenant *as to* 320 *Acres of Land*, and as to the reſt that he was not Tenant, and the *Judgment was* that the Demandant ſhall recover Dower *out of the* 320 *Acres*; Error was aſſigned in B. R. that the *Verdict and Judgment* were *for more Acres* of Land *than were demanded*; But on the other ſide it was ſaid Land was a General Word, and might include Meadow and Paſture. Per Cur. in a Grant Land will extend to Meadow, Paſture &c. but in pleading it ſignifies Arable only, and here in regard they are diſtinguiſhed in the Count, the Verdict and Judgment muſt be reverſed for the whole; though Hale ſaid anciently ſuch Judgment would have been reverſed but for the ſurpluſage. The Caſe was moved again, and the Court ſaid, that the Demandant might have taken Judgment for the 300 Acres only, *habito nullo reſpectu to the reſt, and releaſed all the Damages*, but this was not proper for an Amendment, the Miſtake being in the Verdict, but if it could have been amended in C. B. the Court here might have made ſuch Amendment. Vent. 260, 262. Trin. & Mich. 26 Car. 2. B. R. Silly v. Silly.

7. In Treſpaſs of *Battery by Baron and Feme for beating of* them *both*, upon Not Guilty the *Verdict* was *for ſo much* Damage *for beating the Husband, and ſo much for beating of the Wife*; the Court ſaid, upon a Motion to arreſt the Judgment, that the Plaintiff might releaſe the Damages for beating of himſelf, and take Judgment for the other. Vent. 328. Paſch. 30 Car. 2. B. R. Anon.

8. In Actions upon *Specialties or Contracts, where the Sum is certain*, the Plaintiff *cannot abridge his own Demand* without ſhewing how the reſt is ſatisfied; Contra in Actions that lie in Damages. 10 Mod. 69. Mich. 10 Ann. B. R. Stafford v. Beneath.

9. If *Judgment* be given *to recover two diſtinct Sums*, and being ſenſible that he has a *Right only to one* the Plaintiff releaſes the other, he may take out Execution for the other only; Per Pratt J. 10 Mod. 307 Paſch. 1 Geo. 1. B. R.

(Y. b) In what Caſes *Conſenſus tollit Errorem.*

1. **Upon a** cepi Corpus **if the** Defendant appears by Attorney **by Conſent it is not Error.** 21 E. 4. 77. b. Br. Error, pl. 184 cites S. C.

2. So **if the Defendant appears by Attorney** upon the Exigent **by the Aſſent of the Plaintiff, it is not Error.** 7 H. 6. 21.

3. One cannot *enter for Nonpayment of Rent without Demand*; yet by Conſent of Parties it may be good. Godb. 429. 5 Rep 40. b. S. P. per Curiam — Roll Rep 363. S P. Arg

4. *Where*

4. *Where it is not againſt a Fundamental Point of the Common Law* Conſent of Parties tollit errores. Godb. 429. 430. agreed. Arg.

5. *Appearance by Attorney where Plaintiff ought to appear in proper Perſon* is not Error, if by Aſſent of Parties; Per Haughton J. Godb. 430. pl. 495. Trin. 21 Jac. B. R.

6. Pleading *Feoffment in Fee upon Condition without Deed* and *Re-entry* is good, if the other *Party confeſſes the Condition.* 5 Rep. 40. b. in Dormer's Caſe, cites 7 H. 6. 7. b.

Roll Rep. 363. Arg. S. P. cites 10 H. 6. a. pl. 22. —— 2 Inſt. 124. S. P.

7. In *Qua. Imp.* the Court may by Conſent *grant longer Day than is limited by the Stat. of Marl.* 5 Rep. 40. b. cites 11 H. 6. * 13.

* This is miſprinted, and ſhould be Hill. 11 H. 6. 23. b. 24.

Br. Cuſtoms, pl. 74. cites S. C.

8 In Error it was awarded, that where it was *alledged in Aſſiſe of Freſh-Force in O.* that the *Uſage* is, *that he who has been ſeiſed by* 40 *Weeks ſhall not be ouſted though he has no Title, but by Writ of the King by Suit*, which was tryed by Jury, that yet this is no Error; For though the Uſage be a Law, and that the Law is, that what is Law and what not, ſhall not be tryed by Jury but by Record or by Judgment, yet this is no Error, and eſpecially where the Party agrees to the Iſſue for his Advantage; For *a Thing may be uſed for the Cuſtom which is not the Cuſtom in Fact.* Br. Cuſtoms, pl. 21. cites 21 E. 3. 46.

9. The Stat. of 2 *H.* 5. 3. ordains, that in Caſe of Liſe, or Plea of Land, or *where the Damage* ſuppoſed in the Declaration *exceeds* 40 *Marks*, every Juror in thoſe Caſes ought to have 40 s. per Ann. Freehold in a Suit which exceeded 40 Marks, and ſo was alledged, a Juror had not 40 s. per Ann. Freehold; after the Venire Facias returned the Plaintiff and Defendant *agreed that the Roll ſhould be made* 39 *Marks*; Yet this Juror ſhall not be ſworn, for he was diſabled when the Scire Facias was returned. By the Juſtices of both Benches. Jenk. 159. pl. 1.

10. A. brings *Debt* againſt B. *upon an Obligation bearing Date at Coventry*; This Suit was in the King's Bench, removed hither out of Coventry; a *Procedendo* was *awarded to Coventry*; by Agreement between the Parties, the Procedendo *was not delivered, but the Plaintiff Proſecuted his Suit in B. R. and laid the ſaid Action in London*; Upon Iſſue on Non eſt factum pleaded the Plaintiff had a Verdict, and Judgment reverſed in Error notwithſtanding the ſaid Conſent of Plaintiff and Defendant, and although this Action be tranſitory. Jenk. 310. pl. 89. cites 11 El. D. 284. **Croutch's Caſe** Conſent cannot take away the Natural and eſſential Viſne. 27 H 8. 15. 44. E. 3. 6.

11. The *Record was J. S. de D. in Com' Lincoln*, and the *Writ of Error was J. S. de D. in Com' Warwick*; the Court thought it a material Variance for which the Writ ſhould abate, but by Conſent of Parties it was ruled, that no Advantage ſhould be taken thereof. Sid. 193. Paſch. 16 Car. 2. Booth v. Beard.

12. *Two Attornies* at the Tavern *agreed each to name* 24 *Perſons to the Sheriff, out of which he ſhould return* 24 *to try an Iſſue.* The Court held, that if Sheriff will return a Jury at the Denomination of any Perſon it is a Miſdemeanour in him, and it may be Maintenance in him at whoſe Requeſt it is done, but here it being by Conſent of Attornies of each Side, Conſenſus tollit Errorem. 12 Mod. 564. Mich. 13 W. 3. Turner v. Burnaby.

(Z. b) [Prevented or aided by Conſent.]

For Trials.

1. IN Treſpaſs Villainage in the Plaintiff to a Manor in another County is pleaded; **the Trial ought to be where the Writ is brought, yet if it be** tried by Aſſent where the Manor is, **it is not Error.** * 44 E. 3. 6. b. † 44 Aſſ. 4.

* 5 Rep. 40. b. S. C. cited per Cur —— S. C. cited Godb. 429. ——

S. C. cited Roll Rep. 28. pl. 7. —— S. C cited 2 Roll Rep. 363. Arg. in Caſe of Loyd v. Williams. —— Raym. 372. S. C. cited per Cur. in Caſe of Viſcount Clare v. Lynch.
† S. C. cited Cro. E. 664. in pl. 14.

2. Upon an Iſſue, **if the** Court be in Doubt by what County it ſhall be tried, **and the Court by Aſſent of the Parties** grant of both Counties, **this is not Error.** 7 H. 6. 21.

If a Venire Facias be awarded to the Coroners where it ought to be to the Sheriff, or the Viſne comes out of a wrong Place, yet if it be per Aſſenſum Partium, and ſo entered of Record, it ſhall ſtand; for omnis conſenſus tollit Errorem. Co. Litt. 125. b. 126. a —— Cro E. 664. pl 14. Paſch. 41 Eliz. C. B. Finch v. Hovendon, Trial by wrong Viſne held good, it being by Conſent of the Parties entred on Record.

3. **In** Debt upon an Obligation **if the** Condition **be** to pay Money apud Coventriam, **and Iſſue thereupon, and this is** tried in Middleſex **by Aſſent of the Parties, and by Order of Court** where the Action is brought, **and not in Coventry**; **yet if the** Aſſent of the Parties **does** not appear upon the Record, though **it be** confeſſed by the Demurrer, **it ſhall be Error. My Reports, 12 Jac. Camera Scaccarii, between** *Edwards and Crow* **adjudged in a Writ of Error**; **the ſame Caſe Hobert's Reports** 8.

Hob. 5. pl. 11. Crow v. Edwards, S. C. and the former Judgment reverſed; for Conſent of the Parties cannot change the Law. —— Roll Rep. 28. pl. 7. S. C. —— Bulſt. 216. Trin. 10 Jac. B. R. **Materſon's Caſe,** S. P. and ſeems to be S. C. Judgment was affirmed for the Plaintiff in the Action. —— Hob. 266. pl. 330. Trin. 17 Jac. in Caſe of **Fawkner v. Andrews,** ſays that theſe kind of Aſſents ſhould be entered upon Record. —— 2 Jo. 199 Paſch. 34 Car. 2. B. R. cites the Caſe of **Crow v. Edwards,** ſed non allocatur; But in the principal Caſe there of **Beveren v. Malcot,** the Conſent of the Parties was entered on the Roll, which was not in the Caſe of Crow v. Edwards, but only in a Paper Rule of Court, which was the Reaſon of the Reverſal of that Judgment, whereas had it been entered on the Roll, as in the principal Caſe, it had been good; And ſays, that with this accords Cro E. 664.

4. **If an** Ejectione Firmæ **be brought and laid** in the County of D. for Lands lying in another County, **though it be by Aſſent of the Parties, and the Defendant pleads Not Guilty, and a Verdict and Judgment is given for the Plaintiff; yet this is Error, for this is againſt the** Law, **which** cannot be altered by the Conſent of the Parties. **Hill. 14 Car. B. R. per Curiam; But** upon View of the Record it could not appear to the Court that the Land lay in another County; **and therefore they did not reverſe the Judgment for this Cauſe.**

5. If a *Pannel by ſufferance of the Sheriff* be made by Aſſent of the Parties, yet it is good, and ſhall not be challenged, though made *at the Denomination of the Parties.* 6 R. 2. Challenge. 102.

6. The Statutes of 2 *E.* 3. and 20 *E.* 3 provide, that neither by the Great Seal, nor Petit Seal, ſhall *Juſtice be delayed*; yet *when the*

Matter concerns the King only, if he commands it, it may be ſtayed. 5 Rep. 40. b. per Cur. in Dormer's Caſe.

7. In a *Quare Impedit*, if the *Venire Facias* be *returned*, the *Plaintiff* cannot be *Nonſuited without calling of the Jury*, yet he may be if *by Conſent of Plaintiff himſelf*. Noy. 107. Anon.

So of the Spiritual Court, 10 H 6. b. pl 43.

8. It was reſolved by all the Judges, that the *Court of Requeſt has no Juriſdiction in any Matter touching Freehold*; and per Williams J. no *Conſent of the Parties to ſubmit themſelves to the Judgment of that Court* in ſuch Caſes will any way help them, or give them any Juriſdiction which by Law does not belong to them. Bulſt. 108. Hill. 8 Jac. Anon.

9. A *Venire Facias* awarded *to one of the Coroners* by Conſent of Parties was held to be good. Godb. 429. in the Caſe of Floyd v. Williams, cites Baynam's Caſe.

5 Rep. 40. b. S P. cites 34 E 3. tit. Office de Court 12.

10. *One of the* 12 *Jurors depart*; if the *Juſtices appoint one* of the Pannel *to ſupply his Place*, it is erroneous; but if with Conſent of Parties, it is good. Godb. 429. cites 43 E. 3. tit. Office of Court. 12.

— Roll Rep. 363. cites S C. —— Fitzh. Office del Court, pl. 12. cites Mich. 34 E. 3.

11. *More than two* ought not to *try the Array*, yet by Aſſent of Parties more may try it. Godb. 429. per Brian.

S. P. per Cur. 5 Rep. 40. b. cites 39 E. 3. 1.

12. In a *Writ of Right* there ought to be four Knights; but if by Conſent of Parties *two Knights and two Eſquires* be returned, it is good. Godb. 429. cites 30 E. 3. 2. or 39 E. 3. 2.

—— Roll Rep. 363. cites 39 E. 3. 2. S. P.

2 Roll R. 363. S. C. cited. —— The ſame in Ejectment.

13. The *Trial in Favour of Liberty* ought to be in the ſame County where the Action is brought, and not *where the Manor is*; but by the Aſſent of Parties it is ſufficient. Godb. 429. cites 44 E. 3. 6.

Palm. 100. Stafford v. Mackdonnoſh. —— And per Doderidge J. admitting the Action to be real, yet the Conſent of the Parties may alter the Trial where the Action is more in the Realty than an Ejectment is, As in a Writ of Right, the Parties may agree that the Trial be by 12 common Jurors, and not by the grand Aſſiſe. Ibid.

14. The Court cannot *draw a Juror* of themſelves by the Law yet they may with Conſent of Parties; Per Ley Ch. J. Godb. 431. Trin. 21 Jac. B. R. in Caſe of Williams v. Floyd.

2 Roll Rep. 363. S. C. adjudg'd.

15. In Ejectment the *Array* was *challenged*, and by Conſent of Parties the Array was *tried by two Attornies of the Court*, and it was adjudged per tot. Cur. that it was well tried. Gobd. 431. pl. 495. Trin. 21 Jac. B. R. Williams v. Floyd.

* Br. Challenge, pl. 186. cites S. C.

16. *Coſinage* is *good Cauſe of Challenge*, even by the Party that is Coſin; for if the Court ſees there may be Partiality, *though the Parties conſent*, yet the Court ought not to ſuffer it, leſt Juſtice ſhould not be impartially adminiſtered; Arg. 11 Mod. 100 Mich. 5 Ann. B. R. in Caſe of Queen v. Soleby & al' cites * 21 Ed. 4. 21.

(A. c) *Bars* of a Writ of Error.

Fol. 788.

1. A Releaſe of all Errors is a good Bar. 9 H. 6. 48.

Br. Error, pl. 9 cites 9 H. 6. 46. S. C. — Fitzh. Error, pl. 20. cites 9 H. 6. 46. S. C.

2. So a Releaſe of Actions and Demands, and of Right in the Land, will be a Bar of a Writ of Error upon a Judgment in Re-diſſeiſin. 11 H. 4. 6.

Fitzh. Error, pl. 64. cites S. C.

3. A Releaſe of all Actions Real and Perſonal will bar a Writ of Error, upon a Judgment in a Writ of Right. 9 H. 6. 46. b. 48. b.

Br. Error, pl. 9. cites 9 H. 6. 46. S. C. — Fitzh. Error, pl. 20. cites S. C.

4. A Releaſe of all his Right in the Land will Releaſe a Writ of Error upon a Judgment in real Actions. 9 H. 6. 46. b. 48. b.

Br. Error, pl 9. cites S C. — Fitzh. Error, pl. 20. cites S. C. — Co. Litt. 288 b. S. P.

5. If a Man outlawed upon a Re-diſſeiſin releaſes all Actions to the Recoveror yet he may have a Writ of Error of the Outlawry, becauſe that this does not belong to the Party, but to the King in Intereſt, and he may aſſign Error in the Judgment of the Re-diſſeiſin to reverſe the Outlawry. 11 H. 4. 6. b. 94. adjudged.

Fitzh. Error, pl. 64. cites 11 H. 4. 6 [and the Caſe is continued at fol. 94.]

6. If the Tenant pending a Præcipe againſt him aliens in Fee, and re-purchaſes for Life, and after Judgment is given againſt him, he ſhall have a Writ of Error, and his Feoffment is no Bar.

See (K) ſupra, pl. 21. S. P.

7. So after his Death his Heir ſhall have a Writ of Error for the Privity which he hath to the Judgment, though he ſhall have nothing in the Land, contra, 50 Aſſ. 3.

See (K) ſupra, pl. 22. cites S. C.

8. If the Tenant pending a Præcipe againſt him, aliens in Fee, and after Judgment is given againſt him, and he brings a Writ of Error, this Feoffment is not any Bar of the Writ, becauſe he was Privy to the Judgment after. * 12 Aſſ. pl. 41. Co. 1. Albany 111. † 20 Aſſ. 2. adjudged. Dubitatur ‡ 21 E. 3. 53. b.

* Br. Error, pl. 111. cites S. C. — S. C. cited Bridgm 77. — S. C. cited Roll Rep. 306. — If after Execution had he enters upon the Demandant and makes a Feoffment in Fee, his Writ of Error is gone. 2 Le. 221. cites 12 Aſſ. pl. 41. — 1 Rep. 112. a. cites S. C. and ſays that the Feoffment cannot bar him of the Writ of Error, becauſe notwithſtanding his Feoffment he remains Tenant as to the Demandant, and ſhall plead all Pleas which Tenant may plead, and notwithſtanding this ſhall be reſceived &c. and Judgment given againſt him as Tenant, and therefore upon ſuch Judgment given againſt him he ſhall have Writ of Error after his Feoffment; but if after the Judgment given he makes Feoffment, he ſhall never have Writ of Error nor Attaint.

† Br. Error, pl. 118. cites S. C.

‡ Fitzh. Error, pl. 74. cites S. C.

9. If a Plea be diſcontinued or an eſſoin allowed for the Tenant where it does not lie, and after Judgment is given againſt the Demandant upon this Nonſuit, and he brings a Writ of Error, this Nonſuit is not any Bar becauſe the Error was before the Nonſuit. 22 E. 3. 2. adjudged.

It is Error to deny the Eſſoin when it ought to be granted, and not e contra. Hob. 47. pl. 52. in Caſe of Clanrickard v. Liſle. — 8 Rep. 59. a. S. P.

10. If

The Court ſeemed that it is a Bar of the Writ of Error, and took this Diverſity, that where

10. If a Man that hath Title to a Writ of Error to reverſe a Fine makes a Feoffment of Part of the Land, this is a Bar only for that Part, and not for the Reſt, of which he hath not made any Feoffment. Trin. 5 Jac. B. R. between *Wright and Jennings*, per Curiam præter Tanfield. M. 38, 39 El. B. R. between Wright and the Mayor of Wickam, per Curiam.

one has Action or Right to the Land, and he ſuſpends or extinguiſhes in Parcel, it is extinct for the whole; But if he has Right to the Land he may releaſe or ſuſpend it in Part, and this remains good for the Reſidue. Mo 413. pl 569. S. C. — Cro. E. 648. pl. 27. S C. and per tot. Cur. the Feoffment only deſtroys the Title of Error for that Part. — Ow. 21. Wright's Caſe, S. C and reſolved according to Cro E. and thereupon they took a Difference between Suſpenſion and Extinguiſhment of an Action; for perhaps if he ſuſpends his Action as to any Part for a Time, this is a Suſpenſion as to all, but Extinguiſhment of Part is a Bar to that Part only.

Br. Error, pl 121. cites S. C.

11. If the Plaintiff in a Writ of Error be nonſuit after the Error aſſigned, this is not any Bar of a new Writ of Error. 22 E. 3. 7. adjudged.

12. In a Writ of Error upon a Judgment in an Aſſiſe of Darrein Preſentment, it is not any Bar that the Plaintiff was nonſuit in another Writ of Error in the ſame Court; upon which a Writ to the Biſhop was awarded for him, for this award of Execution was no Affirmance of the firſt Judgment. 23 Aſſ. 8. adjudged.

Noy 59. Hart v. Amerideth, S. C. and adds a Note, that that ſecond Fine cannot be pleaded becauſe it was not ingroſſed,

13. If an Infant brings a Writ of Error to reverſe a Fine levied by himſelf for his Nonage, and is inſpected by the Court and found within Age, which is recorded by the Court, and after before the Fine is reverſed, he levies another Fine to another; this ſhall bar him to have the Fine reverſed. M. 38, 39 El. B. R. *Hart's Caſe* held, but there adjudged contra, for that the ſecond Fine was not pleaded.

and that the Ingroſſing was ſtayed on Purpoſe by the Conuſee.

Cro. E. 151. pl. 28. Mich. 31 & 32 Eliz. B. R.

* Fol. 789.

Molton's Caſe, S. P. exactly, and held accordingly, and ſeems to be

14. If Tenant in Tail levies an erroneous Fine with Proclamations, and after levies another erroneous Fine with Proclamations and dies, and the Iſſue in Tail brings a Writ of Error upon the firſt Fine, and the Defendant pleads in Bar the ſecond Fine, and after the Iſſue brings a Writ of Error upon the (*) ſecond Fine, and the Defendant pleads in Bar the firſt Fine by which the Right is bound; the Plaintiff may reply upon the firſt Writ, that the ſecond Fine is erroneous, and upon the ſecond Writ that the firſt Fine is erroneous and ſo ſhall be helped. M. 32 El. B. R. *Carington's Caſe* per Curiam.

S. C. — 2 Le. 211. pl. 263. S. C. & S. P. accordingly. — S. C. cited Roll Rep. 306. — Mo. 366. cites Carrington's Caſe, thus; Tenant in Tail levies erroneous Fine, and after levies another Fine; he and the Iſſue is barred of Writ of Error upon the firſt Fine.

15. In *Ward* by J. K. againſt E. of J. Proceſs continued till the Proclamation returned, by which the Plaintiff recovered the Ward and Damages by Default, and the Defendant brought Writ of Error, and *ſuffered it to lie in B. R.* and the *firſt Plaintiff brought Scire Facias to have Execution of the Body, and Damages, and ſaid that the Original is not come in*; Thorp J. ſaid, This is your own Default, for *where Record is removed for Error* the *Original ſhall come unleſs it be aſſigned for Error that there was no Original*, and then the Court ſhall write for the Original; *but in Aſſiſe the Original, and all that is, ſhall come here by Error.* Br. Error, pl. 86. cites 24 E. 3. 24. 43.

16. *And*

16. *And* after ſhe aſſigned for Error, *That where ſhe was impleaded as a Feme Sole ſhe was Covert* with B. J. her Baron the Day of the Writ purchaſed, and the Day of the Judgment given, and that the Continuance of the Proceſs was againſt E. who was Wife of B. J. Ibid.

17. *And* where the *Judgment was*, that the Plaintiff recover the Ward and Damages, they *were not then aſcertained of the Damages*; for they did not know if the Infant was married or not; and after Harleſton came and ſhewed Writ in the Files which agreed as above, and he carried it back with him again. Ibid.

18. *And* the *Scire Facias ſuppoſed that the Record reſted before the Juſtices of B. R. and the Original was wanting*, and therefore falſe Writ, Per Fiſher, et non allocatur, quod mirum! for it ſeems that the Matters are Error. Ibid.

19. If he who has Cauſe to have a Writ of Error *enters into the Land and makes a Feoffment* the Writ of Error is gone for ever. Godb. 25. 26. cites 21 E. 3. and 35 H. 6.

20. In a Writ of *Error* brought *by the Heir of the Conuſor of a Fine*; it is a good *Plea in Bar that the Conuſor after the Fine levied ſuffered a Common Recovery, in which the Conuſor was vouched, and vouched over the Common Vouchee*; Adjudged per tot. Cur. that ſuch Recovery with double Voucher is a Bar by Reaſon of the Voucher to every Manner of Right which the Vouchee or his Heirs by Means of him is to have in the Land; and if the Recovery be erroneous, it remains a good Bar until it be avoided by Error. But a void Recovery is no Bar. Poph. 100. Mich. 37 & 38 Eliz. Barton's Caſe.

Cro. E. 388. pl. 11. Barton v. Lever & al' S. C. & S. P. agreed, but no Judgment was entered becauſe the Parties were moved to compound.

—— Mo. 365. pl. 499. S. C. and all the Juſtices ſeemed that the Fine was barred. —— S. C. cited Bridgm. 76. —— By general Entry into the Warranty the Error upon the Fine is gone; but where the Recovery was before the Fine, it does not give away the Error in the Fine. Gouldsb. 181 pl. 116. Hill. 43 Eliz. Jones's Caſe.

21. In Error there *ought to be a Reverſal of the Judgment and Reſtitution alſo to the Loſs*, and if either of them fails the Writ fails alſo; As if he, againſt whom an erroneous Judgment is given, *releaſes his Right or makes Feoffment after Judgment*, he ſhall not have Error, becauſe he cannot be reſtored againſt his own Act; Per Chamberlain J. Palm. 247. Mich. 19 Jac. B. R. cites 9 E. 4. 6. and 1 Rep. 12.

22. *But* if he makes *Feoffment, pending the Writ*, the Feoffor ſhall have Error, and when he is reſtored the Feoffee ſhall enter upon him; Per Chamberlain J. Palm. 247. and ſays this was Brook's Caſe in 6 H. 8. and cites 12 Aſſ. 4. 20 Aſſ 2. 21 E. 3. Error 41.

23. *But* if he againſt whom the Recovery is had *makes a Feoffment after Judgment of one Acre* he may have Error for the Reſidue; *But if he releaſes all Errors for one Acre* he ſhall not have Error for any; becauſe the Record is intire; Per Chamberlain J. Palm. 247. Mich. 19 Jac. B. R.

24. *So if Judgment* erroneous *is had againſt two, and one releaſes*, the other ſhall have Error; Per Chamberlain J. Ibid. and ſays upon theſe Diverſities was adjudged Paſch. 23 Eliz. The Caſe of Wright v. the Mayor and Commonalty of Wickham.

Palm. 319. Mich. 20 Jac. B. R. Grieſly v. Lea and Taylor,

S. P. ruled accordingly; and cites 6 Rep. Ruddock's Caſe, and 2 Jac. B. R. * Farley v. Blunt. —— * Cro. J. 116.

25. By *Releaſe of all Suits* the Writ of Error is gone. Lat. 110. Hill. 1 Car. Cole's Caſe.

S. C. in several other Books, but I do not observe S. P. in any of them. —— In Ejectment the Plaintiff entered Mesne between Verdict and Judgment, and this was assigned for Error in the Exchequer Chamber, but the Judgment notwithstanding was affirmed; Cited by Flemming Ch. J. 2 Brownl. 238. 239. as adjudged 2 Eliz. in B. R. Jackson v. Parker.

26. *Entry by the Plaintiff in Error pending the Writ into Part* was resolved to be no Plea; for he may have a Writ of Error before any Possession recovered against him, when he is possessed of the Whole, to reverse the Judgment though he cannot have Restitution of that which he has never lost; But *Entry and Feoffment* is Extinguishment of Writ of Error, because he hath departed from his Title, and *Entry and Lease is Suspension* of Writ of Error for the Time. Lev. 12. Mich. 14 Car. 2. B. R. Winn v. Loyd.

27. A *Release of Errors* before Judgment entered is good where Judgment is entered afterwards of the precedent Term; Per Holt. Cumb. 244. Pasch. 6 W. & M. B. R. Anon.

28. If Judgment be *irregularly obtained*, a Release of Errors *sets it right* to all Purposes. 12 Mod. 560. Mich. 13 W. 3. Anon.

29. Where a Writ of *Error* is *brought, and no Record certified at the Day of the Return of the Writ*, the Defendant in Error taking a Certificate of this Matter from the proper Officer of the Court, where the Writ is returnable, he may out a Writ De Executione Judicii of Course, and the Party cannot hinder Execution thereupon, without he brings a new Writ of Error. 3 Salk. 146. pl. 7. Anon.

(B. c) What shall be a *good Bar*.

* Br. Error, 1. pl. 130. cites S. C. & S. P. per Cavendish.

1. IN a Writ of Error it is a perpetual Bar that the Plaintiff hath purchased the Land in Fee after the Judgment. * 39 Ass. 18. 20 Ass. 2.

Br. Error, pl. 130. cites S. C. & S. P. per Finch.

2. In a Writ of Error it is a good Bar, during the Term, that the Plaintiff hath accepted from the Defendant a Lease for Years by Deed of the Land after the Judgment. 39 Ass. 18. Per Finch.

Br. Error, pl. 130. cites S. C.

3. In a Writ of Error by the King, it is no Bar that after a Judgment certain Commissioners upon a General Commission have seised the Land for the King; for the King shall not be adjudged Tenant by the Seisure of his Ministers, but where it is for his Advantage. 39 Ass. 18. adjudged.

4. If a Man be *condemned upon Recognizance by erroneous Judgment*, and after is *outlawed and has* Charter of *Pardon*, he shall have Writ of Error, and the Outlawry is no Plea, for this Action is revived in him; for it is not like to an Obligation; for there if the one be outlawed the Obligation is forfeited, but here he *is not to recover* any Thing *but to discharge himself* of the Execution. Br. Extinguishment, pl. 41. cites 29 Ass. 47.

5. Where the *Title of the Plaintiff in Error is Paramount the Plea* or Right claimed by the Defendant in Error, such Plea is not good; *As* where the Baron of Dudley brought Writ of Error and the Tenant came by Scire Facias, and the Baron *shewed that A. and B. his Feme, and C. a third Person, brought Writ of Right against J. S. Ancestor of the Baron, whose Heir* &c. *and demanded the fourth Part of the Manor of*

M.

M. and C. *the third Perſon was ſummoned and ſevered*, and the *Baron and Feme ſued forth, and recovered the Moiety of the fourth Part* &c. *by erroneous Judgment*, and the *Plaintiff as Coſin and Heir of the ſaid J. S. brought this Writ of Error*, and prayed that the Errors be examined, and the *Tenant ſaid, That* to this Writ he ſhall not be received; for *after the Recovery the ſame Baron acknowledged the ſame Moiety by Fine to be the Right of two Perſons, by which they were Tenants in Common et pro indiviſo with the ſaid J. S. who after made Purparty between them, by which ſix Parts of the Vill* of M. *was allotted to the ſaid three Perſons, Que Eſtate the Tenant has*; Judgment if he ought to proceed to the Examination of Errors; for Partition between the Anceſtor of the Plaintiff and the other Tenants in Common makes that every one has Part of that which was recovered by Name of the Moiety, and therefore *cannot have Writ of Error to be reſtored to that whereof he is ſeiſed of Parcel*, and becauſe the Writ of Error is of the fourth Part of the Manor of M. and the Pleading of the Partition is, That ſix Parts of the Vill of M. was allotted between them &c. and *does not ſay that the Vill of M. is Parcel of the Manor of M.* and alſo Partition between Tenants in Common is not good *without Deed*, therefore the beſt Opinion was, that it is no Plea, but non adjudicatur; And per Newton, if the Partition was good yet the Plea is no Plea, becauſe the *Plaintiff claims of Right Paramount the Partition.* Br. Error, pl. 75. cites 19 H. 6. 25.

6. *So* where a Man has *a Son and a Daughter by one Venter, and a Daughter by another Venter*, and *dies ſeiſed*, and the *Son enters*, and *dies ſeiſed*, and the *Daughter as Heir* to him *enters*, and the *other Siſter of the Half Blood brings Writ of Nuper obiit againſt her*, and the other who is of the Half Blood, and it is *found that ſhe is of the Whole Blood by which ſhe recovers the Moiety*, and *after ſhe brings Writ of Partition and recovers*; yet the other may have Writ of Error of the Right which was in her before the Partition, and the Partition is no Plea; And per Paſton, by the Recovery in the Nuper obiit the eldeſt Daughter is *eſtopped to ſay, but that the other Daughter is Co-heir with her*, and therefore ſhe ſhall be compelled to make Partition, *and yet by Error ſhe ſhall defeat it*, and ſo in this Caſe; And ſo ſee by them this Matter is no Bar in Writ of Error; and ſo ſee that if it had been well pleaded it had been no Plea. Br. Error, pl. 75. cites 19 H. 6. 25. Br. Eſtoppel, pl. 81. cites 19 H. 6. 26. S. C.

7. *For* where Judgment is, though it be erroneous, yet it being in Force the Parties are bound to all that which is implied within the ſame Judgment, as Partition and the like, and yet all thoſe ſhall not be Bar nor Eſtopple in Writ of Error to reverſe the ſame, quod nota good Caſe; But take Heed that there be not a *Difference where he makes Partition where he is not compellable* by the Law, *and where it is made by Coertion* of the Law. Ibid.

8. If he who has Cauſe to have a Writ of Error to reverſe a Judgment of Land does make a good *Leaſe for Years*, he hath *ſuſpended* his Writ of Error for the Term, as he does *extinguiſh it* by his *Feoffment*; Per Bridgman. Bridgm. 57. Hill. 12 Jac. in Caſe of Loyd v. Bethel.

9. A Writ of Error was *returnable ſix Days ſince*, and the Record not yet remov'd. Execution was granted per tot. Cur. becauſe it appears to be meerly for *Delay*. Roll Rep. 172. pl. 2. Paſch. 13 Jac. B. R. Marſh v. Whetſtone.

10. Where a Writ of Error is *abated* the Party cannot have a *new Writ* praying it; Per Holt. Cumb. 109. Paſch. 1 W. & M. in B. R. Evans v. Pettifer.

11. Shewing

11. Shewing the Writ of Error before it is allowed, it being allowed afterwards in convenient Time, is a good *Superſedeas from the Shewing*, for it ſhall be taken as one Act. Cumb. 264. Trin. 6 W. & M. in B. R. Williams v. Cary.

(C. c) In what Caſes a Bar *of Part* ſhall be *of the Whole.*

Jo. 352. pl. 5. Donne v. Smithurſt. S. C & S. P. agreed. —Ibid. 373. pl. 11. S. C. adjudged accordingly.

1. IN a Writ of Error to reverſe a Fine of ten Acres of Land, brought by one who was in Remainder in Tail; if the Defendant pleads in Bar a common Recovery of Part of the Land, which is a good Bar as to that, yet this is no Bar as to the Reſidue; but the Court ſhall examine the Error in the Fine as to that. Mich. 10 Car. B. R. between *Done and Smithurſt*, per Curiam; in a Writ of Error to reverſe a Fine levied in Cheſter. Intratur Tr. 8 Car. Rot. 1310.

2. In a Writ of Error to reverſe a Fine a Releaſe of Part is not any Bar as to the Reſidue; but the Court may reverſe a Fine as to the Reſidue. M. 10 Car. in *Done and Smethurſt's Caſe* aforeſaid per Curiam.

3. In Error brought on a Fine levied by Tenant in Tail, it was held by the Juſtices that a Writ of Error is quaſi a Commiſſion, and *may reverſe for Part, and affirm for Part*, and it is not abateable becauſe the Fine is good for Part. Mo. 366. pl. 499. Paſch. 23 Eliz. Barton v. Lever &c.

Where a Plea &c is good for Part and ill for Part, in what Caſes Judgment ſhall be given for the Whole. See Tit. Judgment. (N. 2)

(C c. 2) Bar to one Plaintiff in Error where a Bar to another.

1. ERROR was brought *by Six of* a Judgment in C. B. in Replevin, where *one of the Six in his own Right avowed for an Amercement* in the Leet, *the other made Conuſans as his Bailiffs*, Judgment given againſt the Six, Damages and Coſts; They brought Error and pending the Action, the *Releaſe of one of the Five* was pleaded in Bar; It was ſaid by the Court to be no Bar, and this Difference was taken, Where many are Actors by way of charging one another, the Act of one ſhall prejudice the other; otherwiſe where they are Plaintiffs to diſcharge themſelves, and in this Caſe when they are *compelled to join in a Writ of Error* or Attaint for *to defeat a Judgment*, it is no Reaſon that *the Act of one ſhould predudice his Companion*, wherefore it was adjudged no Bar. Cro. E. 648. pl. 4. Hill. 41 Eliz. Razing v. Ruddock.

(D. c) Error *in Parliament.*

1. WHEN a Record comes in Parliament upon a Writ of Error, the King may aſſign certain Earls and Barons, and with them the Juſtices to determine the Matter. 22 E. 3. 3. Fitzh. Error, pl. 8. cites S. C. — S. C. cited by Coke Ch. J. 2 Bulſt. 164.

2. But they cannot reverſe the Judgment after the Parliament is ended if they do it not before; for this ought to be done in Parliament. 22 E. 3. 3. Fitzh. Error, pl. 8. cites S. C. — 2 Bulſt. 164. S. C. cited by Coke Ch. J.

3. It appears that the Parliament *may err*, as where they reverſe the Eſtate of J. N. in certain Land, and the Charter thereof, and *do not call the Party* to it *by Proceſs before the Repeal.* Br. Parliament, pl. 16. cites 21 E. 3. 46. 2 Bulſt. 164. S. C. cited by Coke Ch. J.

4. And it ſeems there that Error in Parliament *cannot be revers'd but by another Parliament*, and that erroneous Judgment there is good till it be revers'd. Br. Parliament, pl. 16. cites 21 E. 3. 46. Br. Error, pl. 60. cites S. C. & S. P. by Brooke.

5. The Bp. of Norwich ſhew'd in the Houſe of Lords, that an erroneous Judgment was given againſt him in the Common Pleas for the Archdeaconry of Norwich belonging to his Preſentation, and pray-ed that thoſe Errors might be heard, and redreſſed there; whereunto Anſwer was made that *Errors*, by the Law, *in the Common Pleas are to be corrected in the Kings Bench, and of the Kings Bench in the Parliament*, and not otherwiſe. 4 Inſt. 21, 22. cap. 1. cites Rot. Parl. 50 E. 3. Nu. 48.

6. The Dean and Chapter of Litchfield recovered in the Common Pleas againſt the Prior of Newport Pannell; the Prior by Writ of Error reverſeth the Judgment in the Kings Bench; the Dean and Chapter by Writ of Error in Parliament *reverſed the Judgment in the Kings Bench, and affirmeth the Judgment in the Common Pleas*, and a *Commandment given to the Chancellor, that the Judgment in the Common Pleas be executed by Proceſs by him to be made.* 4 Inſt. 22. cites Rot. Parl. 15 R. 2. Nu. 23. and 18 R. 2. Nu. 11, 12, 13, 14.

7. A *Writ* came to Sir Wm. Thorpe Ch. J. of B. R. *to cauſe to be brought the Record and the Proceſs into the Parliament of a Judgment which was given for the King* at the Suit &c. And note, That a *Petition was there made to the King, before that the Writ was granted*; And ſo the Roll, in which the Proceſs and the Judgment was, was brought by Sir Wm. Thorp into the Parliament, upon which the King did aſſign certain Counts and Barons, and with them the Juſtices to determine the Buſineſs; and *before any Thing was done therein the Parliament was ended*; There it is ſaid that the Judgment cannot be reverſed but in Parliament, and for that this was ended in this Buſineſs, Ulterius nihil agendum eſt. Per Coke Ch. J. 2 Bulſt. 164. cites 22 E. 3. 3. [pl. 25] Fitzh. tit. Errror, pl. 8.

8. A Writ of Error *lies* in Parliament *upon the Tranſcript of the Record without bringing the Record itſelf into Parliament*; For the Parliament is holden at the King's Pleaſure, and may be diſſolved before the Errors are diſcuſſed, and ſo the Record itſelf cannot be brought here again, becauſe the Parliament, which was a higher Court, was once poſſeſſed

of it; Agreed per tot. Cur. Godb. 247. pl. 345. Paſch. 12 Jac. B. R. and cites 8 H. 6. Error 88.

9. Note, that *Error in Chancery* ſhall be reverſed by Parliament, and this is *in Repealing of Patents*, *or* in *Debt* &c. *between Perſons privileg'd* which goes by Order of the Common Law, and *not in Matters* which are *decreed upon Subpœna*, there does not lie Writ of Error; For of this it is no Court of Record. Br. Error, pl. 95. cites 37 H. 6. 13.

10. *B. R. after Judgment entered in another Term, cannot amend their own Default unleſs in Proceſs*, and therefore Writ of Error ſhall be ſued of it in Parliament; Quod Nota. Br. Error, pl. 88. cites 9 E. 6. 3.

2 Bulſt. 164. Hill. 11 Jac. S. C. cited by Coke Ch. J. who ſaid it is a very Notable Caſe.—Jenk. 22. pl. 41. cites S. C.

11. If Error is ſued in Parliament of a Judgment given in B. R. by all the Juſtices in the Exchequer Chamber, the *Party ſhall have Bill to the King indorſed, and* upon this the *Chancellor ſhall make to him Writ of Error*, and the *Chief Juſtice ſhall bring all into the Parliament Chamber, and there leave the Tranſcript of the Record and Proceſs with the Clerk of the Parliament amongſt the Lords with the Writ of Error*, and the *Party ſhall aſſign the Error in Writing*, and the *Chief Juſtice ſhall carry back all the Rolls into B R.* For they concern other Matters, and alſo *if Judgment be affirmed the King's Bench may make Execution*, and the *Record it ſelf ſhall not be left in Parliament*; For Record which comes into B. R. non exibit abinde, and alſo if Judgmeut be affirmed, the *Parliament cannot make Execution*, and the *Clerk of the Parliament ſhall have the Cuſtody* of the Record ſuppreſſed; and the Lords only, and not the Commonalty, *ſhall aſſign a Steward, who with the Lords Spiritual and Temporal, with Aſſent of the Juſtices, ſhall proceed ad Errores examinandos*, and *when the Errors were aſſigned the Plaintiff ſhall offer Surety by Recogniſance* in Parliament *of the Sum recovered, to ſatisfy the Party if the Judgment be affirmed, or to render his Body to Priſon*, as thoſe of B. R. do of Judgment and Execution made in C. B. *But* to this all the Juſtices anſwered, That in this Caſe the *Party ſhall not be delivered out of Priſon by Recogniſance*; For if the Parliament ſhall end before that Judgment be diſcuſſed, then the Party ſhall go at large, and the Recogniſance not Forfeited, and the Plaintiff without Remedy; Quod nota bene. Br. Error, pl. 137. cites 1 H. 7. 19. 20.

Error in Parliament; the Caſe was, *In Aſſiſe* brought againſt the Defendant *Judgment was given for the Plaintiff*; he *brought Error in B. R. and there the Judgment was affirmed* and upon that Judgment he brought Error in Parliament.

12. If a Judgment be given in B. R. either upon a Writ of Error or otherwiſe, the Party grieved may *upon a Petition of Right made to the King* in Engliſh, or in French, (which is not ex debito Juſtitiæ, but for Decency, for that the former Judgment was given Coram Rege) and his Anſwer thereunto (fiat Juſtitia) have a Writ of Error directed to the Ch. J. of B. R. for removing of the Record in præſens Parliamentum, and thereupon *the Roll itſelf, and a Tranſcript in Parchment is to be brought by the Ch. J. of B. R. into the Lords Houſe in Parliament; and after the Tranſcript is examined by the Court with the Record, the Ch. J. carries back the Record itſelf into B. R.* and then the Plaintiff is to aſſign the Errors, and thereupon to have a *Scire Facias* againſt the adverſe Party, returnable either in that Parliament, or the next, and the Proceeding thereupon ſhall be ſuper tenorem recordi, & non ſuper Recordum. 4 Inſt. 21.

It was *reſolved by three Juſtices, Contra Doderidge, that* a Writ of *Error did not lie in Parliament to reverſe a Judgment given in B. R. in Error brought there*, for that there is a double Judgment, and the Reverſal of a Judgment in a Writ of Error given ſhall not reverſe the firſt Judgment, but that Execution ſhall iſſue upon the firſt Judgment in the Aſſiſe. Mo. 834. pl. 1122. Paſch. 12 Jac. Heyden v. Shepherd.

13. The

13. The Method of bringing a Writ of Error in Parliament is, 1ſt. To petition the King, which being referred to the Attorney General, he writes on the Petition, " This is to be granted of Courſe, without " Prejudice to your Majeſty." 2dly, The King writes upon the Teſte of the Petition, " Fiat Juſtitia". Mo. 834. pl. 1122. Paſch. 12 Jac. Heydon v. Shepherd.

14. Writ of Error returnable in Parliament upon a Judgment in B. R. and *the Tranſcript of the Record was certified, and Errors aſſigned, but before they were determined the Parliament was diſſolved*; and upon a Motion in B. R. to have *Execution on the Judgment*, the Court after grand Debate how it ſhould appear to them that the Errors are undetermined above, and that the Judgment is not there reverſed granted it, becauſe the Record itſelf was never out of the Court, but only a Tranſcript carried up by the Ch. J. and left there, and when a Judgment of B. R. is reverſed in Parliament the Tranſcript is returned, and this Record made up according to the Tranſcript ſo returned. Raym. 5. Hill. 12 Car. 2. B. R. Dethick v. Bradbourn. 2 Sid 110. 117. S. C. but ſame Point does not appear.

15. It was declared by the Lords, and the Law is now taken ſo to be, that a Writ of Error in Parliament doth *not determine by a Prorogation.* 2 Lev. 93. Mich. 25 Car. 2. B. R. cited in Caſe of Goſton v. Sedgwick.

16. A Writ of Error may be *returned* in Parliament *Ad proximum Parliamentum ſuch a Day*; but if a *particular* Day be not *mentioned* it is naught, and though a particular Day is expreſſed, yet if that Day is at 2 or 3 Terms Diſtance, the Court will adjudge it to be for Delay, and it ſhall be no Superſedeas; Per Hale Ch. J. and he ſaid, that in the Regiſter there is a Scire Fac. ad Prox'. Parliamentum, but not a Writ of Error. Mod 106. pl. 15. Hill. 25 & 26 Car. 2. B. R. Sedgewick v. Goſton.

17. The Parliament hath a *Judicial Power* (beſides their Legiſlative) executed and adminiſtred by the Lords, yet it is *legally and virtually the Judgment of the King, if not of the Commons alſo*; ſometimes the Judgment is *entred coram Rege & ejus Conciſio ad Parl'*, Ryley 4. 1. 145. 1. 3. 66. and 266. ſometimes *coram ipſo Domino Rege in Parl'*, The Writs of Error ſay, *coram nobis* ad præſens Parl', that we may proceed by the Advice of the Lords Spiritual and Temporal, and the Judgment is entred *per Curiam Parliamenti*, but here the King ſeems to be excluded. Journals are no Records of Parliament. Hob 110. for when made up, the Record muſt be per Dominum Regum, or Curiam Parliamenti, if the King's Authority be neither expreſſed nor implied, it is excluded. Fleta, cap. 17. Nemo poteſt judicare in temporalibus niſi ſolus Rex vel ſub eo clamans, their Style ſhews in what Capacity they act, when we give Judgment it is not *per Juſt'* that would be void, but *per Cur. Domini Regis*, and ſo of the Lords. Comb. 276. Arg. Trin. 6. W. & M. B. R. The King and Queen v. Knowles.

18. It is beneath the Dignity of the Houſe of Peers (that being the Supreme Judicature) to try Matters of Fact, and for that Reaſon *Errors in Fact* of any Judgments in B. R. muſt of Neceſſity be redreſſed there, and not in Parliament; Per Holt Ch. J. 3 Salk. 145, 146. pl. 6. Knoll's Caſe.

19. On a Writ of *Error of a Judgment in Ireland brought in B. R. in England, the Judgment in Ireland was reverſed*; *but* on a Writ of Error brought *in the Houſe of Lords in England, the Judgment in B. R. in England was reverſed againſt the unanimous Opinion of all the Judges.* Gibb. 30 37. Paſch. 1 Geo. 2. The King v. The Archbiſhop of Armagh and Whaley.

In what Caſes Error brought in Parliament ſhall be a Superſedeas, See tit. Superſedeas (C. 2) And ſee Ibid. pl. 2. and the Notes there.

(E. c) How a *Court* ſhall *demean* itſelf.

Of what Error the Court ſhall take *Conuſance without a Certificate* upon a Certiorari.

Fitzh. Error, pl 74. cites Paſch. 21 E. 3. 53.

1. If a Matter in Fact be pleaded in Bar of the Writ, as the Feoffment of the Plaintiff, or his Releaſe, and Iſſue is taken thereupon, and this is found for the Plaintiff, yet the Court may examine the Judgment, and if there be any Error in the Judgment they may reverſe it. 21 E. 3. 54.

Fitzh. Office del Court, pl. 25. cites S. C.

2. If an Error be aſſigned in the Record the Court is to view the Record if there be any other Error in it, and if there be, to reverſe it. 24 E. 3. 34. b.

Fitzh. Office del Court, pl. 25. cites S. C.

3. So if there be any Matter in the Record to affirm the Judgment, which is not pleaded, the Court may make Advantage thereof. 24 E. 3. 34. b.

Fol. 790.

4. In a Writ of Error upon a Judgment in Banco, in an Action of Waſte by Default, and after a Writ of Inquiry of Waſte returned by the Sheriff according to the Statute, if it be not aſſigned for Error, that there was not any Attachment granted according to the Statute before the Diſtringas, but there are other Things aſſigned for Error, the Court cannot of themſelves, or by the ſhewing of the Party, reverſe the Judgment, becauſe by the Record certified it does not appear that any Attachment was granted before the Diſtringas according to the Statute; for the Plea-Roll is only certified upon the Writ of Error, which is before the Chief Juſtice, and the Proceſs appears upon the Philizer's Roll, which is not certified but upon Diminution alleged, and if he had aſſigned this for Error, it might have been certified, and therefore no Advantage ſhall be taken, becauſe it does not appear upon the Record certified. Mich 10 Car. B. R. between *Atkins and Higges* adjudged, and the Judgment affirmed accordingly. Intratur Hill. 8 Car. Rot. 821.

5. In a Writ of Error upon a Judgment in Banco in an Ejectione Firmæ, a ſhort Entry of the Writ according to the Courſe there is certified, and then the Declaration at Large, and by the Recital of the Writ, which mentions that the Action is brought De Rectoria de D. 20 Acris Terræ & 12 Acris Prati cum Pertinentiis in D. and the Declaration is of the Leaſe by Indenture of the ſaid Rectory and Tenements, cum Pertinentiis (excepta Terra pro manſo Vicarii ibidem cum omnibus talibus eaſiamentis quales Vicarius ibidem adtunc habuit cum omnibus talibus decimis etiam prout idem Vicarius ante tunc habere uſus fuit & adtunc habuit & exceptis etiam & reſervatis jure patronatus & advocatione Vicariæ & Eccleſiæ Parochialis de D. prædicta) and upon Not Guilty pleaded, a Verdict and Judgment is given for the Plaintiff, and aſſigned now for Error that the Judgment is given for the Plaintiff where it ought to have been for the Defendant; and after In Nullo eſt erratum pleaded, it was moved for Error that it appeared by the Record certified, that the Writ is General of a Rectory, and the Declaration of a Rectory with certain Exceptions; In this Caſe the Court ought not to reverſe the Judgment for this Cauſe

Cauſe, inaſmuch as it is not aſſigned for Error, nor the Writ itſelf certified, ſo that the Court cannot take Notice that the Writ is as the Entry thereof is certified, and this Exception is but a Variance between the Writ and the Declaration; and perhaps this Exception in the Declaration was Ex abundanti, and not Parcel of the Rectory, and then there was no Need to have demanded the Rectory with a Fore-priſe. And it ſeems it would not have been a good Plea for the Defendant in the firſt Action, to have ſaid that it appeared by the Declaration that there is a Forepriſe &c. without an Averment thereof in Fact, that it is Part of the Rectory. Paſch. 11 Car. B. R. between *Gregory and Shepherd* adjudged in a Writ of Error upon a Leaſe made by the Dean and Chapter of Peterborough. Intratur Hill. 11 Car. Rot. 41.

6. In Debt if Judgment be againſt the Defendant by Nihil dicit, and in a Writ of Error it is aſſigned, that there is not any Warrant of Attorney for the Attorney of the Plaintiff; but does not procure it to be certified upon a Certiorari as the Uſe is; and the Defendant in the Writ of Error pleads In Nullo eſt erratum, yet this is not any Acknowledgment that there is not any Warrant of Attorney, but the Judgment ſhall be affirmed as if no ſuch Error had been aſſigned; for it is to be proved by the Record, and the Warrant of Attorney is no Part of the Record, which was before the Chief Juſtice in Banco, to whom the Writ of Error was directed, and therefore it ought to be certified upon a Certiorari, or otherways the Court ſhall not take Notice thereof. Mich. 13 Car. B. R. between *Clutterbuck and Billing*, per Curiam adjudged, and the Judgment affirmed accordingly. Intratur Paſch. 13 Car. Rot. 185.

7. In a Writ of Error upon a Judgment in Banco upon Demurrer, if (*) the Plaintiff aſſigns for Error, that there is not any Original of ſuch Term, in which the Action is commenced, and upon a Certiorari it is certified accordingly; and upon this the Defendant in the Writ of Error ſues a Certiorari, and upon this an Original is certified three Terms before, but no Continuation is certified between the Time of the Original and the Declaration, and ſo a Diſcontinuance, the Court ought to intend that there was not any Continuation between theſe Terms, and ſo a Diſcontinuance; for upon the Certificate of the Original he ought to have procured the Continuances to have been certified, or otherways the Court cannot intend this to be the Original in this Action. Hill. 14 Car. B. R. between *Rily and Hillman* adjudged in a Writ of Error upon a Judgment in Banco, and the Judgment reverſed accordingly for this Error. Intratur Tr. 14 Car. Rot. 399.

* Fol 791.

8. If the Plaintiff in Writ of Error *aſſigns a Thing* for Error *which is not Error*, yet if the *Court finds other Errors of* which the Party ſays nothing, the Court ſhall reverſe the Judgment. Br. Error, pl. 163. cites 6 E. 4. 5. 8. Per Markham Ch. J.

9. If the *Plaintiff will not aſſign Errors* the Court ought not to proceed to the Examination of the Errors; for the Aſſignment of the Errors is in Lieu of Declaration. Per Jenny, the Entry of the Judgment is, That for theſe Errors and others in the Record we reverſe &c. And per Yelverton, the *Plaintiff may* as well allege *Diminution* as the Defendant &c. Br. Error, pl. 166. cites 7 E. 4. 25.

10. *Error ſued of a Judgment in B. R.* and the *firſt Judgment was affirmed*, and *before Affirmation of it the Plaintiff in the Writ of Error pleaded Releaſe of the Defendant*, who was Plaintiff in the firſt Action, *of all Actions, Suits, Executions and Errors, after the laſt Continuance*, et non allocatur; for he is Plaintiff and cannot plead in Bar; And when Judgment is affirmed it was ſaid that the Judgment ſhall be *Quod Judicium*

dicium reddit' remanebit ſtabile imperpetuum. Brown ſaid, You ought Ex Officii to examine the Errors; but the Juſtices and all the Serjeants ſaid No. By which the Judgment was affirmed, and Execution awarded without examining the Errors; quod nota. Br. Error, pl. 182. cites 21 E. 4. 38. 39.

11. On a *Judgment in Account in C. B.* it was aſſigned for Error that it doth *not appear* to the Court *that there was an Original Writ*, for it is not certified, *and the Defendant has pleaded In nullo eſt erratum*; and therefore cannot allege Diminution; cites 20 E. 3. Error 2. 9 Ed. 4. 32. and Judgment given where there is no Original is erroneous. Coke ſaid, If the Plaintiff aſſigns for Error that there is no Original, and the Defendant pleads In Nullo eſt erratum, he *cannot after allege Diminution*; *but* this *Error being aſſigned Hors de Record the Court here may write to C. B. to certify it*; for by the Writ of Error all is certified which is with the Ch. J. there, which is only the Body of the Record; but the *Original and Judicial Writs remain with the Cuſtos Brevium, and other Officers* which *are never certified but where Error is aſſign'd for Want of them.* Cro. E. 84. Hill. 30 Eliz. B. R. Robſert v. Andrews.

(E. c. 2) Abated.

What will abate a Writ of Error.

1. WRIT of Error was ſued *Joanni Priſot Capitali Juſticiario de Communi Banco*, to remove the Record before him, where there is no Title of Record in the Bank; For the *Records in Banco are coram Capitali Juſticiario et ſociis ſuis*, and *not coram Capitali Juſticiario only*, and therefore he ſued a new Writ of Error. And in *the Exchequer* Writ of Error was ſued *Theſaurario et Baronibus*, and therefore ill; For the *Records there are coram Baronibus only*, and therefore he was compelled to ſue a new Writ. Br. Error, pl. 13. cites 28 H. 6. 11.

2. Writ of Error to remove a Record out of the Common Bench, was *Jo. priſot Capitali Juſtic' noſtro* &c. *without ſaying et Sociis ſuis*; for Omiſſion of which Words the Writ was rejected. Thel. Dig. 95. Lib. 10. cap. 6. S. 27. cites Trin. 28 H. 6. 14.

3. But ſuch Writ of Error came into the Exchequer Chamber directed *Theſaurario & Baronibus Scaccarii* &c. And thereupon it was awarded to ſue a better Writ Quia placita ibidem ſunt *coram Baronibus* tantum. Thel. Dig. 95. Lib. 10. cap. 6. S. 27. cites Trin. 28 H. 6. 14.

4. Writ of Error was brought *upon ill Iſſue*, and the Court ſaw that *the Original was not good*; For it was *Ex aſſignatione where it ſhould be Ex dimiſſione*, and therefore they *relinquiſhed the Error* which was aſſigned, *and abated the Writ*; Quod Nota. Br. Error, pl. 105. cites 38 H. 6. 30.

5. *Debt by Baron and Feme againſt A.* Proceſs continued till he was outlawed, and he brought Writ of Error to reverſe the Outlawry, and had Scire Facias ad audiendum Errores, againſt the Baron and Feme, and the Sheriff returned the *Baron Dead, and the Feme warned, and ſhe made Default.* A. prayed that the Court would proceed to the Examination of Errors as if both had been returned warned, and had made Default, for no Scire Facias ſhall be againſt the Executors of the

the Baron; Per Heigham. But per Frowick, the Writ of Error ſhall abate and you ought to purchaſe a new Writ &c. Br. Error, pl. 84. cites 14 H. 7. 23.

6. In a Writ of Error if the *Defendant dies* the *Writ is not abated*; *Otherwiſe if the Plaintiff dies.* And the Secondary informed the Court of a Caſe between **Thyn and Cory**, where a Sci. Fa. ad audiendum Errores went againſt the Executors when the Defendant in the Writ of Error died. Vent. 34. Trin. 21 Car. 2. B. R. Anon.

But where there are *two Plaintiffs in Error*, and one dies, this is no Abatement of the Writ, Arg. quod Curia conceſſit. 12 Mod. 240. Mich. 10. W. 3. in Caſe of Wicket v. Creamer.——S. P. as to the Death of the Defendant in Error admitted accordingly. 1 Salk. 264. Paſch. 11 W. 3. B. R. in Caſe of Wicket v. Creamer.——Ld. Raym. Rep. 439. S. C. held accordingly per tot. Cur.

7. After a Writ of Inquiry returned againſt the Defendant in an Action on the Caſe, Exception was taken that the *Defendant* was dead; ſed non allocatur; For per Wild, and all the Clerks, he *dying the Day of* the *Writ of Inquiry returned*, it *cannot be aſſigned for Error*, but had the Death been before it were Error; and Judgment for the Plaintiff. 3 Keb. 160. pl. 30. Paſch. 25 Car. 2. B. R. Hobland v. Hales.

8. Debt on a Judgment in B. R. the Defendant *pleaded* in Abatement *a Writ of Error depending in the Exchequer-Chamber*, and per Cur. it is good, but if he *concludes Reſpondere non debet quouſque*, it is not good; For we have no Reſummons. 5 Mod. 68. Mich. 7 W. 3. Daſhwood's Caſe.

9. If there are *ſeveral Plaintiffs in one Writ of Error*, the *Death of one abates the Writ*, becauſe there cannot be any Judgment according to the Writ; *but if* there are *ſeveral Defendants* in Error, *and one dies*, it is otherwiſe, for they are not named in the Writ; Per Cur. Ld. Raym. Rep. 244. Trin. 9. W. 3. B. R. in Caſe of Penoyer v. Brace.

10. A Writ of Error does not abate by the *Death of the Defendant after In nullo eſt Erratum pleaded.* 2 Ld. Raym. Rep. 1295. Mich. 8 Ann. Ludlow v. Lennard.

(F. c) *What* Things ſhall be Errors.

[Want of Pledges, pl. 17, 18, 19.]

1. **If the Writ be abateable, yet if no Exception be taken it is not Error.** 18 E. 4. 19.

Br Brief, pl. 379 [in the large and firſt Edition, but pl. 383. in the After-Editions] cites S. C. —— Br. Error, pl. 176. cites S. C. —— As where Plaintiff takes Baron, pending the Writ, the Writ by this is not abated, but only abateable, which ought to be pleaded, and Error does not lie thereof after Judgment. Br. Error, pl. 117. cites 19 Aſſ. 8.

2. Otherwiſe **if the Writ be** abated. 18 E. 4. 19.

Br. Brief, pl. 379 [in the old Edition, but in the other Editions it is pl. 383.] cites S. C. —— [See the Notes to pl. 1.] —— Br. Error, pl. 176. cites S. C. —— Br. Error, pl. 117. cites 19 Aſſ. 8. S. P.

3. If

Br Error, pl. 145. cites 5 H 7. 8.

3. If Aid be granted where it is not grantable it is not Error. 18 E. 4. 16. b. 14 H. 6. 5. b. contra 7 H. 6. 21.

per tot. Cur. and 8 H. 7. 9 per Brian. —— Ibid. pl. 151. cites 8 H. 7. 11. per Huſſey. —— 8 Rep. 58. a 59. b. cites 5 H. 7. 8. b. and 8 H. 7. 9. b. S. P. and ſays the Reaſon there given is, becauſe the Demandant has no Prejudice as to his Right, but only a Delay.

Br. Error, pl 145. cites 5 H 7. 8.

4. Otherwiſe it is if it be not granted where it is grantable. 18 E. 4. 16. b. 14 H. 6. 5. b.

per tot. Cur. and 8 H. 7. per Brian —— 9 Rep 28 b. cites 2 E. 3. 29 Mortimer's Caſe, S. P. —— So of the denying of Proceſs againſt Witneſſes or View, which are Dilatories likewiſe, it is Error; Per Cur. 8 Rep. 59. a. cites 21 E. 4 65. b. 22 E. 4. 15. &c. —— It is Error to deny an Eſſoign where it ought to be granted. Hob 47. pl. 52.

Roll Rep. 450. pl. 12. S. C. & S. P adjudged accordingly. —— See (M. b) ſupra pl 3 and tit. Eſtoppel (L) pl. 12. S. C.

5. If an Action be brought againſt J. S. Knight and Baronet, and he appears and pleads, and Judgment is given againſt him and Execution done where he is not a Baronet, but only a Knight; yet he cannot aſſign this for Error againſt his own Acceptance; *Markham and Sir Francis Forteſcue.* H. 16 Jac. in Cam. Scac. adjudged in a Writ of Error.

Br. Error, pl. 179. cites S. C.

6. If an Action be ſued by Prochein Amy, ſuppoſing the Plaintiff to be within age, when he is of full Age, this is Error. 20 E. 4. 2. b. accordingly.

7. If A. S. brings an Action as Adminiſtratrix to J. S. her late Husband, and the Defendant pleads fully adminiſtred, and this is found by Verdict againſt him, and Judgment accordingly; in the Writ of Error he cannot aſſign Error in this that J. S. her Husband is yet living and ſo ſhe is a Feme Covert, and the Action does not lie, becauſe the Defendant hath by Plea admitted her to be a Feme Sole, and to be Adminiſtratrix of her Husband. Trin. 10 Car. in Camera Scaccarii adjudged in a Writ of Error. Intratur 6 Car. B. R. Rotulo.

Br. Error, pl. 184 cites 21 E. 4. 77. S. P. that the Record was that he always appeared by Attorney, and per Curiam this is no Error; for now it ſhall be intended that it was by Aſſent of the Parties, and then it is not Error; Quod Nota. —— Br. Attorney pl. 79. cites 21 E. 4. 77 that if in ſuch Caſe the Appearance be by Attorney by Aſſent of the Parties it is well, though the Aſſent is not of Record; for it ſhall be ſo intended when the Record is by Attorney. —— And Roll ſeems miſprinted, 7. b. for 77. b. pl. 12.

8. If a Man, upon a Cepi Corpus returned, appear by Attorney, this is Error. 21 E. 4. 7. b.

* Br. Error, pl. 52. cites S. C. —— Fitzh. Aſſiſe, pl. 48. cites S. C.

9. In an Aſſiſe againſt two, if the Tenants accept ſeveral Tenancies, and plead ſeveral Pleas in Abatement or Bar, if the Court inquires of any of the Pleas before it be inquired of the Tenancies, this is Error. * 11 H. 4. 68. Contra 7 E. 4. 31. b. becauſe if the other had been inquired before, it might have been found that the other was Tenant, and ſo the ſecond Iſſue not to be inquired.

Fitzh. Aſſiſe, pl. 48. cites S. C.

10. So in an Aſſiſe, if the Tenant ſays that there is not any Tenant named &c. and pleads over Nul Tort &c. if the Inqueſt inquires of the Diſſeiſin before it inquires of the Tenancy, this is Error for the Cauſe aforeſaid. 11 H. 4. 68.

Br Error, pl. 32. cites 2 H. 4. 4. S P [and Roll ſeems miſprinted by the Omiſſion of the (2)].

11. If the Mayor and Bailiffs of B. have Conuſance of Pleas, and one of the Bailiffs brings an Action, and the Defendant takes Exception that the Plaintiff is Judge, and notwithſtanding this they proceed, this is Error. H. 4. 4. b.

12. In

12. In an Action of Debt in an interior Court upon a Bill Obligatory, if the Plea be entered before the Debt becomes due by the Bill, ſcilicet, before the Time of Payment, and the Defendant pleads to Iſſue, and this is found for the Plaintiff and Judgment given accordingly, yet this is Error. Mich. 11 Caroli B. R. between *Holden and Collet*, adjudged in a Writ of Error upon a Judgment in Nottingham, and the Judgment reverſed accordingly, Intratur Hill. 10 Caroli. Rotulo 762. Hill. 11 Caroli. B. R. between *Walker and Wigſal* adjudged in the Caſe of Treſpaſs, upon a Judgment in Cheſterfield, and between *Marſhall and Wigfield* Intratur Trin. 11 Caroli. Fol. 792. In Error of a Judgment in Aſſumpſit the Error aſſigned was, that the Promiſe was 4 March, 43 Eliz. for Payment on 19 March following,

and the Action was brought 16 March, 43 Eliz. which was three Days before there was any Cauſe of Action; and this was held to be a manifeſt Error, and for this Cauſe Judgment was reverſed. Cro. J. 69, 70. pl. 11. Paſch. 3 Jac. B. R. Egles v. Vale.— Yelv. 70. Vale v. Egles, S. C. and Judgment reverſed.

13. If the Tenant appear by Attorney without Warrant of Attorney, this is Error. 11 H. 4. 88. b. * 7 H. 4. 16. † 11 H. 4. 44. * Br. Error, pl. 37. cites S. C. adjudged Error, and yet this was (as Brook obſerves) the proper Default of the Defendant himſelf; Quod Nota.

† Fitzh. Judgment, pl. 71. cites S. C. but Hank. ſaid that the Defendant comes too late, becauſe Judgment is given. And Ibid. cites Hill. 35 H. 6. where Judgment was given in Treſpaſs notwithſtanding ſuch Allegation; And alſo cites 13 R. 2. Judgment given for the Plaintiff in Detinue notwithſtanding ſuch Matter alleged by the Defendant.

14. In an Action upon the Caſe for ſcandalous Words, the Plaintiff declares that the Defendant ſpoke the Words 1 Die Junii 12 Caroli, and the Original bore Teſte after [before] the ſaid Time that he alledged the ſaid Words to be ſpoke; this is Error, for though the Day is not material, yet when he lays it, it ſhall be intended to be true, and if it was ſo in Truth, then the Action was brought before any Cauſe of Action. Paſch. 15 Caroli B. R. between *Colly and Oliver*, per Curiam adjudged, and the Judgment given in Banco reverſed accordingly. Intratur Mich. 14 Caroli Rotulo 154. and Hill. 15 Caroli B. R. between * *Smith and Fames* adjudged in a Writ of Error upon a Judgment in Banco. Intratur Mich. 14 Caroli Rotulo, 499. * Cro. C. 574, 575. pl. 17. S. C. adjudged. —— In an Action for Words the Plaint was entered the ſame Day on which the Words were alleged to be ſpoke; after Verdict and Judgment this was alleged for Error; For there muſt be one Hour ſuppoſed when the Words were ſpoke, and another Hour when the Plaint was entered; But Roll held it well enough, and ordered the Plaintiff to take her Judgment niſi Cauſa before the End of the Term. Sty. 72. Mich. 23 Car. B. R. Symons v. Low.

15. If by Matter ſufficient it appears to the Court for the King for which they ought not to proceed in Loquela Rege inconſulto, if they proceed in Loquela, without a Procedendo in Loquela, and after upon a Procedendo ad Judicium they give Judgment, the Proceeding in Loquela without the Writ is erroneous. 9 H. 6. 41. Curia. Br Error, pl. 8. cites S. C.

16. In Treſpaſs for breaking his Houſe and Garden, if the Defendant pleads Not Guilty to the Garden, after pleads a Licenſe to enter into it, and Iſſue is taken upon the Whole, and it is found againſt the Defendant, this is good, and the Plaintiff ſhall have Judgment; for this is but a double Plea and double Iſſue, and both found againſt the Defendant. Mich. 14 Car. B. R. between *Breſy and Lapworth*, adjudged, this being moved in arreſt of Judgment. Intratur Trin. 14 Car.

17. If no Pledges (where they ought to be found) are returned by the Sheriff, nor found pending the Writ, and after Judgment is given; this want of Pledges at the Common Law made the Judgment erroneous. By Reports 14 Jac. Dr. * *Huſſy againſt Moor* adjudged. Paſch. 3 Jac. B. R. between *Randal and Higgins* adjudged.

* Cro. J. 414. pl. 2. B. R. the S. C. adjudged. —— Roll Rep. 445. pl. 9. S. C adjudged —3 Bulſt 275 281. S. C. adjudged. —— Hob. 93. 101. pl. 127. Moor v. Huſſey, S. C adjudged e contra in C. B. but that Judgment reverſed in B. R. —— S. C. cited Mar. 46. in pl. 72. Trin. 15 Car.

18. If a Replevin be brought in the Country, and this is after removed by Recordari in Banco, and there the Parties plead, and Judgment is given upon demurrer for the Plaintiff, though no Pledges are returned, or found pending the Suit, yet this is not erroneous; becauſe it was not required upon the Plaint in the Country to find Pledges, as it is in the Caſe of an Original, and the Sheriff when he made Deliverance, took Pledges for his Indempnity. Trin. 9 Car. B. R. between *Randal and Score* adjudged in a Writ of Error upon a Judgment in Banco, this being aſſigned for Error. Intratur Paſch. 8 Car. Rot. 422.

19. But Paſch. 15 Car. B. R. between *Groſe and Boſcawen*, ſuch Exception was taken in arreſt of Judgment, and per Curiam held erroneous; but Pledges were permitted to be put in, inaſmuch as it was before the Judgment, and ſo pending the Suit, and ſo it was helped.

Jo 439. pl. 5 Groſſe v. Boſcow, S. C. and takes a Difference between Pledges De Proſequendo at Common Law, and Pledges De Returno habendo, that if Pledges De Proſequendo are not found it makes the Judgment erroneous; But otherwiſe of Pledges De Returno habendo. —— Mar. 46. pl. 72. S. P. and ſeems to be S. C. and Judgment affirmed.

20. *In waſte* if the *Tenant takes Day by Prece Partium without Eſſoign, and at the Day is eſſoigned*, which is admitted without Challenge, this is not Error, but is well; Per Cur. in C. B. Quod nota. Br. Error, pl. 22. cites 40 E. 3. 15.

21. Where *Reſcous is returned* by which Capias iſſues to take the *Reſcuer* who *ought to appear in Perſon*, there if the *Court admits him by Atttorney*, yet it is not Error; And the like of him who appears by Exigent or Capias; Per Needham and Moyle J. Quod non negatur. Br. Error, pl. 98. cites 37 H. 6. 27.

22. Error was aſſigned upon Judgment in a Court, *which Court was held Wedneſday the third Day of March*, and the *third Day of March was Monday*, and this is clear Error. Br. Error, pl. 134. cites 1 H. 7. 12.

23. *So if the* Court be held *Thurſday on the Feaſt of St. Andrew*, and the Feaſt was the *Friday* this Year, this is Error, by which Judgment was reverſed; and becauſe the *Pledge was in Execution in the Baſe Court, ſpecial Writ was awarded to deliver him.* Ibid.

24. *If Proceſs ought to be made againſt the Witneſſes which is denyed*, this is Error. Br. Error, pl. 145. cites 5 H. 7. 8. per tot. Cur. and 8. H. 7. 9. per Brian.

25. *So of the View.* Ibid.

29. *But if* thoſe are *granted where they are not grantable*, this is not Error; Quod nota Diverſity inde, per tot. Cur. Ibid.

27. *Where Recordare, Certiorari, Writ of Error, or Falſe Judgment comes*, the Power of the Court is determined by it, and *if they proceed after, it is Error.* Br. Error, pl. 147. cites 6. H. 7. 15, 16.

28. If Voucher be *granted where* Voucher *does not lie*, this is Error. Br. Error, pl. 151. cites 8 H. 7. 11. per Huſſey.

29. Debt upon an *Obligation*, the Condition was *to pay an Annuity at the Feaſt of the Annunciation, or within* 20 *Days after*; The *Original was brought* 8 *April*, and the *Breach alleged to be at the Feaſt of the Annunciation* laſt paſt, which was within 20 Days after the Feaſt of the Annunciation, and ſo the Action brought before he had Cauſe; And the Court held it an apparent Fault, for that the Annuity was not due till the End of the 20 Days. Cro. E. 565. pl. 29. Paſch. 39. Eliz. C. B. Blunden's Caſe.

30. *Debt on Bond* was *brought before the Day of Payment*, and Judgment was given for the Plaintiff; Then Defendant brought Error and Judgment was affirmed in Cam. Scacc. and Note, that *pending the Writ of Error the Day of Payment happened*, and cites the 46 E. 3. 28 per Perſay, that if my Writ be brought before the Day of Payment, and depends in Suit till after Day of Payment, my Writ is made, good; For at all Times the Defendant was my Debtor. 2 Le. 20. pl. 26. Trin. 29 Eliz. B. R. Thurkettle v. Teys. Cro. E. 101. pl 7. Thirkettle v. Reeve. S. C.

31. Error of a *Judgment in Debt upon an Obligation*, becauſe the Teſte of the Writ was 15 Sept. 32 Eliz. returnable Oct. Mich. and *the Money was due* at Mich. 32 Eliz. and ſo *after the Teſte and before the Return of the Writ*, and for this Cauſe although the Judgment was after Verdict, yet being brought before Cauſe of Action, the Judgment was reverſed, and is not helped by the Statute of 18 Eliz. Cro. E. 325. pl. 17. Paſch. 36 Eliz. B. R. Buckley v. Williamſon.

32. In a *Darrein Preſentment* the *Count was Et inde dicit quod ipſe the Plaintiff ad eandem preſentavit, without ſaying Eccleſiam*, but no Error, for it can have no other Intendment but that he preſented to the ſame Church mentioned in the Plaint. Cro. C. 341. pl. 6. Hill. 9 Car. B. R. Cort v. The Bp. of St. Davids.

33. Error of *Judgment* given *in an Inferior Court per Seneſchall' hic in Cur'*, and affirmed; for though if it be per Seneſchall' only, without more it would be ill, becauſe it might be in a Tavern or other Place, yet being ſaid *in Cur. ſhews it to be in Court judicially*. 12 Mod. 16. Hill. 3 W. & M. Fiſher v. Baſton.

34. *Granting a Dilatory when it ought not to* be granted is no Error; but it is *otherwiſe to deny it when it is grantable*. Carth. 173. Hill. 2 & 3 W. & M. in B. R. in Caſe of Clobery v. Bp. of Exon.

35. If a *Record begins that A. B. ſummonitus fuit*, which preſuppoſes a Writ, yet *if there be no Writ* Judgment cannot be arreſted for this Reaſon, but the Party may have a Writ of Error; Per Cur. Ld. Raym. Rep. 232. Trin. 9 W. 3. in Caſe of Pechey v. Harriſon.

36. Error upon a *Judgment in Aſſumpſit*, where the Plaintiff *declared upon ſeveral Promiſes*, and in the Count *upon the Inſimul computaſſent, no Time was laid when, nor Place where*, the Account was made between them. Holt Ch. J. ſaid it is the ſame Thing as if a Man ſhould declare, that at Cambridge the Defendant was indebted to him for Goods Sold, and not ſay where they were Sold; it ought to be, Ad tunc et ibidem venditis. The Judgment ought to be reverſed. Ld. Raym. Rep. 533. Hill. 11 W. 3. Desborough v. Kelby.

Fol 793.

(G. c) Error *in Proceſs.*

[In Fines. pl. 13. to 20.]

1. IF there be an Omiſſion of any Writ in Proceſs, or * one Writ awarded in Lieu of another, and Judgment given thereupon without any Appearance of the Party, this is erroneous. 3 H. 6. 9.

* But where a Man *appears* by Capias in Action in which Capias does not lie, this is Error. Br. Jours &c pl. 54 cites 12 E. 4. 11.

Variance between Plaint and Declaration in Inferior Courts is Error. 1 Salk. 266.

2. If Debt, if there be but two Capias's awarded, and then an Exigent, this is erroneous. 3 H. 6. 9.

3. If a Petit Cape be awarded in Lieu of a Grand Cape, and the Demandant recovers thereupon, this is erroneous. 3 H. 6. 9.

4. In Debt, if a Capias be awarded before any Summons, and Judgment after given, this is erroneous; for there ought to be a Summons awarded by the Law before any Capias ought to iſſue. Paſch. 3 Jac. B. R. between *Banks and Pembleton* adjudged in a Writ of Error. Paſch. 5 Jac. B. R. between *Ballard and Cook* adjudged, which Ineratur Trin. 4 Jac. Rot. 681. Hill. 4 Jac. B. R. between *Moyle and Catchnud* adjudged, which Intratur Trin. 4 Jac. Rot. 1609.

Cro E 371. pl. 14. Collet v. Marſh. S. C. adjornatur. — Ibid. 397. pl. 2. S. C. and Judgment was affirmed per tot. Cur. præter Gawdy. — Mo. 349. pl. 467. Corbet v. Marſh S. C. and becauſe the Sheriff had returned him ſummoned and proclaimed, the Court adjudged according thereunto, and put the Party to his Remedy againſt the Sheriff. — Gouldsb 128. pl. 22. S. C. adjudged that the Party ſhall not have Averment againſt the Return of the Sheriff; For if the Return be falſe, the Party ſhall have an Action upon the Caſe againſt the Sheriff.

5. In a Præcipe quod reddat, if the Tenant before the Statute of 31 El. be returned ſummoned, where no Summons was made, and upon this the Tenant loſes by Default, yet this Non-ſummons is not erroneous; for the Juſtices have given a good Judgment, and the Party cannot aver againſt the Return upon a Writ of Error upon the ſame Judgment. Hill. 37 El. B. R. between *Collet and Marſhal.*

6. So it is not erroneous by the Statute of 31 El. cap. 3. if he was not ſummoned according to that Statute. Hill. 37 El. B. R. between *Collet and Marſhal* adjudged. Vide the Statute.

7. In an Action upon the Caſe, if the Plaintiff declares that A. was indebted to him in 10 l. and he exhibited a Plaint in the Court of Exeter ſecundum conſuetudinem, and upon this a Capias was awarded againſt A. ſecundum conſuetudinem, and upon this A. was arreſted, and thereupon the Defendant promiſed that in Conſideration the Plaintiff vellet permittere A. to go at Lsrge, and not farther to proſecute the ſaid Plaint, he aſſumed to re-deliver A. again to the Cuſtody of the Serjeant that arreſted him before ſuch a Day, or otherways to pay; and avers that he ſuffered him to go at Large &c. After a Verdict upon Non Aſſumpſit pleaded, and Judgment for the Plaintiff, it was aſſigned for Error, that the firſt Proceſs againſt A. was a Capias without any Summons, yet the Judgment was affirmed; but no body was of the other Part to ſhew to the Court that in this Caſe A. never appeared to the Plaint, ſo that he never made the Proceſs good by any Appearance.

Appearance. Trin. 8 Car. B. R. between *Hawkins and Snelling* adjudged in a Writ of Error upon a Judgment in Exeter. Intratur Trin. 7 Car. Rot. 630.

8 If one indicted for Felony be rendered, and hath a Superſedeas, and delivers it to the Sheriff before the Exigent is pronounced and returned, if the Exigent be after pronounced and returned it is erroneous. 18 E. 3. 38.

9 So if he never delivers it to the Sheriff, yet the Exigent is erroneous, for this loſt its Force by the Render and Superſedeas. Contra 18 E. 3. 38.

10. So if the King pardons him pending the Exigent, and notwithſtanding the Sheriff pronounces the Exigent, it is erroneous. 18 E. 3. 38.

11. If an Action of Dower, by Way of Plaint and not Writ, be brought in an Inferior Court by the Cuſtom of the Court, and the Plaintiff thereupon recovers by Judgment, this is erroneous; becauſe it is againſt the Statute of Magna Charta to ſue by Plaint in real Action. Hill. 11 Car. B. R. between *Hodgſon and Cremer* per Curiam, in a Writ of Error upon ſuch * Judgment in Lynn, and the Judgment reverſed for this Cauſe among others. Intratur H. 11 Car.

In Error of Judgment in Dower given in Newcaſtle, * Fol. 794. it was aſſigned that the Proceedings were by Plaint, and no ſpecial Cuſtom certified to maintain it. The Court held it to be erroneous for this Cauſe, but would not determine whether it might not be good upon a ſpecial Cuſtom. Vent. 267. Hill 26 & 27 Car. 2. B R. Lomax v. Armorer.——2 Lev. 98. S. C. and Judgment reverſed. ——Raym. 233.

12. In an Action of Debt in an Inferior Court, if the Summons be awarded, and after a Capias, and upon this a Cepi returned and the Record is return'd in a Writ of Error, that at the Return of the Cepi quod Defendens venit & Comperuit, and thereupon two others came in their proper Perſons and became Bail for him; after a Day is given to the Defendant till another Court, at the Prayer of the Plaintiff, and no Mention of any Prayer or Imparlance of the Defendant, and at the other Court he makes Default, and upon this Judgment is given by Default againſt him, this is erroneous; becauſe the Record is not that he appeared in proper Perſon, or by Attorney; for the Clerks de B. R. ſaid, that it is uſed always to be ſaid, that he appeared in proper Perſon or by Attorney or Guardian; for a Man may appear by any of theſe Ways. Mich. 15 Car. B. R. between *Orchard and Jenkins* adjudged in a Writ of Error upon a Judgment in Briſtol, and the Judgment reverſed accordingly for this Error. Intratur Mich. 14 Car. Rot. 194.

13. In a Writ of Covenant between *Foſter and Foſter*, the Commiſſioners upon the Dedimus having taken the Conuſance, return Executio iſtius Commiſſionis patet in quodam Panello huic Commiſſioni annexo, where it ought to be in quadam Schedula; yet this is not erroneous in the Fine, for this had been well, if it had been only Executio patet in hac annex' without other Words; and ſo it was ſaid it would have been good, if no Words had been writ thereupon, but had only returned the Concord under their Seals. Trin. 4 Jac. B. R. between the *Earl of Bedford and Foſter* adjudged in a Writ of Error. Cro. J. 77. pl. S. C. and the Fine was affirmed.

14. So in the ſaid Caſe, if in the Label annexed to the Præcipe it is there recited the Parties are named *Foſter and Foſter*, without naming their Chriſtian Names, and in the Concord their Chriſtian Names are named; yet this is not erroneous for not naming their Chriſtian Names in the Præcipe, for the Reaſon in the Point before. Trin. Cro. J. 77. pl. S. S. C. but S P does not appear.

3 Jac. B. R. between the *Earl of Bedford and Foſter* adjudged in a Writ of Error.

Cro. J. 77. 78. pl. 8. S. C. and the Fine was affirmed.

15. So in this Caſe, if in the Label the Præcipe be de 8 Meſſuagiis & 2 Meſſuagiis, and the Concord is well, ſcilicet, 2 [8] Meſſuagiis & 2 Toftis; yet this Variance is not Error, becauſe the Præcipe in the Label is not neceſſary but idle; for the Concord is in the Writ of Covenant, which is the material Thing, and the other but Surpluſage; for the Juſtices, who take Fines, never return upon their Dedimus more than only the Concord. Trin. 3 Jac. B. R. between the *Earl of Bedford and Foſter* adjudged in a Writ of Error.

Cro J. 292. pl. 5 S. C. and ſame Error aſſigned, but the Defendant pleading Infancy it was adjudged that the Parol ſhall demur.——Mo. 847 pl. 1148. Herbert v Bingham S. C. the Age was granted, becauſe he that pleaded it was Tertenant, but otherwiſe he ſhould not have his Age in Error.—— 3 Bulſt. 134. Harbert v. Bynion, S C. very fully debated by the Court, and adjudged that the Age be allowed, and that the Plea ſhould ſtand till the Defendant's full Age.——Roll Rep. 223 pl. 31. S. C. and by Coke and Doderidge if Dedimus Poteſtatem of a Fine bears Date before the Writ of Covenant, this is Communis Error; Adjornatur.——Ibid. 250 pl. 19 S C. and Coke and Crooke ſeemed that the Age lies, but Doderidge and Haughton e contra; Adjornatur——Ibid. 323 pl. 31. S. C. debated by the Court whether the Age lies.——Jo. 419. pl. 7. S. C. the Parol demurred till he came to full Age; And after he came to full Age the Matter upon Reſummons was revived, and after Argument at Bar the Court was divided.—— See Infra pl. 20.

16. If the Dedimus poteſtatem to take the Conuſance of a Fine bears Date before the Writ of Covenant, this is Error; for the Dedimus poteſtatem ſays, ſcilicet, quod cum breve pendeat de Placito Conventionis &c. and this cannot be pending when it bears Teſte after. Hill. 42 El. 7. 9 El. B. R. adjudged in a Writ of Error. Brook 35 H. 8. 262. 1 H. 7. 9. Fitz. Nat. 146. G. Hill. 10 Car. B. R. between *Herbert and Benion*, per Curiam intratur.

17. Vide Mich. 43 44 El. B. R. between *Arundel and Arundel* contra. Hill. 13 Jac. B. R.

Cro. J. 11. pl. 15. S. C. & S. P. accordingly, For as Popham ſaid the uſual Courſe of the Fine Office is, when a Fine is levied of a Manor and Rent, if the Rent be under the Value of 5 l. they never uſe to make Mention thereof in the Fine; but if it amounts to 5 l. or more, then they uſe to mention it in the Concord of the Fine, and therefore this Error was diſallowed.——S. P. as to the Value. Cro. E. 275. Hill. 34 Eliz. C. B. Argenton v. Weſtover.

18. If the Dedimus poteſtatem be to take the Conuſance of Lands, Tenements and Rents, and no Conuſance is made of the Rent, and ſo the Dedimus not purſued in the Whole; yet this is not erroneous. Mich. 43, 44 El. B. R. between *Arundel and Arundel* per Curiam.

Cro. J. 160. *Fol. 795. pl. 15. S. C. but S. P. does not appear.—See Hutt. 135. Champnon's Caſe.

19. If the Writ of Covenant bears Teſte 23 Jan. and the Dedimus poteſtatem the 24 Jan. and the Writ of Covenant is returnable Octabis (*) Purifications, which is the 12th of February; and the Caption of the Fine, taken before Gawdy Juſtice, is the 14th of February, and ſo certified upon the Back of the Dedimus poteſtatem; ſo that the Caption is after the Return of the Writ of Covenant; yet this is erroneous. Trin. 5 Jac. B. R. between *Champernon and Godolphin*. Dubitatur Mich. 5 Jac. B. ſame Caſe per Curiam.

See ſupra pl. 16. and the Notes there.

20. If upon a Fine levied at the Grand Seſſions in Montgomery, the Record in the Writ of Error is certified, that A. brought a Writ of Covenant againſt B. &c. and that this bore Date 8 Julii 7 Jac. and it is alſo certified, that a Dedimus poteſtatem was granted between the ſame Parties, and of the ſame Premiſſes which bore Date before, ſcilicet, 6 Feb. 2 Jac. in which it is recited quod cum breve noſtrum de Conventione pendet, and the Indorſement of Execution thereof is certified, ſcilicet, Executio patet in quadam Schedula huic annexa, and after there is certified a Præcipe between the Parties &c. and the Concord thereupon & captio & cognitio 18 Feb. 2 Jac. coram nobis &c. virtute

Brevis

Brevis de Dedimus poteſtatem huic concordiæ annexi, and after it is certified hæc eſt finalis concordia facta &c. prædicto die Lunæ 24 Julii, 7 Jac. and proclaimed then, and the Writ of Error is brought to reverſe this Fine which was levied at the Grand Seſſions held Die Lunæ 24 Julii, 7 Jac. and aſſigns for Error that the Dedimus poteſtatem bore Date before the Writ of Covenant; but whether in this Caſe it ſhall be intended by the Court that this Fine was levied upon the Conuſance upon the Dedimus poteſtatem, or after in Court, is the Queſtion; the Conuſance upon the Dedimus being 2 Jac. and the Writ of Covenant and Fine perfected 7 Jac. Hill. 10 Car. B. R. between *Herbert and Benion*, dubitatur, it being for the Defendant in Error; but ſome of the Judges ſaid, that this cannot be a Fine levied in Court, becauſe there are not the Parts of ſuch Fine, without that which was done upon the Dedimus poteſtatem. But Trin. 14 Car. it was argued by Barkley and Croke, that it was not Error, becauſe it ſhall be intended to be levied in Court; But Mich. 14 Car. it was argued by Jones, who ſeemed contra; for that this could not be in Court, being that there was but one Concord certified, and this appeared to be taken in the Country before Commiſſioners, and not in Court; and the Concord is ſuch an eſſential Part of the Fine that it is not good without it; and if there was another Concord in Court there might be a Diminution alleged, and thereupon to have it certified upon a Certiorari, otherwiſe ſuch Thing which could not be, unleſs it be of Record, ſhall not be intended if it do not appear to the Court by the Record itſelf, and after Hill. 14 Car. Brampſton was of the ſame Opinion with Jones, and ſo the Court divided.

21. In a Writ of Error in Banco, or Banco Regis, upon a Judgment given in an inferior Court, if the Stile of the Court be entered in this manner, Coram J. S. Majore, and the Burgeſſes Burgi prædicti, and does not ſay Secundum Conſuetudinem Villæ prædictæ, this is erroneous, for it ought to appear to the Court, where the Record is removed by Writ of Error that they have Power to hold Plea by Preſcription, or by Letters Patent of the King. Mich. 38, 39 El. B. R. between *Holman and Collins* adjudged. Cro. E. 489. pl. 5 Halman v. Collins. S. C. and this was held a manifeſt Error. — Mo. 422. pl. 588. S. C. and for this Error Judgment was reverſed. — Noy 35. S. C. and the firſt Judgment was reverſed. — Ow. 50. S. C. and cited D. 262. and a Judgment 30 Eliz. Rot. 32. and the firſt Judgment was reverſed. — S. P. and Judgment reverſed for not ſhewing by what Authority they hold Pleas. Noy. 90. Mich 2 Car. B. R. Ganton v. Ganton. — Godb 380. pl. 466. Gunter v. Gunter. S. C. and Judgment reverſed. — Lat. 180. S. C. and Judgment reverſed. — Yelv. 46. Trin. 2 Jac. B. R. Mouſe's Caſe. S. P. adjudg'd on a Record remov'd out of the Court of Graveſend.

22. If the Plaint in an Inferior Court be in Placito Tranſgreſſionis ſuper Caſum, and the Declaration is in Placito Debiti, and the Judgment is given thereupon for the Plaintiff; this is erroneous. Hill. 10 Car. B. R. between *Bowman and Hixſon* per Curiam, and ſuch Judgment given at St. Albans reverſed accordingly. Intratur Mich. 10 Car. Rot. 34.

23. If a Man declares in an Inferior Court in an Action againſt J. S in Cuſtodia de J. D. Serjeant and Miniſter of the Court this is not good without any Averment that he took him in Cuſtody by Force of the Precept or Proceſs of the Court or ſuch like. Trin. 1649. between *Lawe and Doddeſworth*, adjudged in a Writ of Error upon ſuch Judgment in (*) the Court of York (as it ſeems) and the Judgment reverſed accordingly, where the Defendant demurred there upon the Declaration for this Cauſe, and this overruled, and Judgment given there againſt him. See (L. b) pl. 9. S. C. * Fol. 796.

24. In

24. In a Formedon in Diſcender, if the Defendant counts that A. gave it to B. in Tail per quod B. was ſeiſed ut de feodo and jure per formam &c. this is good and not erroneous, though the Words ſeem to imply that he was ſeiſed in Fee; for inaſmuch as he ſays per formam &c. it ſhall be intended a Fee per formam doni, which is in Tail, and this is the uſual Count. Hill. 10 Car. B. R. between *Coxpe and Turner* per Curiam, adjudged in a Writ of Error. Intratur Hill. 9. Rot. 253.

25. In an Action of Debt in Banco, if the Plaintiff declares and does not ſay after, as is uſed in Banco Regis, & petit quod Defendens reſpondeat; but thereupon Judgment is given againſt the Defendant upon nonium informatus, though it was ſaid that the Court ought not to give Judgment for the Plaintiff without his Prayer, as not to increaſe the Coſts without the Requeſt of the Plaintiff, yet this is not erroneous, becauſe the bringing the Action is a Demand itſelf, and this is the Uſe de Banco to enter the Judgment ſo without ſuch Prayer. Paſch. 11 Car. B. R. between *Preen and Keel* adjudged, and the Judgment given in Banco affirmed accordingly. Intratur Hill. 10 Car. Rot. 907.

Cro. Jo. 420. pl. 12. Cotton v. Weſtcot. S. C adjornatur —— Ibid. 441. pl. 14. S. C. and though the Infant was ſued as Executor, yet it was held erroneous and the Judgment was reverſed. —— Poph 130. Weſtcot v. Cotton. S. C. reſolv'd. —— Roll Rep. 380. pl. 40. Weſtcott v. Cottle. S. C. & S. P. admitted. —— See tit. Attorney (C) pl. 2. and the Notes there.

26. If an Infant appear by Attorney, where he ought to appear by Guardian, this is erroneous. Mich. 15 Jac. B. R. between *Weſtcot and Cottne* adjudged per Curiam, and a Judgment reverſed for this Cauſe. Co. 8. *Beecher* 58. b. Co. 9. *Ab. Str. Mar.* 30. 1 H. 5. 6. 22 H. 6. 31. b.

See tit. Trial. (C) pl. 8. S. C.

27. Mich. 11 Car. B. R. between *Scawen and Arundel*, a Judgment given in a common Recovery, in which the Tenant being an Infant appeared by Attorney, reverſed per Curiam, in a Writ of Error. Intratur Trin. 11 Car. B. R. Rot. 315.

Roll Rep. 336. pl. 48. Hill. 13 Jac. B. R. Hewſon's Caſe, the Omiſſion of the Chriſtian Name of the Attorney was held by Coke Ch. J. to be apparent Error. —— Ibid. 381. pl. 1. Howſon v. Fountain. Trin. 14 Jac. S. C. held accordingly. —— 3 Bulſt. 202. S. C. held accordingly. —— Cro. E. 59. pl. 2. Trin. 29 Eliz. B. R. Rainſcroft v. Lawney. S. P. and therefore the Judgment was reverſed. —— See tit. Attorney (H) pl. 3. and the Notes there.

28. In an Action upon the Caſe, if the Judgment be given by Nihil dicit againſt the Defendant, and the Record is quod Defendens per with a Blank, attornatum ſuum venit & defendit vim &c. & nihil in barram dicit &c. this is erroneous, becauſe there is not any Attorney named. Mich. 13 B. R. between *Chapman and Chaundler* per Curiam, a Judgment in Banco reverſed for this Cauſe. Intratur Hill. 12 Car. Rot. 310.

Sty. 216. S. C. adjornatur. —— Ibid. 218. S. C. Hale held that it being after Verdict was help'd by the Stat. 21 Jac. but Roll Ch. J. e contra.

29. If a Clerk in Chancery declares there by Bill, by force of his Privilege, he being within Age, and not by Guardian and after he comes of full Age, and after they plead to Iſſue, and after it is tranſmitted in Banco Regis, and there Judgment is given for the Plaintiff after a Verdict for him this is erroneous, becauſe he did not appear by Guardian, for if it ſhould be admitted he appeared in proper Perſon and declared and not by Attorney; yet it is erroneous, for it is more dangerous for an Infant to appear in Perſon than by Attorney, becauſe if an Attorney defrauds him, an Action lies againſt him, but if he appears in Perſon there is no Remedy againſt any one. Trin. 1650. between *Dawks and Payton* adjudged per

per Curiam, and the Judgment reverſed accordingly for this Error. Intratur.

30. If a Woman recovers in a Writ of Dower againſt an Infant by default, this is not erroneous; for the Parol ſhall not demur in this Writ. Trin. 4 Jac. between * *Eppes and Eppes*, adjudged. Hill. 41 El. B. R. between † *Williams and Williams* per Curiam.

* See tit. Age, (B) pl. 1. S. C. and the Notes there.

† Cro. E. 547. pl. 14. S C. adjornatur.——Ibid. 567. pl. 1. S. C. the Court was divided, and adjornatur.——Mo 342 pl. 465. Williams's Caſe, S. C. the Court ſeemed that it is not reverſible, becauſe it is not a Recovery in which he might have his Age.——S. C. cited per Cur. Cro. J. 392. that the Infant ſhould not avoid it by Error for this Cauſe; For if ſo then ſhe never ſhould recover —— Roll Rep. 326. at the End of pl. 32. cites S. P. adjudged Paſch. 35 Eliz. Williams v. Drue.

If a Writ of Dower be brought by an Infant, who loſes by Default at the Grand Cape, he may reverſe the ſame by a Writ of Error; but where an Infant appears by a Guardian, and afterwards loſes by Default, there he ſhall never avoid it; for if any Default be in the Guardian, the Infant ſhall recover againſt him in a Writ of Diſceit, and afterwards the Judgment in the firſt Caſe was reverſed. 2 Le. 59. pl. 85. Mich 32 Eliz C. B. Anon. —— 2 Le. 189. pl. 238. Boſtwick v. Boſtwick. S. C. takes Notice that the Judgment was reverſed, and that there commenced a new Action.——In Dower againſt Infant, who makes Default upon the Grand Cape returned, and agreed by all the Juſtices, that Judgment ſhall be given upon the Default, for the Infant ſhall not have his Age, and ſo it was adjudged upon the Writ of Error. 2 Brownl. 118. Mich. 9 Jac. C. B. Anon.

31. Writ of Error was brought in this Court of a *Judgment* given before Commiſſioners *in Plea of Land*; One Error aſſigned was, becauſe there was *not any Summons awarded*, according to the Law of the Land; And another Error *becauſe a Commiſſion was awarded for the Trying of a Title to Land*, and tried before them, *where it ought not to be tried* by the Law of the Land *but upon an Original Writ*. And for this Cauſe it was reverſed, and the ſpecial Cauſe of the Reverſal entred upon the Record; So *although the Judgment there was merely void, yet a Writ of Error was maintained upon it*; Cited Cro. J. 96. by Popham as a good Precedent 6 E. 3. Ld. Stafford's Caſe.

32. Aſſiſe of *Freſh-Force paſſed againſt two in Newcaſtle upon Tine*, and they brought Writ of Error, and one died, by which the Survivor and the Heir of the other brought new Scire Facias and well, and becauſe it was aſſigned for *Error that the Party was not attached nor ſummoned, and ſo it appeared by the Record*, by which the Judgment was reverſed, and the Party reſtored; *But* Brook ſays it ſeems that *if the Record had made mention that he had been attached and ſummoned*, then he ſhould not aſſign it for Error; for contra Recordum; and then it ſeems that he is put to his Action againſt the Sheriff who returned it. Br. Error, pl. 116. cites 19 Aſſ. 7.

33. If in *Præcipe quod reddat* the *Sheriff returns one Summoned where he ought to have returned two*, and Grand Cape is awarded upon it, this is Error. Br. Error, pl. 29. cites 50 E. 3. 17.

34. Where *a Man appears by Proceſs which had not 15 Days between the Teſte and the Return*, *or* if he *appears upon Capias in Writ of Ward where no ſuch Proceſs lies* in this Action, yet this is not Error; Per Littleton J. quod non negatur; And in like Manner it is ſaid elſewhere, the Admittance of an Eſſoign where Eſſoign does not lie is not Error; Contra of rejecting it where it does lie. Br. Error, pl. 169 cites 12 E. 4. 11.

Br. Tour pl. 54. cites S. C.

35. Where *Proceſs* is miſcontinued and *Judgment* given *for Defendant* thereupon, it is Error, and ſhall not be *amended*. Br. Error, pl. 139. cites 2 H. 7. 11.

36 *But if the Party has Day and pleads*, and *Judgment is given upon other Matter*, there the Miſcontinuance ſhall be amended, and ſhall not be Error. Br. Error, pl. 139. cites 2 H. 7. 11.

Mo. 459. pl. 635. Anon. S. P. and ſeems to be S. C. and Judgment reverſed accordingly.

37. Error of a *Judgment* given *in a Writ of Entry ſur Diſſeiſin.* The Error aſſigned was, *becauſe the Sheriff returned not the Names of the Summoners, or Veyors*, and held for this Caſe to be Error; for if there be no Summons made, the Party cannot have a Writ of Deceit, Et non conſtat de Recordo againſt whom he ſhould have it; Wherefore it was reverſed. Cro. E. 557. pl. 13. Paſch. 39 Eliz. B. R. Meryll v. Robyns.

38. In a Writ of Error to reverſe a *Judgment given for three*, the Error *aſſigned was, that one of them was dead Tempore judicii redditi*; the other *anſwers, that he was in full Life Tempore judicii (Scilicet) at ſuch a Day*, viz. 18 Auguſti. The whole Court was clear of Opinion, that *this Scilicet is idle*, and the other Iſſue good, that he was in full Life; the ſole and material Iſſue here being the Time of the Judgment. Williams J. ſaid there is no Book wherein Mention is made of ſuch an Iſſue joined upon a Scilicet, and ſo by the Rule of the Court the Scilicet here is void, and the other Iſſue to ſtand, being only whether the Party were living at the Time of the Judgment given, or not. 2 Bulſt. 26, 27. Mich. 10 Jac. Baskervile v. Henſham & al'.

Cro. C. 272 pl. S. and 281. pl. 21. Johns v. Stayner. S. C. and Judgment reverſed.

39. In *Ejectment* the *Original certified was* 24, and the *Ejectment was* 31 *Jan.* which was after the Date of the Writ, this was held to be Error, and not aided by any Statute, for this is an ill Original, and Judgment was reverſed. Jo. 304. pl. 11. Mich. 8 Car. B. R. Stayner v. Jones.

—— 4 Le. 98 pl. 250. Trin. 29 Eliz. B. R. Griffith v. Price S. P. and Judgment reverſed.

3 Keb. 629. pl. 20. Iriſh v Hillar. S C. and per Cur. on Yelverton,

40. Upon a Judgment given a *Scire Facias went out into a proper County*, and *upon the Return of a Nihil, a Teſtatum Ca. Sa. into another County, without any Capias into the proper County*; and it was held to be Error. Freem. Rep. 422. pl. 563. Paſch. 1676. Iriſh v. Hill.

and Certificate of Prothonotaries of C. B. there muſt be an Original Capias notwithſtanding Non eſt inventus, and Nihil returned on the Sci. Fa. and the Judgment reverſed; For he may be found after &c.

41. Error upon a Judgment in C. B. the Writ was a *Treſpaſs for entering into his Houſe and ſeveral Cloſes*, and the *Declaration is of an Entry into his Houſe, & in unum clauſum & unum toftum*; held naught, for that Toftum is not a Cloſe, but Ground whereon a Houſe formerly ſtood. 2 Show. 93. pl. 87. Hill. 31 & 32. Car. 2. B. R. Skidmore v. Bouchier.

42. It is not Error *to allow an Eſſoin where it does not lie*, but it is Error *to deny an Eſſoin where it does lie*; for it is not Error to allow *toſſH omins*; Per Powell junior. But Powell ſenior ſeemed to doubt of this later Point, becauſe it is within the Act of Fourching by Eſſoins. Ld. Raym. Rep. 80. Paſch. 8 W. 3. in Caſe of Burghill v. Canterbury (Archbiſhop.)

43. *Denial of Imparlance* was generally aſſigned for Error, and per Holt Ch. J. if it *appears upon the Record that the Defendant has Title to an Imparlance, and he prays it*, and it is denied him, it is Error; But if no ſuch Thing appears upon the Record, Denial of an Imparlance cannot be aſſigned for Error. Judgment was affirmed. Ld. Raym. Rep. 285. Mich. 9 W. 3. Ellis v. Thomas.

But Ibid. 320. Mich. 11. W. 3. S. C. the Original certified being of another Term,

44. Upon Writ of Error *want of Original aſſigned*, and *one certified varying* from the Declaration; and Holt Ch. J. ſaid, let Variance be ever ſo great, yet ſince it is ſo certified, it ſhall be taken for the Original in this Action. 12 Mod. 235. Mich. 10 W. 3. Jenniſon v. Ellis.

and no Continuance, the Court would not allow it for an Original; cites Cro. C. 281. 272.

272. Yelv. 108. That it muſt be an Original of the ſame Term with the Pleading, or at leaſt Pending the Pleading.

45. *Original* ſued out *to Suffolk*, and the *Action laid in N.* and Judgment thereupon reverſed for this Error. 12 Mod. 371. Paſch. 12 W. 3. Bois v. Bruerton.

46. Upon a Writ of Error from the Court of *Ely* of a Judgment in Treſpaſs, it appeared that a *Capias* was made *returnable the ſame Day on which the Summons was*, and it was inſiſted for Error that the Summons being made *returnable generally ſuch a Day*, the Defendant had that whole Day to appear, and then it was erroneous to compel his Appearance by Capias that Day, and that was agreed to by the Court; for though *in Counties Palatine, and Grand Seſſions* of Wales, they *ſplit Days and Hours*, and perhaps they might do the like here, yet having not done ſo, viz. made the Proceſs *returnable at ſuch an Hour* of the Day, but generally at ſuch a Day, as here, it was erroneous to award a Capias till the Day was over; for the Capias is for the Contempt in not appearing at the Return of the Summons, and in Contempt he could not be till after the Time of the Return. 12 Mod. 523. Trin. 13 W. 3. Bidolph v. Veal.

47. In Error upon a Judgment in the Common Pleas, the Plaintiff *aſſigned* for Error *the want of an Original*, and took out a Certiorari directed to the Cuſtos Brevium, to certify whether there was any Original between the Parties *of Hillary Term*, (which was the Term of the Placita;) The Cuſtos returned that there was no Original; the Defendant alledged Diminution, and took out a Certiorari to the Cuſtos Brevium to certify whether there was not an Original of Mich. Term. The *Curſitor certified an Original of Mich. Term.* The Defendant pleaded in Nullo eſt Errat'. The Court held, that *Original* which was *returnable in Mich. Term would not warrant the Proceedings in Hillary Term unleſs it was continued to Hillary Term, which Continuances the Defendant ought to have procured to be certified*; whereupon the Defendants Counſel alleging that there were Continuances, prayed the Court to ſend a Certiorari to the Ch. J. of the Common Pleas to certify the Continuances, upon which Point the Court was divided; Pratt Ch. J. and Powis held, that Certioraries after in Nullo eſt Erratum pleaded being awarded only Ad informandam Curiæ Conſcientiam, they ought not to iſſue them upon the bare Requeſt of the Party, becauſe it would tend to great Delay, therefore held that a Certiorari ought not to be granted in this Caſe without an Affidavit that there were Continuances; Eyre and Forteſcue Juſtices agreed, that after in Nullo eſt Erratum pleaded, and the Record cloſed, Certiorari could not be taken out without the Leave of the Court, but held that they ought Ex debito Juſtitiæ to grant them upon the Prayer of the Party in Affirmance of the Judgment, becauſe otherwiſe they ſhould reverſe legal Judgments. The next Day the Party did prodnce an *Affidavit that there were Continuances, whereupon a Certiorari was awarded to certify the Continuances.* MS. Rep. Trin. 4 Geo. B. R. Winkworth v. Clark.

Fol. 797.

(H. c) What Things ſhall be *Error* in the *Name of the Jurors or Parties.*

See Tit. Amendment and Jeofails (B) pl. 21. S. C and the Notes there.

1. IF J. Broke be returned upon the Venire Facias to try the Iſſue, and J. Brook is ſworn, and tries it with others; yet this is good without any Amendment, or Examination whether he be the ſame Perſon; for though it was objected that the Names of Men have their Denomination, ſome from their Trade, and ſome from the Place where they inhabit, and then here Broke and Brook, ſcil. a River, differ, yet the Court would not intend it, and they are idem ſonantia, and therefore good. Mich. 9 Car. B. R. between *The King and Jennings*, in a Writ of Error upon a Judgment in a Quare impedit in Banco.

(I. c) *What* Things ſhall be Errors *in Proceſs, or Execution thereof.*

See Tit. Amendment and Jeofails (B) pl. 18. S. C. and the Notes there.

1. IF an Habeas Corpus iſſues tempore Regis Jac. to have the Jury Summonitos in Curia nuper Reginæ, and after the Diſtringas was to diſtrain the Jury ſummonitos in Curia noſtra; this is erroneous; for the Jury cannot be ſummoned upon other Writ than the Venire Facias; for after by the other Writs they are attached and diſtrained. Trin. 3 Jac. B. R. between *Knowles and Burtenſtaw.*

See Tit. Amendment and Jeofails, pl. 19 S. C. and the Notes there.

2. If the Bail ſues an Audita Querela, and a Scire Facias thereupon, which recites the Audita Querela and the Capias againſt the Principal, and the Return thereupon, which Capias was awarded tempore Reginæ El. and the Scire Facias is recited to be per breve Dominæ Reginæ Angliæ Vicecomiti noſtro de S. direct', which is to the Sheriff of the King which now is; this is Error by the Common Law, but is now amendable. Paſch. 3 Jac. B. R. between *Barns and Worlich* admitted.

Jo. 357. pl. 8. Taſte v. Haynes S. C. and the firſt Judgment was revers'd.

3. In a Writ of Dower de tertia Parte 1 Meſſuagii, 1 Stabuli, 1 Horrei &c. if the Defendant pleads Ne unque Seiſie que Dower, upon which they are at Iſſue, and at the Niſi Prius the Tenant makes Default, and a Petit Cape is awarded, and the Sheriff returns Quod cepit in Manus tertiam Partem 1 Meſſuagii, 1 Horrei &c. but makes no Mention of the Stable, and upon this Judgment is given for the Stable, as well as for the Reſt, this is erroneous. Mich. 10 Car. B. R. between *Taſh and Hamets* per Curiam in a Writ of Error upon a Judgment in Banco. Intratur Mich. 9 Car. Rot. 420. and adjudged alſo that this cannot be amended.

Jo. 373. pl. 11. S C. agreed not to be Error, and Rule given that the Fine be affirmed. —

4. If the Sheriff of a County levies a Fine, and in this the Writ of Covenant is directed to the Coroners, becauſe it was brought againſt the Sheriff himſelf, and this is returned by them, and upon this the Fine levied; this is not erroneous, though there cannot be any Favour in the Execution of an Original Writ. Hill. 10 Car. B. R. between *Done and Smethehurſt* dubitatur, this being aſſigned for

for Error upon a Fine levied in Cheſter. But Mich. 11 Car. adjudged per totam Curiam, that this is not erroneous; but that properly it ought to be awarded to the Coroners, becauſe the Sheriff is Party, as the Uſe is in ſuch Caſe, as was certified by the Curſitors. Intratur 8 Car. Rot. 1310. and the Judgment in Cheſter affirmed accordingly.

Cro. C. 415, 416. pl. 3. S. C. and the Fine was affirmed. —— Jo. 352. pl. 5. S. C. but S. P. does not appear.

5. If a Judgment be given by Nihil dicit in an Inferior Court held before the Steward by Letters Patents within Time of Memory, the Writ of Inquiry of Damages ought to be awarded returnable in Court, to be inquired there, unleſs ſpecially otherwiſe declared by the Letters Patents, ſcilicet, that the Bailiff of the Court, or other Officer, ſhall inquire; (*) for otherwiſe the Bailiff ſhall take an Oath upon the Inquiry without expreſs Authority. Trin. 14 Car. B. R. between *Worſeley and Metcalf* dubitatur, Croke contra Berkly; Intratur Trin. 13. Rot. 561. in a Writ of Error upon a Judgment in Eſhetisford; but they agreed that the Sheriff might, becauſe he is an Officer known and ſworn, and ſo in divers inferior Courts by Preſcription the Serjeant or Bailiff may. But Mich. 14 Car. the Judgment was reverſed per Curiam for this Cauſe.

See Tit Court (F) pl. 2. Metcalfe v. Worſley, S. C.

* Fol. 798.

6. If a Man be indicted of Barretry before the Juſtices of Peace, and the Record is Ideo venit inde Jurata &c. and the Jury returned per W. & El. and it does not appear whether they were Sheriffs, or had Authority to return it; yet this is good, being in Denbigh. Trin. 15 Car. B. R. between *The King and Baniſter* in a Writ of Error per Curiam, but adjourned for Precedents, but this was after reverſed for other Cauſe; but per Curiam, this is not Error.

7. Upon an Iſſue joined in an Inferior Court, if a Venire Facias be awarded to the Officer quod Venire Faciat 12 de Vicineto &c. duly, and the Officer returns Præceptum prædictum cum Panello annexo, & quod fuit ſervitum ſecundum exigentiam Warranti; but it does not appear what were the Names of the Jurors, nec quot fuerunt, ſcilicet, 12, or other Number, this is not good. Hill. 14 Car. B. R. between *Whitrow and Edmond* per Curiam, and Judgment given in Kingſton upon Thames reverſed for this Cauſe. Intratur Mich. 14 Car. Rot.

8. Upon Not Guilty pleaded to an Indictment of Barretry, before the Juſtices of a Borough Vill, that hath Power by Charter to hold a Seſſions, a Venire Facias is awarded, and the Record is & Juratores inde prædicti per A. & B. tunc Ballivos Burgi & Villæ prædict' impannellati exacti quidam eorum videlicet &c. venerunt &c. and thereupon there is a Verdict and Judgment; this is erroneous; for that it may be that theſe Bailiffs were Bailiffs of the Vill for other Purpoſes, as to collect their Rents, and ſuch like, and not Miniſters of the Court; for it ought to be by A and B. Bailiff and Miniſters Curiæ præd'. Paſch. 16 Car. B. R. *Banneſter's Caſe* adjudged per Curiam, and a Judgment in Denbigh reverſed accordingly in a Writ of Error.

9. If a Diſtringas iſſues, and alſo apponere thereto decem Tales, this is erroneous, for the Decem Tales cannot be put thereto, but to the firſt Jury ſummoned by the Venire Facias. Trin. 3 Jac. B. R. between *Knowles and Burtenſhaw* adjudged.

See Tit Amendment and Jeofails (B) pl. 18. S. C. and the Notes there.

10. If an Iſſue be joined in an Inferior Court, that hath Power to hold Court from Week to Week, and the Court awards a Venire Facias returnable the ſame Court, and thereupon a Jury is returned, and the Iſſue tried the ſame Court; this is erroneous. Trin. 14 Car.

B. R. between *Morgan and Bodington* adjudged, and the Judgment reverſed accordingly. Intratur Hill. 13 Car. Rot. 1022.

* Fitzh. Brief, pl. 185. cites S. C. held that the Diſtringas is well taken.

† See (S) ſupra, pl. 4. and the Notes there and ſee (Q a) ſupra pl. 1. S. C.

‡ Fol 799.

11. In an Action upon the Statute de R. againſt three, and after Iſſue one dies, and notwithſtanding Proceſs is awarded againſt all three, ſcil. againſt him that is dead and the others, and upon a Diſtringas an Inqueſt is taken; yet if the Plaintiff relinquiſhes his Suit againſt him that is dead, and hath Judgment only againſt the other two; this is not erroneous; for the Writ was not abated againſt all by the Death of one, and the Proceſs, as to him that is dead, is void. * 4 H. 7. 7. per Curiam, this is not Cauſe to arreſt the Judgment. Mich. 14 Car. in Camera Scaccarii between *Hiplyn and Slack*, per Curiam adjudged no Error, and the Judgment given in B. R. in an † Ejectione Firmæ affirmed accordingly, where the Proceſs was continued after Iſſue againſt him that was dead, and a Verdict given againſt him alſo; yet inaſmuch (‡) as no Judgment was given againſt him, but a Surmiſe made that he died after the laſt Continuance, there being a Continuance from the Day of the Verdict (this being Banco) till another Day in the ſame Term, and then Judgment given, and ſo no Judgment given againſt him, but only againſt the others; this was not Error.

Br. Contempts, pl. 4. cites 11 H. 4. 86.

12. If a Man returns a Writ, and names himſelf Sheriff, *it is no Challenge to ſay that he is not Sheriff*; Per Gaſcoign; And per Loding, if a Man returns a Writ by Name of Sheriff who is not Sheriff, and Judgment is given thereupon, this is Error. Br. Retorn de Briefs, pl 40. cites 12 H. 4.

13. *Quare Impedit againſt two*, and *at the Pone the one was returned Nihil*, and *nothing was mentioned of the other*, and yet *Diſtreſs iſſued againſt both*, and upon Iſſue joined it paſſed for the Plaintiff; and the Defendant alleged this Matter in arreſt of Judgment; and per Martin, *Miſcontinuance of Proceſs* is not material *where the Party appears and pleads, and loſes by Verdict*, when they have Day by Roll; *Contra* where there is Recovery *by Default* &c. upon the Proceſs; for there if the Proceſs be diſcontinued or miſcontinued, or one Writ awarded for another, or omitted &c. this is Error; But per Babb. and Cockain, it is Error in the one Caſe and the other, and there is no Difference; But Brook ſays, ſee the Statute of Jeoffails 32 *H.* 8. which aids this Matter. Br. Repleader, pl. 2. cites 3 H. 6. 8.

And 39 H. 6. fol. 7. in the ſame Caſe, per Yelverton, if Aſſiſe be taken before one J. only, this is Error. Ibid. —— And there two of the Prothonaries, viz. Windeſlade and Comberford, ſaid, that the Uſe is not to make any Mention but on the Back of the Writ till the Aſſiſe be paſſed; but Copley the third Prothonotary ſaid the Uſe is contrary, and to make Record of every Day, every Continuance, and every other Thing, ut ſupra; and the Court agreed with this, and contra to the other two; and by the Opinion of all the Juſtices there the Judgment ſhall be reverſed; Quod Nota. Ibid. —— Br. Diſcontinuance of Proceſs, pl. 26. cites S. C.

14. In *Aſſiſe one pleaded to the Aſſiſe as Bailiff*, and *two Jurors were ſworn*, and the *Aſſiſe remained for Want of Jurors*, and *at another Day the Aſſiſe was taken, and found for the Plaintiff*, and *he recovered*, and the *other brought Writ of Error*, and it was *aſſigned* for Error *inaſmuch as no Mention was made in the Record of thoſe who were ſworn at the firſt Day, but on the Back of the Panel; nor no Mention that the Habeas Corpora was awarded, and the Jury appeared upon it, and no Mention was made of it*; and the Opinion was, That the Record ought to make mention of every Juror who was ſworn, and of every Day of Continuance, and of every Writ awarded; for otherwiſe the Party cannot ſay that, At another Time ſworn, nor plead a Plea after the laſt Continuance; and alſo a Juror drawn may be ſworn after, therefore mention ought to be made thereof. Br. Error, pl. 107. cites 38 H. 6. 10.

15. *In*

15. *In Writ of Error if the Errors are not aſſigned, and Scire Facias thereof ſued in the ſame Term*, this is a Diſcontinuance. Br. Diſcontinuance de Proceſs, pl. 44. cites F. N. B.

16. Error of a *Judgment in a Writ of Entry in the Quibus*, for that it *bore Date* 13 *Feb.* and was *returnable in Cro. Pur. in the ſame Year*; ſo the Return was before the Teſte, and it was reverſed. Dyer 129. a. pl. 62. Hill. 2 & 3 P. & M. Marrow v. Drew.

17. Error on a *Judgment on a Quod ei deforceat* at the Grand Seſſions in Wales; Error aſſigned, in that there was *neither Appearance nor Grand Cape*; held Error and the Judgment reverſed, though there were three Summons's. Show. 424. pl. 392. Hill. 36 & 37 Car. 2. B. R. Brown v. Evans.

(I. c. 2) Faults and Variance in the Writ, Plaint, and Declaration, and Specialty.

1. IN *Annuity* the Judgment was reverſed, becauſe *Writ and Præcipe quod reddat* 10 *l.* 6 *s.* 8 *d.* which was Arrear of the annual Rent of 40 s. per Ann. and *in the Count the* 6 *s.* 8 *d. was omitted*, and therefore it was a *Variance*, and not warranted by the Writ, and therefore it was reverſed; for it *is not Miſpriſion*; for the Count is by the Party and not by the Clerk. Br. Error, pl. 94. cites 9 E. 4. 51.

2. In Treſpaſs; Error was aſſigned that the *Writ was Quare Clauſum fregit*, and the *Count was Clauſa fregit*, and for this Variance the Judgment was reverſed. Cro. Eliz. 185. pl. 5. Trin. 32 Eliz. B. R. Edwards v. Watkin.

S. P. adjudged contra; for by Roll Ch. J. the Word Clauſum is Nomen Aggregativum, and may contain many Cloſes Sty. 109. Trin. 24 Car. Burrel v. Lancaſter. —— S. P. accordingly per Cur. and ſaid that it had been ruled often of late that there is no Variance between the Writ and Count, though the Writ is Clauſum, and the Count is Clauſa. 2 Lutw. 1343. Trin. 2 Jac. 2. Meriton v. Ben.

3. Error of a *Judgment in Debt*, wherein the Plaintiff *declared for a Debt of* 20 *l.* and *after Imparlance he declared de novo, and demanded a Debt of* 18 *l.* and had Judgment to recover, and it was held to be Error; for that there *was but one Original* and two Declarations, and the one varied from the other; and Judgment was reverſed. Cro. Eliz. 416. pl. 9. Mich. 37 & 38 Eliz. B. R. Warner v. Winch.

4. In Treſpaſs of *Battery* the *Declaration was, Quod cum the Defendant ſuch a Day &c. aſſaulted and beat the Plaintiff* &c. So it is Quaſi a Recital and *no direct Affirmation* that he beat him &c. But *after Imparlance a ſecond Declaration was entered, in which the (Cum) was omitted*; and Judgment was given for the Plaintiff. But on a Writ of Error brought the Court held the firſt Declaration to be the Principal, and thereupon the Judgment is given, and the ſecond ought to accord with the firſt, and the Judgment in C. B. was reverſed. Cro. E. 507. pl. 32. Mich. 38 & 39 Eliz. B. R. Brigs v. Sheriff.

S. C. cited Arg. by the Name of Shrieve v. Bridgman. 2 Bulſt. 215.

5. In Treſpaſs on the Caſe the Writ was *Ad damnum* 40 *l.* and the Count was Ad damnum 60 l. this was urged in arreſt of Judgment; ſed non allocatur; but it was held he ſhould have no more Damages than in the Writ. Cro. J. 128. pl. 20. Trin. 4 Jac. B. R. Starling v. Long.

6. Error

6. Error on a *Judgment in Debt*, the *Original was againſt A. L. nuper de London, Yeoman, alias dict' A. L. de Sherbone in Com' York, Yeoman*, and the *Ca. ſa. againſt him was by the Name of A. L. nuper de London, Yeoman, alias dict' A. L. de Shelborne* in Com' York, Yeoman, and ſo aſſigned the Variance between the firſt Original and the Ca. ſa. viz. *(Shelbone)* for (*Sherbone*) but this Variance not being in the Name, but in the Addition, it was adjudged no Error. Goldſ. 140. pl. 51. Hill. 43 Eliz. Latham's Caſe.

7. In *Debt for Rent* of 20 s. it was aſſigned for Error that it was *not ſhewn in the Declaration how this Rent grew due*; Per tot. Cur. this Omiſſion is a clear Error to vitiate the Declaration; and Judgment was reverſed. Bulſt. 65. Mich. 8 Jac. Burgeſs v. Standiſh.

8. Error upon a Judgment by Default *in Debt*; the Error aſſigned was, that the *Original was againſt F. H. of Browton*, and the *Declaration was againſt F. H. de Brownton*, and for this Variance the Judgment was reverſed. Bulſt. 184. Trin. Paſch. 10 Jac. Harris v. Sherley.

1 Brownl. 59. S. C by the Name of Serle v. Harris

9. *Covenant for Payment of Rent of* 20 *l. a Year for four Years and an Half*; and *for Non-payment of* 100 *l. according to the ſaid Covenant the Action was brought*; and adjudged good, and affirmed in Error; for in Covenant Damages only are to be recovered, and this *Surplus in Miſcomputing* ſhall be abated; But otherwiſe in Debt for Rent when more is demanded than is due, becauſe in this Caſe the Debt demanded only is to be recovered. Jenk. 324. pl. 38. Mich. 13 Jac. B. R. Farrer v. Snelling.

Roll Rep. 335. pl. 45. S. C adjudged; and Coke Ch. J ſeemed that it would be the ſame in an Action on the Caſe on a Promiſe, becauſe Damages only are to be recovered; and Coventry ſaid that it was ſo adjudged the ſame Term in a Writ of Error in the Exchequer Chamber. —— 3 Bulſt. 155. S. C. adjudged per tot. Cur. and cites the Point of the Promiſe reſolved at Serjeant's Inn.

10. Upon a Writ of Error on a Judgment in C. B. the Error aſſign'd was, *that the Original was between Wood Plaintiff, and Budden and Bodden Defendants*, and this was ſo certified by the Cuſtos Brevium, and the *Declaration was againſt Budden alone*; and this was adjudged a material Variance. 2 Roll Rep. 29. Trin. 16 Jac. B. R. Budden v. Wood.

11. *Treſpaſs* Quare Clauſum fregit &c. and *taking tres Toſſas Anglice Sheafs of Corn* adtunc & ibid. exiſtent', but did *not ſay ipſius Querentis*, and ſo the Declaration did not ſet forth whoſe Goods they were; The whole Court held the Declaration ill. 3 Bulſt. 303. Mich. 1 Car. B. R. Whiteman v. Hawkins.

12. In *Aſſumpſit* Plaintiff declared that *Defendant promiſed to pay him* 10 *l. in Conſideration that he would do all his Commands Honeſtly and truly* for the Space of a Year, and *further declared that he had done all his Honeſt and lawful Commands*, and this was aſſigned for Error; for that he might do all his Honeſt Commands and yet not do them Honeſtly; but the Exception was diſallowed, and the Judgment affirmed. Poph. 193. Trin. 2 Car. B. R. Cleland v. Baldock.

13. In Aſſault and *Battery* in C. B. the *Writ was Contra Pacem noſtram*, and the *Declaration* was Vi & Armis &c. and *concluded contra Pacem nuper Regis Jacobi*; the Plaintiff had a Verdict and Judgment, and upon a Writ of Error in B. R. this Variance between the Writ and Declaration was aſſigned for Error; Sed per Cur. it is a Variance only in Form, for Vi & Armis in the Declaration includes contra Pacem; and this is helped by Stat. 21 Jac. and Judgment was affirmed. Jo. 172. pl. 7. Hill. 3 Car. B. R. Muſgrave's Caſe.

14. A *Covenant* was, *that the Defendant would not cut down more Timber*, growing on the Lands demiſed, *than ſhould be neceſſary to repair the Buildings*; the Plaintiff aſſigned for *Breach that the Defendant had cut down Timber &c. to the Value of* 10 *l. and had converted it to his own*

own Use; after a Verdict and Judgment for him, the Defendant assigned for Error the Variance between the Covenant in the Lease and that set forth in the Declaration; for the one is express that he should not cut down more than is necessary for Reparations &. and the other implies that he covenanted not to cut down any to employ for his own Use, which is not a Breach of the Covenant in the Lease, except it be *averr'd that he cut down more than was necessary for Reparations*, and converted it to his own Use; and therefore the Judgment was reversed. Stile 5. Hill. 21 Car. Wingfield v. Sherwood.

15. In *Trespass* the *Declaration was Quod cum talis, viz. the Defendant* &c. which is not an express Averment that the Defendant did the Trespass, but is only by way of Circumstances that the Defendant did it, which was insisted not to be good, for that he *ought to be charged directly* with it. Roll J. held it not good, though in another Action it might be good; And Judgment reversed Nisi &c. Sty. 117. Trin. 24 Car. B. R. Butler v. Long.

S P. and Judgment reversed 2 Jo. 218. Pasch. 34 Car. 2. B R. though it was after a Verdict. Sheen v. Mason.

16. In *Trespass pedibus ambulando* there was *not Ad Valentiam in the Count*; But because it *was in the Writ* the Court thought it good, and yet there was no Verdict in the Case. Sid. 150. pl. 16. Trin. 15 Car. 2. B. R. Hardy v. Taylor.

Twisden J. made a Quære as to this, whether there be not a Difference between Bill and Suit by Original. Ibid.

17. Error in *B. R.* of a Judgment in the *Palace Court* in *an Assumpsit*, and the Error insisted on was, that the *Plaint* which is the Original in that Inferior Court was General, viz. *Johannes Reeve queritur de T. Neath de Placito Transgressionis super Casum* in the Plaintiff's own and proper Right, but he declared as *Executor of Felix Bayram* for so much Money receiv'd to the Use *of the Plaintiff as Executor &c* And per Cur. This is such a Variance as is inconsistent, and therefore the Judgment was reversed. Carth. 293. Mich. 5 W. & M. in B. R. Neath v. Reeve.

Skinn. 386. pl. 21. S. C. held accordingly, and the Judgment was reversed.

18. Error of a *Judgment in the Palace Court*, for that the *Plaint was at the Suit of W. R. generally*, and the *Declaration was at the Suit of W. R. Executor* &c. so that the Plaint was in his own Right, and the Declaration was an Executor; Per Curiam, if this Variance had been in n Record certified from the C. B. between the Original and the Declaration, where the Original is only by way of Recital, the Party might alledge Diminution, and have the right Original certified; But *the Difference is between inferior and superior Courts*; For * no Diminution can be alleg'd of a Record out of an Inferior Court, so that this Variance is fatal; for want of Plaint in an inferior Court, is like want of an Original in a superor Court, and therefore curable by Verdict; But this not being after Verdict falls not under Consideration, and per tot. Cur. Judgment revers'd. 6 Mod. 149. Pasch. 3 Ann. B. R. Hale v. Clare.

1 Salk. 266. pl. 11. S. C. held accordingly. —— But Ibid. Marg. it is said, that * this Rule extends not to Wales.

19. In Actions upon *Specialties or Contract where the Sum is certain*, the Plaintiff *cannot abridge his own Demand* without shewing how the Rest is satisfied. Contra in Actions that lie in Damages; per Curiam. 10 Mod. 69. Mich. 10 Ann. B. R. Stafford v. Beneath.

(I. c. 3) Variance between the Plea and the Count.

1. WRIT of Error in the Exchequer-Chamber, upon a Judgment in B. R. in an Action brought *upon Articles of Copartnerſhip, one* of which *was, that the Defendant ſhould not ſolicite or intercede* with any of the Plaintiff's Cuſtomers for their Work, and the *Breach aſſigned was, that he had ſolicited ſeveral* of his Cuſtomers &c. The Defendant *pleaded, that he did not ſolicite any* Perſon &c. prout in the Breach, *but did not ſay intercede*, and upon Demurer the Defendant had Judgment, which was affirmed in Error; for though the Word (Intercede) was omitted, yet the other Word *(Solicite) implies Interceding* and more. Nels. Ab. 405. pl. 27. cites 1 Lutw. 865. Hodges v. Nicholas.

(I. c. 4) In the Imparlance and Plea Rolls, and Niſi Prius Rolls.

1. IN *Trover* the Plaintiff *P. Jac.* 4. upon the Imparlance-Roll he *declares of a Feather-Bed*, and *T.* 4 *Jac. he declares of a Feather and Flock-Bed*; And upon the General Iſſue it is found for the Plaintiff and 61. Damages given; And Wamſly and Daniel only in Court held, that the Plaintiff ſhall not have Judgment, for the *Writ is general*, and demands nothing in certain, but the *Declaration upon the Imparlance-Roll is the Original and Warrant of the ſecond Declaration*, ſo that the Addition of the *Flock-Bed* is ill, and the Damages are intirely given, and for that the Plaintiff ſhall not have Judgment. Noy. 139. Andrews v. Lakin.

2. It was aſſigned for Error, that *the Entry of all the Continuances by Li. lo. was generally Ad quam quidem prox' Cur. venit* &c. *without ſaying Coram quibus tent'* as it ought to be; ſed non allocatur; for the *Dies Datus was ſpecial* to a Day certain, *naming before whom the next Court was to be held*, and ſo need not to be repeated on the Appearance. Carth. 207. Hill. 3 W. & M. in B. R. in Caſe of Boſon v. Phyler.

(I. c. 5) In the Venire Facias, Habeas Corpora, Diſtringas, and Returns of Jurors.

Br. Repleader, pl. 12. cites S. C.

1. WHERE a *Jury is drawn out upon Ven. Fac. and returned again upon a Tales*, this is not Error by the beſt Opinion, if the Jury *paſſes without Challenge.* Br. Error, pl. 53. cites 12 H 4. 24.

Br. Repleader, pl. 12. cites S. C.

2. *And* per Hank. where the Sheriff *returns a Juror* who is *of the ſame Name with the Defendant*, and he paſſes upon the Iſſue, this is not Error. Ibid.

4. *And*

3. *And* per Nort. if one who has the ſame Name as the Sheriff brings Action and recovers by Inqueſt returned by the Sheriff, this is not Error; Et Adjornatur. Ibid. Br. Repleader, pl. 12. cites S. C.

4. *For* thoſe are *not* Matters *nor apparent in the Record*; For they may be two Perſons of one and the ſame Name; And ſo it ſeems, that were a Man appears and paſſes over, that the Matter in Fact which is not apparent in the Record is not Error; *Contra upon Default.* Ibid. Br. Repleader, pl. 12. cites S. C.

5. Where an *Iſſue* is *to be tried at Lincoln or* ſuch *a Town, which is a Franchiſe*, the *Ven. Fac. ſhall be of Lincoln &c.* and *not de Vicineto de Lincoln*, for then the Jury ſhall be as well of the County adjacent as of Lincoln itſelf, which the Sheriff of Lincoln cannot do; but a Venire Facias de Suburbiis of Briſtow was awarded good. 2 Le. 22. cites 8 H. 5. 10.

6. In Debt, the Venire Facias was filed Trin. 38 Eliz. to try an Iſſue between R. C. Plaintiff, and P. E. of Mount Edgcomb in Com' Devon' Defendant; The Writ was directed to the Sheriff of Cornwall, and in Hillary Term 39 Eliz. the Continuance on the Roll was entered thus; Jur' inter R. C. de B. in Com' Cornub' Quer' &c. Et P. E. de Mount Edgcomb in Com' Devon' Ar' Def' de placito Debiti ponitur in reſpectu &c. niſi Juſticiarii Dom' Reginæ ad Aſſiſas in Com' præd' capiendas aſſignat' prius venerint &c. and Cornubia was written in the Margin; After a Verdict for the Plaintiff, it was aſſigned for Error in the Exchequer-Chamber, that ad Aſſiſas in Com' præd' muſt refer to the County of Devon', that being the County laſt before mentioned in the Defendant's Addition for the Place of his Habitation, but the Judgment was affirmed; for Cornubia was in the Margin, and in the Addition of the Plaintiff, and the Words Com' præd' may refer either to Cornwall or Devon, and ſhall be conſtrued ſo as to affirm the Judgment. Mo. 696. pl. 968. Paſch. 38 Eliz. Cundey v. Edgcomb.

7. In Debt the *Venire Facias was awarded returnable Die Jovis poſt Quinden' Trin*; The Judgment was affirmed; for this is but a Miſawarding of Proceſs, which is helped by the Statute of Jeofails. Mo. 696. pl. 967. Mich. 38 & 39 Eliz. in Cam. Scacc. Folſowe v. Thorney.

8. Error of a *Judgment in Debt* in C. B. The firſt Error aſſigned was becauſe *upon the Ven. Fac. one Randol Sewel was returned, and the Diſtringas was Randol Sewel*; and the Sheriff upon this *returned Rannus Sewel*, who was ſworn; Sed non allocatur; For the Court ſhall *intend Randol and Rannus to be both one Perſon*, and that it is his Name briefly written. Cro. J. 28. pl. 5. Paſch. 2. Jac. B. R. Hudſon v. Banks.

9. Another Error aſſigned, becauſe *Robert Vaux de Ulton was returned upon the Ven Fac. and Diſtringas. Et idem Rob. Vaux pro defectu Juratorum comparuit, is returned and ſworn upon the Tales de circumſtantibus*, which was *confeſſed by the In nullo eſt erratum pleaded*; But the Court (Gawdy and Fenner abſentibus) held it to be no Error; For it is *contrary to the Record*; For it ſhall be intended ſeveral Perſons, and not one and the ſame; And although In nullo eſt Erratum be pleaded, that is not any Confeſſion, but Quaſi a Demurrer, becauſe it is not an Error aſſignable. Cro. J. 28. pl. 5. Paſch. 2 Jac. B. R. Hudſon v. Banks.

10. The *Venire Facias was Hieronymus*, and the *Diſtringas* was *Jeremias*, and for this Cauſe the Judgment was arreſted. Mo. 762. pl. 1059. Trin. 3 Jac. B. R. Townſend v. Priddy

11. In an *Information the Ven. Fa. upon the Roll was made returnable ubicunque &c.* but *the Writ itſelf was returnable Coram Nobis*, leaving out the Word (Ubicunque,) and ſo it did not anſwer the Award on the Roll,

Roll, and B. R. is removable, ſo that (Coram Nobis) is uncertain where, and for this Reaſon the Judgment was ſtayed. Yelv. 61. Paſch. 3 Jac. Briggs v. Thompſon.

12. Error of a Judgment in C. B. The Error aſſigned was, that *W. B. of Bradfield mas returned upon the Venire and Habeas Corpora*, and *W. B. of Metfield who was another Perſon and not returned was ſworn.* The Court held, that it is not aſſignable for Error, for that he is *eſtopped by the Record* to the contrary; And by this Means every Record might be brought in Queſtion; and the Judgment was affirmed. Cro. J. 244 pl 1. Trin 8 Jac. B. R. Bowſe v. Cannington.

Ibid cites S P ruled accordingly, Mich. 3 Jac. where the Ven. Fac. was De Vicineto de Briſtow;

13. Error was aſſigned of a *Judgment in N.* becauſe the *Venire Facias was De Vicineto de N.* for that the Court there has a Particular Juriſdiction within N. and not out of it, but the Exception was overruled; For De Vicineto *does not exclude the Place itſelf.* 2 Roll Rep. 44. Trin. 16 Jac. B. R. the Caſe of Newberry.

and 6 Jac De Vicineto Civitatis Ebor'; And S. P. 8 Jac held accordingly in Caſe of Proctor v. Johnſon, and Mich. 14. Jac. ſame Exception taken and diſallowed, and there it was held per Curiam that the Book of 8 H. 5. 10. was only an Opinion which was not Law.

Noy. 96. S. C. held per Cur. accordingly.

14. The Plaintiff *recovered in the Court of the Verge*; It was aſſigned for Error, that the *Declaration was of a Treſpaſs done in St. Martin's infra Juriſdictionem*, and the *Venire Facias was from St Martin præd'* and did *not ſay infra Juriſdictionem*, and *this* being a *Court* which *alters the Limits of its Juriſdiction according to the Reſidency or Remove of the King*, it *might be* that St. Martin was *infra Juriſdictionem at the Time of the Treſpaſs and the Declaration, and yet* might *not be ſo at the Time of the Ven. Fac.* which was many Months afterwards; And Doderidge and Jones J. being only in Court, held it Error for this Reaſon. Latch. 214. Paſch. 3 Car. Thaire v. Foſſet.

15. If a Clerk *miſenters a thing Uſual in Matter of Form* it is to be amended; but the Error of the Judge is not to be amended; Per Roll Chief J. who ſaid he took it to be a Rule. Sty. 412. cites Mich. 13 Car. Sawyer v. Horton and Hill. 15. Car. Belch v. Fates.

Ibid. 164. Mich. 1649. Brook v. Hogg. S. P. and Judgment reverſed.—

16. A *Judgment* given *in an Inferior Court* was reverſed in this Court, becauſe the Venire was, *Venire Facias &c.* and *did not ſhew from what Place the Venire ſhould be*; which by Roll J. ought to have been expreſſed at large it being in an Inferior Court, and not with an &c. although the Uſe of C. B. be to make the Venire ſhort, with an &c. Sty. 20. Paſch. 23 Car. Cook v. Allen.

So where it was *Venire Facias Duodecim &c.* it was not held good in an Inferior Court. Sty. 187. Mich. 1649. Jenkinſon v. Porter. —Ibid. 86. Hill. 23 Car. Hales v. Moor S. P.

17. A Writ of Error was brought to reverſe a Judgment given in an Action of Trover and Converſion; In the awarding of the *Venire* it *is Ideo præceptum fuit with an &c.* and *ſo it is not certain whence the Vinire iſſued*, as it ought to be. The Rule was, that the Judgment ſhould be reverſed Niſi &c. Sty. 195. Hill. 1649. Batisford v. Yate.

18. Error aſſigned was, that the *Venire was* only *Præceptum eſt, without ſaying per Curiam*, and Roll Ch. J. held it a good Exception, Et reverſetur Niſi. Sty. 383. Trin. 1653. Hodges's Caſe.

19. Error to reverſe a *Judgment in the City of Exeter*, for that the *Venire Facias was returnable coram Majore and Ballivis, without ſaying Hic, or in Curia*; It ſeems that this is Erroneous, becauſe it may be returned in a Tavern. Sid. 77. pl. 13. Paſch. 14. Car. 2. B. R. Davis v. Pitts.

20. The

20. The Defendant was indicted and *convicted at the Seſſions*, for ſpeaking ſcandalous Words of a Juſtice of Peace, and upon a Writ of Error brought, the Error aſſigned was, *Ideo venit inde jurata*, when it ought to be, *Ideo præcept' eſt Vic' quod Venire faciat* 12. It was agreed that the firſt was the Form in the Courts of Weſtminſter, and the other the Form in Inferior Courts. Sid. 364. pl. 11. Paſch. 20 Car. 2. B. R. The King v. Knott.

2 Keb. 350. pl. 38. S. C. that it *being in an Inferior Court the Venire Facias ſhould be De Vicineto de D. ſpeci ally*, though reverſed.——

in County Palatines it would be well enough, which the Court agreed, and Judgment S. P. and ſo it would be in the Grand Seſſions of Wales, but not in more Inferior Courts. Sid. 364.

21. Error to reverſe a Judgment in Hull for that the *Venire Facias* for returning the Jury *was*, *Qui nulla affinitate ſe attingend'* when it ſhould be *attingunt*, and it ſeemed to the Court that this was Error, becauſe Original Writs cannot be altered. But on Veiw of the Roll it was (attingunt) and therefore was held good. Sid. 438. pl. 5. Hill. 21 & 22 Car 2. B. R. Eely v. Ward.

Vent. 55. Ely v Ward. S. C. the Word was *Attingen'* inſteadof Attingunt; Sed non

allocatur Exceptio; For it was held to be as well though Twiſden ſaid that the Form of a Writ ought not to be altered into another Expreſſion of the ſame Signification.

22. Error of *Judgment in Præmunire* for refuſing the Oath of Obedience and Allegiance on 3 Jac. was aſſigned in the *Venire Facias*, becauſe it *was præceptum fuit for præceptum eſt*, which per Cur. on Search of Precedents is Error, and Judgment reverſed. 2 Keb. 846. pl. 90. Mich. 23 Car. 2. B. R. The King v. Perin.

The Acts of the Court ought to be in the Preſent Tenſe; as Præceptum eſt, and

not Præceptum fuit; But the Acts of the Party may be in the Præterperfect Tenſe, as Venerunt, and not Veniunt; Per Hale Ch. J. Mod. 81. pl. 46. Mich 22 Car. 2. B. R. Anon.——2 Saund. 393. S. C. and the Judgment was reverſed.——Vent. 170 Mich. 23 Car. 2. B. R. The King v. Alway and Dixon S P accordingly, and Judgment for that Cauſe reverſed.——S. C. cited 2 Saund. 393.——Freem. Rep. 282. pl. 323 The King v. Parſons, (but mentions no Year) ſeems to be S. C. and is reported thus, viz. Error to reverſe a Judgment; *The Record certified was præceptum fuit vicecom'* for the Venire Facias, whereas it ought to have been *præceptum eſt*, for the Record itſelf is to be certified, and not the Hiſtory of it; Hale ſeemed that it is good, becauſe it is not in the Venire itſelf, but only the awarding of it. Twiſden ſaid that it is naught, and has been ſo ruled oftentimes, eſpecially as the Record here is, for it is quod defend' ponit ſe ſuper Patriam, and then the Venire being in the Preterperfect Tenſe, it is as though the Venire had been awarded before Iſſue joined, and moſt of the Precedents are ſo; Curia adviſare vult; But afterwards it was moved again, and they held that Præceptum fuit was well enough, and moſt of the Precedents are ſo.

23. Error of a Judgment in the Court of Lynne, for that in the Entry of the Swearing of the Jury it is Qui electi &c. & jurati dicunt ſuper Sacramentum ſuum, omitting ad veritatem de infra content' dicend' and the Judgment was reverſed. 2 Lev. 83. Hill. 24 & 25 Car. 2. B. R. Bedingfield v. Berrisford.

24. Error was brought of a Judgment in an Inferior Court, becauſe in the *Venire Facias* there was *per quos Veritas melius Scire poterit* inſtead of *Sciri*, and all agreed that it was bad; But *Scir'* with a Daſh was well enough. Freem. Rep. 104. pl. 122. Paſch. 1673. B. R. Anon.

2 Lev. 83. Hill. 24 & 25 Car. 2. B. R. Bedingfield v. Berisford

S. P. and ſeems to be S. C. and S. P. as to (Scire) inſtead of (Sciri) and Judgment reverſed.

25. *Præceptum eſt* in the Venire Facias, and does *not ſay per Curiam*; and the Judgment in the *Inferior Court* was reverſed. Freem. Rep. 281. pl. (322. b.) Anon.

Ibid. 315. pl. 390. Trin. 1673. B. R. Clemming v. Fudge

S. P. and Ibid. 318. pl. 395. Fleming v. Fudge S. P. and the Reporter ſays it ſeems that it is Error.

26. Exception was taken to the *Venire Facias* becauſe it *was Probos & Legales Homines inſtead of Liberos* and Legales Homines; but it was anſwered, that *Probos and Liberos are of one Senſe*, and that Multitudes of Precedents are ſo; and the Court were clear of that Opinion. Raym. 417. Mich. 32 Car. 2. B. R. Attorney General v. Blood & al.'

(I c. 6) In the Records of Niſi Prius, and Judgments in the Courts of Weſtminſter.

1. THE Plaintiff had *Judgment in* an Action of *Debt*, and there was a *Space left in the Roll for the Coſts*; after a Year and a Day a *Sci. Fa. was brought on the Judgment as well for the Debt as Coſts*, and in that Action there was a *Judgment againſt the Defendant by Default*; then a Writ of Error was brought, and the Error aſſigned was, that there was no Coſts entered in the principal Roll, and afterwards the Record was remov'd; and the Court denied to put the Coſts into the Roll and held not good. Brownl. 75. Paſch. 44 Eliz. Elliat v. Golding.

2. Error of a Judgment in B. R. for that the *Entry of the Jury was, Qui electi, triati & jurati dicunt* ſuper Sacramentum &c. omitting theſe Words, *qui ad veritatem de infra contentis dicend' electi* &c. the Judgment was reverſed. Cro. J. 119. pl. 8. Paſch. 4 Jac. in Cam. Scacc. Scarro v. Saprani.

3. The Plaintiff had a Verdict at the Aſſiſes; It was mov'd to ſtay Judgment till he brought in the Poſtea, becauſe it did *not appear on what Day the Aſſiſes was held*, for the *Record of Niſi Prius was* Niſi Juſtitiarii Domini Regis ad Aſſiſas in Com' præd' capiend' aſſign' &c. Die Jovis *decimo ſexto die Martii* &c. The *Diſtringas was*, Si prius Die Jovis *viceſimo ſexto Die Martii apud &c. and ſo was the Jurata*; The Court held that the Defendant cannot take Advantage of this Error after Judgment; For if the Clerk of Aſſiſe enters Judgment for the Plaintiff inſtead of the Defendant, he hath no Remedy but by Action. 5 Mod. 398. Paſch. 10 W. 3. Addingſon v. Oakley.

1 Salk. 265. pl. 9. S. C. & S. P. by Holt Ch. J.

4. When a Writ is returned, the *Defendant has all the* ſame *Term to make Complaint of any Irregularity* concerning it, or the Execution of it; *as the Sheriff has* alſo all the ſame Term *to diſavow the Return.* But if the Defendant permits the Term to paſs without Application made to the Court, and the Return is filed, and made a Record of the Court, every one is eſtopped to ſay, That the Perſon who returned it was not Sheriff. But it can never be aſſigned for Error in Caſe of an original Writ, becauſe the Defendant might have pleaded it. There would have been more Colour if it had been a return of a *Writ of Inquiry*, becauſe the Defendant would have been out of Court, and had not Day to plead; but as afore is ſaid, it cannot be aſſigned for Error. As to the Caſe of a *Venire Facias*, if it be *returned by a Man who is not Sheriff*, it *is not aſſignable as Error*, becauſe the Party might have challenged the Array for that Fault at Niſi Prius; and therefore it is *not aſſignable that the Sheriff was out of the Realm*, and had no Deputy, as in the Caſe in Hen. 4. becauſe it was a good Challenge to the Inqueſt. Per Holt Ch. J. to which all the Court agreed. 2 Ld. Raym. Rep. 885, 886. Eaſter 2 Annæ. Andrews v. Linton.

(I c. 7.) Variance between the Writ of Error and the Record.

1. IT was reported by Rolf that a Writ of Error abated which was brought *by one A. againſt B. de loquela* which was *between the ſaid A. and the ſaid B.* where *in Truth the Plea was between the ſaid A. and the ſaid B. and one* G. &c. Thel. Dig. 77. Lib. 9. cap. 1. S. 13. cites 9 H. 6. 38.

2. If there be a Variance between the Record and the Writ, there *although a Tranſcript of the Record be ſent out of C. B. into B. R. yet the Record remains in C. B. and there ſhall be Execution granted*; *As* if a Writ of Error be to ſend the *Record of a Recovery by A. againſt B. and the Record ſent is of a Recovery by A. againſt C.* this is without Warrant, and the Record ſtill remains in C. B. F. N. B. 20. (F) in the new Notes there (a) S. 3. cites * 9 H. 6. 4. and ſays, See 24 E. 3. 24. 43.

* S. C. cited 2 Bulſt. 167. as Frankner's Caſe.

3. Sir John Parret was *outlawed, upon a Judgment in Debt*, where *in the Original the Plaintiff had his Addition of Sadler*, and *in the Scire Facias for Execution it was Salter*, a Writ of *Error was brought in which the Plaintiff was named Salter*, and this being without Warrant, in regard there was no ſuch Original, he was therefore enforced to bring a new Writ of Error; and yet here was a *Variance only in Surpluſage, in the Alias dictus.* Per Haughton J. 2 Bulſt. 168. cites D. 2 Eliz. 173. [b. pl. 16. Kirk v. Parrat.]

4. An Action of *Covenant* was brought *by B. Aſſignee of D.* and afterwards a Writ of *Error brought by the Defendant* which *was inter B. Quer' et G. Defend'* the Word *Aſſignee of D. being omitted.* Manwood was of Opinion that the Word Aſſignee being the Subſtance of the Action, and the Writ of Error founded thereon, the Record ſhould not be removed, but all the other four Judges held it to be well enough, becauſe there is the full Name of the Plaintiff without ſuch Addition. D. 356. b. pl. 41. Paſch. 19 Eliz. Anon.

5. Error in the Exchequer Chamber upon a Judgment in B. R. in an *Aſſumpſit*, the Writ of *Error ſuppoſed, that the Recovery* in the Action *was of 222 l. Damages, whereas in Truth the Damages and Coſts aſſeſſed by the Jury did amount to ſo much; but the Court did adjudge to the Plaintiff de incremento 12 l. ſo as all the Damages did amount to 234 l.* and it was ſaid now in Court, that there is no Recovery of 222 l. only. So the Writ was no Warrant to remove the Record, and cited 9 H. 6. But Popham moved, That the Writ of Error was well brought; for it needed not to have mentioned all the Damages, but only what was found by Verdict, and might leave out the other. Curia contra; For when the *Damages* are *aſſeſſed* they are entire and *cannot be divided*; and thereupon awarded, that the Writ of Error was not well brought. Cro. E. 92. pl. 20. Hill. 30 Eliz. B. R. Albany v. Sturline.

6. Error to reverſe an *Outlawry*, becauſe the *Original was againſt Levellin, with a ſingle L.* and all the *mean Proceſs was verſus Llevellin, with a double L.* and the *Proceſs was againſt two*, and the *Sheriff returned Quod non ſunt inventi*, and does *not ſay Nec eorum aliquis*; And the Judgment was for theſe Cauſes reverſed. Cro. E. 85. pl. 3. Hill. 30 Eliz. B. R. Levellin v. Watkins.

7. Error

7. Error to reverſe an *Outlawry* in Debt; Coke aſſigned the Errors, 1ſt. The Defendant in the *Original was* named *Elred, according to his true Name*, and in the mean Proceſs, viz. the *Capias* he *was* named *Eldred*, and ſo is erroneous, for if there be any difference by Omiſſion, Addition, or Interpoſition of any Letter between the original and judicial Proceſs, it is erroneous, cites Trin. 26 Eliz. Outlawry reverſed upon a Difference, viz. *Walwyn and Walweyn*. 2 R. 3. 13. *Seint John and Saint John*; ſo in Fiſher's Caſe, *York for Yerk*, and Judgment was reverſed. Cro. E. 104. pl. 14 Trin. 30 Eliz. B. R. Elred v. Waſs.

8. In Error a Variance was aſſign'd, becauſe the *Judgment was ſuppoſed to be given before the Ld. Anderſon and his Companions, whereas it was before the Ld. Dyer* &c. And this was held a great Variance, and ordered to be examined &c. Cro. E. 198. pl. 18. Mich. 32 & 33 Eliz. B. R. York (Archbiſhop) v. Barkly.

9. The *Record* was *between A. and P. and P. is named De Civitate London Fiſhmonger*, and *the Writ of Error was between A. and P. Civem & Fiſhmonger London*; and it was objected that the Record was not well removed, becauſe of this *Variance between de Civitate and Civem*; for a Man may be a Citizen of London and yet live at Lincoln; but when he is De Civitate, he muſt live there; Sed per Cur. this is no ſubſtantial Variance, for a Man cannot be a Citizen of London unleſs he inhabits there, though he may be a Freeman of London and live elſewhere, and he may be a Freeman of ſeveral Cities, but he can be a Citizen but of one, whether Freeman or not. And. 276. pl. 284. Palmer v. Pendlebury.

10. Error to reverſe an Outlawry; the *Original was Sheffington*, and the *mean Proceſs Skeffington*, and for this Variance it was reverſed. Cro. E. 248. pl. 8. Trin. 33 & 34 Eliz. B. R. Dalton v. Sheffington.

11. Writ of *Error to remove a Record in Ejectment* directed to the Biſhop of Durham, *ſetting forth that the Action was brought before him and Seven other Perſons* &c. and the *Record certified was an Ejectment brought before him and Eight other Perſons*. The Record was held to be well removed; for if the Parties are rightly named any other Variance will not hurt. 2 Ld. Raym. Rep. 1200. Arg. cites Yelv. 211. [Mich. 9 Jac. B. R.] Orde v. Moreton.

12. Theſe *three Things are to be obſerved* in a Writ of Error, 1ſt. It is to be rightly obſerved *before whom the Plea was held*. 2dly, *In what Manner* this was held. And 3dly, *Between what Perſons* this was. For the Firſt, The ſame is proved by 28 H. 6. fol. 11. Error in C. B. to remove the Record; The Writ was Rex Johanni Priſot Capitali Juſticiario noſtro de Banco ſalutem, quia in Recordo, & Proceſſu ac in redditione loquelæ quæ fuit in Curia noſtra, coram vobis, inter &c. Whereas the Writ ſhould have been, Coram vobis & ſociis veſtris, the Record and the Rolls being all of ſuch a Form, and therefore no ſuch Record there was in this Place, for all the Records here are, Coram Johanne Priſot & ſociis ſuis, ſo the Writ held to be inſufficient, and the Party there was driven to have a new Writ of Error; And ſo in the Exchequer, if the Writ be Rex. Theſaur. & Baronibus Scaccarii noſtri ſalutem, quia &c. in Recordo &c. que fuit coram vobis, &c. and the Records there are, coram Baronibus, and not coram Theſaur. & Baronibus and therefore bad; For the 3d. *Between what Perſons* 9 H. 6. fol. 4. John Frankner Citizen of London brought a Writ of Debt againſt a Woman as Executor to one B. and in this recovers; ſhe brings a Writ of Error to the Ch. J. of C. B. to have the Record brought into the Court of B. R. by which the Record was ſent into B. R. and the Juſtices there did ſee the Writ by which the Record came before them; which Writ was falſe, for the ſame was of a Record which was between the Woman and B. the Teſtator, whereas it

ſhould

ſhould have been between the Woman, and the ſaid J. F. and ſo not good, and ſo the Record came without any Warrant by the Juſtices, and ſo no Record by this Writ remained in B. R. but was ſtill in C. B. and therefore they would not proceed unto the Errors; Then *as to the Manner*, this ought alſo to be purſuant; if it was per breve this ought then to be ſo; and ſo if it was per Billam, the Writ ought to be accordingly; and ſo if it was ſine breve, the Writ of Error ſtill ought to be purſuant. Per Haughton J. 2 Bulſt. 167. Hill. 11 Jac. B. R. in Caſe of Heydon v. Godſalve.

13. If an *Ejectment* be brought *againſt ſeven*, and *one dies*, and *Judgment is given againſt the Six, and laid ad damnum of the Seven* the Writ ſhall abate. Adjudged, though per Doderidge it might have been otherwiſe, if the Writ had concluded ad damnum of the Six only. 2 Roll. Rep. 210. Mich. 18 Jac. Bethell v. Parry.

Palm. 152. S. C. adjudged but per Doderidge if the Writ of Error had mentioned the Seven only according to the Record, and concluded ad damnum of the Six, it had been well. —— If one of the Parties is dead yet he ought to be named in the Writ of Error. Arg. 2 Mod. 28. Hill. 29 & 30 Car. 2. in Caſe of Daſhwood v. Cooper.

14. The Writ of Error ſuppoſed the Proceedings to be *in Cur. noſtra* [*viz. Car.* 1.] and it appeared by the Record that the Beginning thereof was in 22 *Jac.* and therefore abated. Cro. C. 310. Trin. 9 Car. In the Caſe of Gwin and his Wife v. Gwin.

15. A Writ of Error was quaſh'd for a Variance between it and the Record, the *Record being againſt the Aſſigns* and *the Writ of Error to remove the Record was againſt the Aſſignee.* Sty. 407. Hill. 1654. Porter v. Swetnam.

16. The Writ of Error was Inter *J. J. and J. W. de Civitate Exon in Com' Civitatis Exon* (with a *Blank* left for the Addition) and the Record was J. W. *de North Moulton in com. Devon Yeoman* attachiat fuit ad reſp' J. J. Clerico de Placito, and the Writ was abated accordingly, per Curiam. Sid. 104. Hill. 14 & 15 Car. 2. In Caſe of Williams and Jenkins.

17. So where in the Writ of Error the Addition of the Plaintiff was *Chandler*, and in the Record certified it was *Innholder*, and for this Cauſe abated per Cur. Ibid. ſaid to be the Caſe of Mills v. Carpenter.

18. *Scire Facias reciting the Judgment to be coram Olivero Nuper Protectore without any &c.* whereas *the Judgment is before Oliver Protector of the Common-Wealth* &c. adjudged no material Variance, becauſe the Act to confirm judicial Proceedings did not confirm the Stile then uſed, but only the Proceedings in the Courts, and not the Courts themſelves, and Nul tiel Record cannot now be pleaded. Sid. 173. pl. 5. Hill. 15 & 16 Car. 2. B. R. Lord Biron v. Dudley.

19. Error to reverſe a Judgment in C. B. in Treſpaſs, the Defendants in Error moved that it might be quaſhed, becauſe the *Record was W. R. de D. in Com' Lincoln* and the *Writ of Error was W. R. de D. in Com' Warwick*, this ſeem'd to the Court to be a material Variance for which the Writ ſhould abate, though the Writ would be good without any Addition. Sid. 193. pl. 23. Paſch. 16 Car. 2. B. R. Booth v. Beard.

20. Writ of Error *to remove a Record* of B. R. *in quadam Tranſgreſſione done by Baron and Feme*, and the *Record certified was of a Treſpaſs by the Feme only*, and for this Variance the Writ was abated. Sid. 269. pl. 24. Trin. 17 Car. 2. in Cam. Scacc. Lumbrey & Ux' v. Tailor.

21. A Writ of Error was brought *to remove a Record* out of C. B. *of a Querela between A. Plaintiff, and B. Defendant*, and *the Record certified was between A. Plaintiff, and B. ſimul cum D. E. &c. Defendants*, And it was moved that this was not the ſame Record; for a Record between A. and B. cannot be the ſame as a Record between A. and B.

ſimul cum D. E. &c. But adjudged no Variance, and the Precedents are agreeable. Ld. Raym. 347. Trin. 10 W. 3. Hunt v. Lawſon.

21. Writ of Error was to remove a Record *coram* J. N. *milite* J. P. *milite et* Jo. Bl. *milite Juſt' noſtr' de Banco* and *Placita* returned were *coram* G. Treby Ch. J. &c. *et ſociis*, and it was moved to quaſh the Writ for Variance; and per Holt Ch. J. the Plaintiff's Attorney might have ſued Execution notwithſtanding this Writ, for it was no Authority to remove the Record and Writ quaſhed nili. 12 Mod. 523. Trin. 13 W. 3. Anon.

22. Error of a Judgment in Debt in the Court of Carliſle was, That *the Writ was directed Majori Aldermannis Ballivis et civibus civitatis Carlioli to remove the Record of a Judgment given in quadam loquela before them &c.* and *the Record removed was of a Plaint levied at the Court held before the Deputy Mayor and Bailiffs.* And therefore this was held a material Variance. Ld. Raym. Rep. 704. Mich. 13 W. 3. Watſon v. Huddleſton.

23. It was moved to quaſh a Writ of Error for a Variance *in ſetting out the Record*; the *Writ mentions only three Defendants, whereas in the Record in C. B. there were Five*; Holt Ch. J. thought it well, becauſe the Reſt being acquitted there was no need to name them in the Writ of Error; Powell being of the contrary Opinion adjornatur; But afterwards abſente Holt the Writ was quaſhed. Per Cur. 11 Mod. 240. pl. 14. Trin. 8 Ann. B. R. Simms v. Peters.

24. Error upon a *Judgment in C. B.* given *againſt the Principal and Bail in a Scire Facias*, the *Writ of Error deſcribed a Scire Facias againſt the Bail only de & concernen' the Sums which they had acknowledg'd to owe* &c. *Et de et concernen' the Sum which the Principal had acknowledg'd to owe* &c. and concluded ad grave Damnum of the Bail and the Principal, and by the Record return'd the Scire Facias appear'd to be againſt both the Bail and the Principal; by the whole Court the Writ of Error was quaſh'd for the Variance between it and the Record, and they ſaid that a Writ of Error ought to contain as perfect a Deſcription of the Record as poſſible, and a Caſe was cited at the Bar where a Certiorari to certify an Indictment againſt A. and B. had been quaſh'd upon the Indictments appearing to be againſt A. B. and C. MS. Rep. Mich. 4 Geo. B. R. Pede v. Jemmina.

(I. c. 8) In the Stile, Proceſs, Pleadings and Judgment in Inferior Courts of Record.

1. DEBT *againſt Executors* was brought *in a Court* which was *granted by Patent, and had Day the Monday next before the Feaſt of St. Boniface*; the *Defendant pleaded Ne unques Executor* &c. and *found againſt the Defendant*, who alleged for *Error*, *that the Day of St. Boniface was paſt before the Day given to him, and there were two Days of St. Boniface in the printed Kalendar, and but one in the Martyrology*, and yet good by the Juſtices of B. R. for if there are two Feaſts known, this is good, though they are not in the Kalendar, quod Juſticiarii conceſſerunt; And per Hanſton, the Martyrology is Kalendar Univerſal in this Realm in all Churches, which Prieſts are bound to obſerve and no other. Br. Error, pl. 153. cites 9 H. 7. 14.

2. *Error* of a Judgment *in Debt* in an Inferior Court, and *aſſigned that there appears no Place of Payment of the Money in the Condition of the Bond, ſo that it cannot thereby appear whether the Cauſe of Action lies within the Juriſdiction of the Court*, and therefore it ſhould have been made appear by ſome Part of the Record that the Money was to be paid within the Juriſdiction of the Court, which not being done, the Judg- is erroneous. Judgment reverſed Niſi. Sty. 2. Hill. 21 Car. Maſtermans Caſe.

3. Error of a Judgment in *Debt for Rent* in the Court of Exeter, *upon a Leaſe made Infra Juriſdictionem* of Lands in Topſham, was aſſigned, for that it was *not alleged that the Lands lay within the Juriſdiction*; and Judgment was reverſed. Lev. 104. Trin. 15 Car. 2. B. R. Drake v. Beare. Sid 151. pl. 18. S. C. and Judgment reverſed.

4. In *Aſſumpſit in Curia Palatii* the Plaintiff on an *Indeb. infra Juriſdictionem pro diverſis mercimoniis ſibi venditis & deliberat'*, but did *not ſay Infra Juriſdictionem* Curiæ; and in Error brought the Judgment was reverſed. Lev. 105. cites Hill. 14 & 15 Car. 2. B. R. Rot. 240. Draper v. Kent.

5. Error of a Judgment in Treſpaſs given in Newcaſtle was aſſigned, becauſe a *Miſericordia was for a Capiatur*; The Court held that this was not aided by 17 Car. 2. cap. 8. and Judgment was reverſed, it being out of an Inferior Court. 2 Keb. 382. pl. 48. Trin. 20 Car. 2. B. R. Freſer v. Eubank.

6. On a *Judgment in an Inferior Court* it was aſſigned for Error, that the *Proceſs brought was directed to the Serjeants at the Mace generally, without naming them* by their proper Names; ſed non allocatur. Carth. 266. Hill. 3 W. & M. in Caſe of Boſon v. Phyler.

7. And that the *Proceſs of Attachment was returned Nihil habet ubi ſummon' poteſt, (which ought to have been Nil habet ubi attachiari poteſt nec eſt inventus in eadem)* and a Capias thereupon was awarded, when as the Return was inſufficient there ſhould have been an alias Attachment; ſed non allocatur. Ibid.

8. *No Cuſtom was returned to warrant the Uſe of a Capias* which is given by Statute, and *doth not extend to Inferior Courts*; ſed non allocatur; for the Court held both theſe laſt Errors were *cured by the Appearance* of Defendant. Ibid.

9. Beſides the Judgment was *Ideo conceſſum eſt per eoſdem Ballivos in eadem Cur.* inſtead of Ideo conceſſum eſt *per Curiam*; but held that both Ways were good, it being ſaid before that it was done in Court. Ibid.

10. Error of a Judgment in Treſpaſs at the *Stannary* Court, for that in the Record ſet up, it is *not ſaid* in the Stile of the Court ſet forth *that it was held Infra Juriſdictionem Curiæ*; And per Holt and Cur. where you declare in the Inferior Court you ought to lay the Fact or Cauſe of Action to have ariſen within their Juriſdiction; Or if you declare that at ſuch a Court (ſuppoſe at Maidſtone) ſuch a Thing was done, there you muſt ſay, That the Court was held within the Juriſdiction of the Court, but when you only ſet forth the Stile of a Court you need not ſhew it. 7 Mod. 103. Mich. 1 Ann. B. R. Reignol v. Taylor.

(I. c. 9) In Inferior Courts.

In the Stile and Proceſs of the Court.

1. IN all Inferior Courts the *Plaint is as the Original at the Common Law*, and without that no Proceſs can iſſue; and the *firſt Entry ought to be* A. *queritur verſus C.* &c. Arg. And per Clench J. a Plaint *ought to be entered before Proceſs iſſues forth, and the Entry that the Defendant ſummonitus fuit is no Plaint*; and for that Cauſe Judgment was reverſed. Le. 302. pl. 415. Mich. 29 & 30 Eliz. B. R. Savage v. Knight.

2. Error to reverſe a Judgment in Aſſumpſit in the Court of Reading, for that the *Certificate was Placita &c. ad Curiam Dominæ Reginæ Burgi ſui de Reading tent' per conſuetudinem & libertat' majori & Burgenſibus conceſſas* &c. *without ſaying per Conſuetudinem ex antiquo uſitat', and without alleging by whom their Liberties were granted*; and this was adjudged erroneous, and Judgment reverſed. Mo. 601. pl. 830. Paſch. 42 Eliz. B. R. Smith v. Johnſon.

Error in Exeter Court. The Error aſſigned was, that there was no Summons, and for that cited 2 Cro. 108. which was ſaid to be the ſame Caſe with this; But per Cur. it was held to be well enough; for by Appearance all Defaults before are ſalved though it be in an Inferior Court; and ſo Wylde ſaid it had of late been conſtantly ruled contrary to 2 Cro. 108. Pratt v. Dixon. Freem. Rep. 468. pl. 642. Trin. 1678. Wheeler v. .....

3. Error of a Judgment in the Court in Norwich was aſſigned that the *Defendant attachiatus eſt, where it ſhould be ſummonitus eſt*; for that ought to be as an Original, and for want thereof it is Error. But it was held that this was not helped by the Statute 18 Eliz. or any Statute, for that extends to Original Writs, which are ſued out of Chancery, and not to other Proceſs which is in Name of an Original, therefore *the Want of Summons in this Caſe is the Want of* ſuch *an Original*, which is not helped by the Statute; and the Judgment was reverſed. Cro. J. 108. pl. 4. Hill. 3 Jac. B. R. Pratt v. Dixon.

4. Error of a *Judgment* in Briſtol in an Action *for Words*, where upon Not Guilty pleaded, the Plaintiff had Judgment, and the Error aſſigned was, that *a Capias was awarded* in that Action *for the ſecond Proceſs*, whereas no Capias lay in this Action till the Statute 19 H 7. which extends only to thoſe Actions brought in the Courts at Weſtminſter, and not to corporate Vills; ſed. non allocatur; for *it might well be by Cuſtom* in thoſe Vills; and Judgment affirmed. Cro. J. 222. pl. 1. Trin. 7 Jac. B. R. Tuthill v. Milton.

S. C. cited Raym. 395. where the Style of the Court was, Coram Thoma Lyddal Majore & Capitalibus Burgenſibus, without ſhewing their Names, this was agreed not to be Error. Mo. 601. pl. 830. Paſch. 42 Eliz. Smith v. Johnſon.

5. Error of a Judgment in the Court of Burton on Trent, becauſe it is *not ſhewn* in the Stile of the Court *by what Authority it was held, viz. by Charter or Preſcription, and becauſe the Stile of it is coram Seneſchallo & Ballivo Dom. Paget without naming them*; and the Judgment was reverſed; for in Inferior Courts the Authority whereby they are held, and the Names of the Judges before whom, ought always to be expreſſed, otherwiſe the King's Courts cannot take Conuſance of their Authority. Cro. J. 184. pl. 3. Mich. 5 Jac. B. R. Jerrat v. Caldewell.

6. Error

6. Error of a Judgment in Aſſumpſit at Leiceſter, becauſe it did *not appear in the Stile of the Court by what Authority it was held, whether by Cuſtom or Letters Patents*; and though it was inſiſted, that they may take Cognizance of their own Juriſdiction without being inſerted in the Stile of the Court; yet the Court held that *the Juriſdiction ought to be ſhewn*; But they would adviſe. Cro. J. 493. pl. 14. Trin. 16 Jac. B. R. Johnſon v. Underwood.

7. Error of a *Judgment in Debt* in Sudbury upon a Leaſe for Years, brought by the Aſſignee of the Reverſion; one Error aſſigned was, for that the *Court is held by Letters Patents*, and the *Proceſs is awarded ſecundum Conſuetudinem Curiæ*, which cannot be where the Court began within Time of Memory; and this was adjudged erroneous. Cro. C. 143. pl. 20. Mich. 4 Car. B. R. Long v. Nethercote.

8. Error of a Judgment in an Inferior Court was aſſigned, for that *the firſt Proceſs was a Capias*, where it *ought to have been a Summons*, and for that Reaſon it was reverſed. Cro. C. 261. pl. 23. Mich. 8 Car. B. R. Ward v. Ellain. Palm 449. Paſch 2 Car. B. R. Marget v. Harvy, S. P. and Judgment reverſed.

9. The Stile of the Court was *Curia forinſeca Civitatis Lincoln, without ſhewing whoſe Court it was*; ſed per Curiam, *it is ſaid to be held coram Majore & Ballivis*, and it appears to be a Court of Record, and every Court of Record is the King's Court; and Judgment was affirmed. Roll Rep. 334. pl. 41. Hill. 13 Jac. B. R. Oglethorpe v. Askue.

10. The Stile of the Court was *Placita coram J. S. Majore & J. C. Recordatore, & J. D. & J. N. Aldermannis Burgi prædicti ſecundum Conſuetudinem Burgi &c.* and the Plaint being entered upon the Summons, a Non eſt inventus was returned at *a Court held before J. S. the Mayor, and J. D. and J. N. Aldermen ſecundum Conſuetudinem &c. omitting the Recorder*, and this was aſſigned for Error; ſed non allocatur; for perhaps at the firſt Court holden the Recorder was there, and at the ſecond Court was abſent, and the Court is well held by the Cuſtom there before the Mayor and two Aldermen. Cro. C. 572. pl. 11. Hill. 15 Car. B. R. Bryan v. Wikes.

11. Error of a Judgment in Briſtow, for that the Style of the Court was *Curia tent' Coram Majore & Ballivis, viz. J. S. J. D. & J. N. a tempore cujus contrar' memoria hominum non exiſtit & Virtute of divers Letters Patents* &c. and the Court cannot be held before J. S. J. D. and J. N. by Preſcription, but it ought to be Curia tent' Coram Majore & Ballivis by Preſcription, and not J. S. J. D. and J. N. Majore & Ballivis. But notwithſtanding this the Style is good when he ſays Virtute Literarum Patentium; and Judgment affirmed. Jo. 448. pl. 12. Mich. 15 Car. B. R. Thurſton v. Vincent. Mar 47. pl. 76 Thurſton v. Ummons, S. C. but S. P. does not appear.

12. The Stile of the Court was, that it was *held per Conſuetudinem & Literas Patentes*; and this was held to be Error; for if it was held by Cuſtom, and afterwards they procured a Patent, and held it by the Patent, the Cuſtom is gone. Style 131. Mich. 24 Car. B. R. Tomkins v. Jurdan.

13. Error of a Judgment in an Indebitatus Aſſumpſit in *the Court* of Marlborough, for that it was *ſaid to be held Coram Majore & Burgenſibus Burgi præd' ſecundum Conſuetudinem ejuſdem Burgi a tempore quo* &c. and *the Name of the Mayor was not mentioned*; and for this Cauſe the Judgment was reverſed. Raym. 395. Trin. 32 Car. 2. B. R. Dumford v. Iriſh.

14. In *Treſpaſs* &c. the Defendant *juſtified, for that* the Earl of Newport was ſeiſed in Fee of the Hundred of Stottesden, and that *King Charles the Second by Letters Patents granted* to him and his Heirs *a*

Court of Record &c. *with Power to make Serjeants at Mace to execute all Attachments and Proceſs* iſſuing out of that Court; then he *ſets forth, that a Plaint was levied there* againſt the now Plaintiff, *and that a Precept was directed to the Serjeant at Mace, and to John Chetwyn, to attach the Goods* &c. and *that the Precept was delivered to Chetwyn, who by Virtue thereof took the Goods* quæ eſt eadem Tranſgreſſio &c. and upon Demurrer it was adjudged, that the Plea was ill; for by Virtue of this Grant all Proceſs was to be executed by the Serjeant at Mace; but here the Attachment was directed not only to him, but to another, viz. To John Chetwyn, and executed by him alone, *which is not purſuant to the Power given by this Grant.* Nelſ. Ab. 724. pl. 43. cites 2 Lutw. 1461. Trin. 9 W. 3. Selman v. Perry and Chetwin.

6 Mod. 61. Evans v. Roberts, S. C. held accordingly.—— 3 Salk. 146. pl. 1. S. C. *Cro C. 46. pl. 5. Mich. 2 Car. C. B. S. P. admitted per Curiam.

15. Error of a *Judgment in Briſtol, in* an Action of *Debt on a Bond*, for that *the Stile of the Court is ſaid to be ſecundum Legem Mercatoriam*, which cannot be, but in a Court of Staple, and Debt on a Bond is not infra Legem Mercatoriam. But per Curiam, we *will intend this another Sort of Cuſtomary Court under that Name*; as where a Court of * *Piepowders* was ſaid to be *held by Preſcription*, which could not be, this *Court held it to be a Cuſtomary Court under that Denomination.* 1 Salk. 265. pl. 10. Mich. 2 Ann. B. R. Gibbons v. Roberts.

(I. c. 10) In the Count in Inferior Courts.

1. ERROR of a Judgment in the Court of Nottingham, in a Plaint of Debt, for that the *Defendant had no Addition but* as follows, viz. H. H. *queritus verſus R. Preſton, alias dict' R. Preſton de* &c. *in Com. Nottingham Husbandman*, ſo that the Addition came after the Alias dict' yet the Judgment was affirmed, for an *Addition is not neceſſary* to a Defendant in an Inferior Court *where Proceſs of Outlawry doth not lie.* Mo. 354. pl. 478. Paſch. 36 Eliz. Preſton v. Hinde.

Brownl. 96. S. C. ſeems only a Tranſlation of Yelv.

2. The Declaration in an Inferior Court was, *& unde (the Plaintiff) per M. his Attorney, whereas the ſaid Defendant &c. leaving out the Word (Dicit.)* After a Judgment for the Plaintiff, and Error brought, this was held no Declaration for want of the Word (Dicit) and the ſenſe is imperfect, and the Judgment was reverſed, this Omiſſion being Matter of Subſtance. Yelv. 103. Mich. 5 Jac. B. R. Field v. Hunt.

3. In *Replevin*, the Defendant avowed for Damage-feaſant, and *the Cauſe was tried in the 3 Weeks Court at Windſor, and found for the Plaintiff*; the *Error aſſigned by the Defendant was, that the Entry of the Plaint in the ſaid Court was on the 7th Day of May, and the Plaintiff declared for the taking his Cattle the 25th Day of May.* This was held to be Error; becauſe no Plaint can be entred but at a Court, and this Entry of the Plaint was meſne between the Court-Days, and ſo the Declaration not warranted, there being no Cuſtom alledged to maintain ſuch an Entry, and Judgmenr reverſed. Godb. 266. pl. 368. Hill 13 Jac. B. R. Brook v. Gregory.

4. Error of a Judgment in Lincoln; the Error aſſigned was, that the *Plaint was, In placito tranſgreſſionis ſuper Caſum*, and the *Declaration was in Treſpaſs Vi & Armis*; Coke Ch. J. thought this not Error, and that it is all one in Effect; and Judgment was affirmed. Roll Rep. 334. pl. 41. Hill. 13 Jac. B. R. Oglethorp v. Askue.

5. Error

5. Error to reverſe a Judgment in Debt in an Inferior Court, for that the *Plaint* was *entered generally in Placito Debiti*, which is uncertain, ſo as the Defendant cannot know what is demanded; and for this the Judgment was reverſed, Niſi. Sty. 86. Hill. 23 Car. Hales v. More.

6 Error of a Judgment in the Palace-Court *in Aſſumpſit*, wherein the Plaintiff *declared upon a Promiſe to pay him ſo much Money if he procure a Leaſe of ſuch a Houſe in Middle-Row in Holborn*, and did *not ſhew that Holborn was within the Juriſdiction of the Court*; and this was held to be Error. Sid. 65. pl. 37. Mich. 13 Car. 2. B. R. Romſey v. Alkinſon. Lev. 50. Rumſey v. Atkinſon. S. C and was in Conſideration *that the Plaintiff had at his Requeſt taken Pains to procure a Leaſe of a Houſe in Holbourn, the Defendant promiſed at Southwark infra Juriſdictionem* Curiæ to pay him 10 l. and the Jury is not only to try the Promiſe, but alſo the Conſideration, viz. the Pains in taking the Houſe, which they cannot do unleſs it be within their Juriſdiction; and for this Cauſe Judgment was reverſed.

7. Error to reverſe a Judgment *in an Aſſumpſit* in an Inferior Court, for that the *Time of the Promiſe alleged was in Figures*; Adjudged that this was Error, and the Judgment was reverſed. Sid. 40. pl. 6. Paſch. 13 Car 2. B. R. Duckett v. Bland.

8. Error of a Judgment in Wallingford Court, in which the Plaintiff *declared, that the Defendant being indebted to him at Wallingford for Goods ſold and delivered to him, promiſed at Wallingford*, but did *not ſay where the Goods were ſold and delivered*, and ſo it might be out of the Juriſdiction; and the Judgment was reverſed. Lev. 137. Trin. 16 Car. 2. B. R. Price v. Hill. Keb. 760. pl. 67. S C. and Judgment reverſed. —— Lev. 156. Hill. 16 & 17 Car. 2.

B. R. Stone v. Waddington, S. P. and Judgment reverſed. —— 2 Lev. 87. Paſch. 25 Car. 2. B. R. Hanſlip v. Coater. S. P. and Judgment reverſed. —— Vent. 243. Hanſlap v. Cater, S. C. and Judgment reverſed.

9. Error of a Judgment in Marlborough in a Court there *held ſecundum Conſuetudinem* of the ſaid Borough, but *ſays not Time out of Mind uſed*, which was inſiſted to be neceſſary in ſuch Courts, though not in Superior Courts; neither was it ſaid that Marlborough was an ancient Borough Time out of Mind; Judgment was reverſed Niſi. Keb. 846. pl. 42. Hill. 16 & 17 Car. 2 B. R. Withers v. Wodden. And where it was ſaid to be held Coram Majore & Burgenſibus Burgi præd' ſecundum

Conſuetudinem ejuſdem Burgi a Tempore quo &c. but the Name of the Mayor was not mentioned Judgment was reverſed. Raym. 395. Trin 32 Car. 2. R. R. Durnford v. Iriſh.

10. Error of a Judgment in an Inferior Court for that the *Plaintiff laid his Damages to* 30 *l.* of which a Court Baron cannot hold Plea; For the Difference taken by Ld. Coke is where Damages are laid under 40 s. Coſts may make it amount to more, but where it is laid above 40 s. all is Coram non Judice, and the Judgment was reverſed. 2 Mod. 101. Trin. 28 Car. 2. C. B. Rider v. Bradley.

11. *Indebitatus Aſſumpſit for Wares ſold* was brought in the Court at Briſtol, and Declaration was that at Briſtol the Defendant was indebted, and at Briſtol he promiſed, but it was *not ſaid Ibid' vendit'*; On Judgment there given Error was brought, and the Judgment reverſed. Show. 395. Paſch. 4 W. & M. Crabb v. Bowdler.

(I. c. 11) Pleadings in Inferior Courts.

Not ſaying Infra Juriſdictionem.

Cro. J. 502. pl 13. Bouen v. Carrington. S C. & S. P as to the Aſſets, and becauſe the Plaintiff did not ſhew the Place of Aſſets it was held ill,

1. ERROR of a *Judgment* in Litchfield *againſt an Heir*, who *pleaded Riens per Deſcent*; The Plaintiff *replied Aſſets, but did not ſay in what Place, or that the Aſſets were within the Juriſdiction of the Court*, but the Jury found Aſſets, and gave no Coſts and Damages to the Plaintiff; and adjudged, that the Judgment was erroneous for both theſe Cauſes; But per Doderidge J. though the Aſſets is not alledged by the Party within the Juriſdiction, yet if the Jury find it to be ſo, it is ſufficient. 2 Roll Rep. 48. Mich. 16 Jac. B. R. Brown v. Carrington.

and the Judgment was reverſed.

Keb. 382. pl 90. Saunders v. Godfrey, S. C. and per Cur. though it does not appear that the Sale was out of the Juriſdiction,

2. Error to reverſe a *Judgment in the Palace-Court*, where the Plaintiff *declared that the Defendant was indebted to him apud Southwark infra Juriſdictionem Cur' &c. in ſo much Money upon a Contract for a Cow*; The Error aſſigned was, that it did not appear that the Contract was made within the Juriſdiction, but only that he was indebted, when a Debt is ſo every where, but it *not appearing where the Contract was made* they have not intitled themſelves to the Conuſance, and this was held Error. Sid 87. pl. 2. Mich. 14 Car. 2. B. R. Godfrey v. Saunders.

yet they will not intend it within it or any other Inferior Court; For *the Sale which is the Conſideration* of the Aſſumpſit *muſt be inquired of, which cannot be by the Inferior Court.*

3. Error of a Judgment in the Court at Hull, wherein the Plaintiff declared, that *in Conſideration the Defendant in ſuch a Place Infra Juriſdictionem Curiæ, had promiſed to pay to the Plaintiff ſo much per Yard he the the ſaid Defendant promiſed to deliver to the Plaintiff ſo Yards of a Kerſey*, which he had not done, and the *Error aſſigned* was, *that the Delivery is not laid to be at a Place infra Juriſdictionem* Curiæ, and in truth there is no Place at all, and for this Reaſon Twiſden, being only in Court, held it erroneous. Vent. 2. Mich. 20 Car. 2. B. R. Heely v. Ward.

4. *Indebitatus Aſſumpſit infra Juriſdictionem Curiæ for Wares ſold*, there was a Verdict and Judgment for the Plaintiff in the Court of Carliſle. Error was aſſigned that *it was not alleged that the Wares were ſold infra Juriſdictionem*, for that is the Contract on which the Aſſumpſit ariſes, and for this Cauſe the Judgment was reverſed. 2 Jo. 230. Mich. 34 Car 2. B. R. Wallis v Squire.

Ibid. 244. The Report at the End thereof ſays, that upon theſe Exceptions to the Plea Judgment was given for the Defen-

5. In *Treſpaſs* for taking his Goods; the Defendant *juſtified, for that Time out of Mind there was a Court in Worceſter held coram Ballivis* &c. *and that a Plaint was levied there in Debt*, and *Plaintiff counted that Defendant being indebted to him Infra Juriſdictionem &c. promiſed to pay* &c. whereupon Taliter Proceſſum fuit; that afterwards, (viz.) 2 Octob. &c. conſideratum fuit; &c. and ſo juſtifies by a Warrant on the Judgment; The Plaintiff replied De injuria ſua propria abſque tali Cauſa abſque hoc quod habetur aliquod tale Recordum &c. and upon Demurrer it was adjudged that *the Plea was ill, becauſe the Defendant did*

not

not allege that the Cauſe of Action did ariſe Infra Juriſdictionem &c. It is true, the Declaration in the Inferior Court is recited in this Plea, wherein it is alleged to be Infra Juriſdictionem, but what is alleged in that Declaration there is not traverſable in this Action here, but only that which is alleged in the Plea here, that the Cauſe of Action did ariſe within the Juriſdiction, becauſe that only which is alleged in the Plea is traverſable. 3 Lev. 243. Mich. 1 Jac. 2. C. B. Adney v. Vernon.

dant [but it ſeems this is miſprinted and ſhould be (for the Plaintiff)] though they agreed the Replication to be ill by reaſon of the Double Traverſe, but the Replication being good, and the Plea ill, and the Replication not ſhewing that the Plaintiff has no Cauſe of Action he ought to have Judgment.

6. In *Treſpaſs of taking his Cattle*, the Defendant *juſtified under a Plaint* by J. S. againſt the now Plaintiff *in the County-Court for a Debt of* 39 *s.* 11 *d. and that ſuperinde taliter Proceſſum fuit, that T. P. the Plaintiff in that Plaint recovered* &c. *and thereupon quoddam præceptum emanavit per quod the Sheriff commanded the Plaintiff to levy the Money &c.* and upon Demurrer to this Plea it was adjudged for the Plaintiff. 1ſt, Becauſe the Judgment was *pleaded in an Inferior Court*, not being a Court of Record, *with a taliter proceſſum fuit*, when the Proceeding ſhould be ſet forth at large. 2dly, It is not ſet forth that the Debt aroſe within the Juriſdiction. 3dly, It did *not appear that the Precept was awarded by the Court*, it being only ſaid that Quoddam Præceptum e Curia emanavit per quod the Sheriff commanded; Whereas the Suitors are Judges, and it ſhould be per quod Præceptum per præfat' Cur' directum fuit &c. 2 Vent. 100. Mich. 1 W. & M. in C. B. Pinager v. Gale.

7. Error of a Judgment in Exceſter Court, where the Plaintiff *declared on two Promiſes*, (viz.) *on an Indebitatus Aſſumpſit and Quantum meruit*; the *Indebitatus Aſſumpſit he alleged to be infra Juriſdictionem* Curiæ; *but* the Words *adtunc & ibidem were left out as to the Quantum Meruit*; the Judgment was reverſed. 5 Mod. 78. Mich. 7 W. 3. Cudmore v. Tripe.

(I. c. 12) Error in the Judgments in Inferior Courts.

1. A Judgment in the Court of Helſton was reverſed, becauſe it was *not ſhewn what Court it was, nor by what Title held.* Cro. E. 185. pl. 6. Trin. 32 Eliz. B. R. Lucas v. Donne.

2. Error of a Judgment in Lynn Regis, for that the *Court was held before the Mayor and J. H. and two other capital Burgeſſes*, and the Parties being at Iſſue, the Cauſe was tried, and a Verdict for the Plaintiff, and that *the ſaid J. H. who was one of the Judges was alſo one of the Jury*; The Defendant pleaded in Nullo eſt erratum, which was a Confeſſion that he was one and the ſame Perſon, and for this Cauſe by Aſſent of the Defendant in Error the Judgment was reverſed. Cro. E. 850. pl. 5. Mich. 43 & 44 Eliz. B. R. Michell v. Woodroffe.

Noy. 40. Woodroffe v. Michell, S. C adjudged to be Error and Judgment was reverſed.

3. Error of a Judgment in Aſſumpſit in Tewksbury-Court, where the Jury gave a *Verdict for* 8 *l. Damages, and* 2 *d. Coſts*, and the *Judgment was entered that the Plaintiff ſhould recover his Damages aſſeſſed by the Jury to* 8 *l. and alſo* 20 *s. for Coſts de incremento, omitting the* 2 *d.* given by the Jury for Coſts, and for that Caſe the Judgment was reverſed. Yelv. 107. Mich. 5 Jac. B. R. Haines v. Guies.

4. Error aſſigned to reverſe a Judgment in an Inferior Court was in a *Continuance*, which was ad proximam Curiam, viz. 16 *Die*, whereas *the Court was not held on that Day but on the 26th Day.* The Judgment was reverſed. Sty. 97. Paſch. 24 Car. B. R. Pay v. Paxted.

5. Error of a Judgment in an Inferior Court; the Error aſſigned was, *that the Court was ſaid to be held on Saturday the 9th of November*, whereas the *Saturday on which the Court was held was* not the 9th, but *the 7th Day of November*, and ſo there is no Court alleged to be held; For there was none held on the 9th, and Judgment was reverſed, Niſi. Sty. 122. Trin. 24 Car. Pimley v. Robinſon.

6. Theſe Errors in the Record were aſſigned to reverſe a Judgment given in the Court of York in an Action of *Debt*. 1ſt, That *the Sum of the Judgment is in Figures.* 2dly, The *Sum recovered is in Figures*; And for theſe Errors the Judgment was reverſed Niſi &c. Sty. 187. Hill. 1649. Jenkinſon v. Porter.

7. Error of a *Judgment in* an Action of *Debt* on a Bond in Rippon Court, *becauſe it was entered on the Record, Aſſid' damna ultra miſas & cuſtagia ad 10 l.* and does *not ſay, occaſione detentionis debiti, or Occaſione prædicta*, and the *Judgment was good recuperet damna prædicta* and did *not ſay per Juratores aſſeſſa*, but the Judgment was affirmed. Vent. 5. Hill. 20 & 21 Car. 2. B. R. Baines v. Biggerſdale.

8. In *Aſſumpſit* in an Inferior Court the *Conſideration was that the Plaintiff ſhould ſolicite a Cauſe in Chancery for him*; The Judgment was reverſed for *want of Juriſdiction*, and becauſe it was *Defendens in Miſericordia & capiatur.* Vent. 28. Paſch. 21 Car. 2. B. R. Berkly v. Paine.

(K. c) *What* Things ſhall be Error *in* the *awarding of Proceſs.*

See Actions (U) pl. 30. S. C. but not S. P.

1. IN an Action in an Inferior Court after Iſſue joined a Continuance is made ad proximam Curiam tenendam ſuch a Day &c. at which Day venerunt Partes prædictæ &c. ſuper quo a Venire Facias is awarded for a Jury &c. and it is not ſaid it was awarded by the Court, or ad eandem Curiam; and though a Jury is returned thereupon, and a Verdict and a Judgment upon this; yet this is erroneous; for it may be that this was awarded out of Court, and then it is a void Trial. Trin. 1649. between *Vigerous and Drake* adjudged in a Writ of Error upon a Judgment in Exeter; Intratur 16 Car. B. R. Rotulo 690. and ſo after adjudged ſeveral Times.

2. But if the Record be after Iſſue joined ſuper quo ad iſtam eandem Curiam, a Venire Facias &c. is awarded, it is good. Trin. 1649. between *Peard and Harris* in a Writ of Error upon a Judgment in Barneſtaple adjudged. Intratur Mich. 24 Car. B. R. Rot. 511.

3. K. had *Judgment in Debt againſt O. who died*; a *Sci. Fa. iſſued into the County of S.* The Sheriff returned R. Tertenant. An Elegit was entered in the Roll thus, viz. *Elegit ſibi liberari Medietatem omnium Terrarum & Tenementorum in Com' S. tenend' &c. quouſque*, but *left out quæ fuerunt prædicti O.* And for this Judgment was reverſed Quoad adjudicationem Executionis upon the Elegit, and yet the Writ of Elegit itſelf and the Return were well in that Point; But where the Roll is faulty the Writ will not help. Hob. 90. pl. 122. Mich. 5 Jac. Keere v. Owen.

(L. c) *In Proceſs againſt Jurors, and* the *Entry of ſuch* Proceſs.

1. IN an Inferior Court if the Parties are at Iſſue, and thereupon Proceſs is awarded to the Serjeant of the Mace (not naming his Name) and miniſter Curiæ præd' quod ſecundum Conſuetudinem Venire faciat a Jury &c. and at the Day of the Return, ad quem Diem Præfatus Serviens ad clavam and Miniſter Curiæ prædictæ (without naming his Name) miſit præceptum ſuum præd' ei in forma præd' directum in omnibus Executum & Returnatum &c. this is a good Return of the Jury and award of Proceſs; for the naming of him is not neceſſary, for it appears that the Officer did it. Trin. 14 Car. between *Bellamy and Davis* adjudged in a Writ of Error upon a Judgment in Exeter, this being aſſigned for Error. Intratur Hill. 12 Car.

2. In an Aſſiſe upon an Iſſue of Nul tort &c. if it be entered quod quidam Juratores venerunt & quidam non venerunt upon the Habeas Corpora returned, ideo conſideratum fuit quod Vicecomes diſtringat Juratores, & apponat decem Tales, though it is not entered quot Juratores non venerunt, nec quot Juratores venerunt nec quod Aſſiſa remanet capienda, becauſe a full Jury did not appear; yet it is not erroneous. Mich. 38, 39 Eliz. B. R. between *Blodwell and Edwards* per Curiam. Cro. E. 509. pl. 34 S. C. reſolved to be Error.

3. If in an Aſſiſe it be entered Quod quidam Juratores habuerunt viſum & quidam non, ideo Aſſiſa remanet capienda this is not good, but erroneous, without ſhewing Quot habuerunt viſum & quot non, for that it may be Sir had the View, which had been ſufficient. * 15 H. 7. 16. b. † 1 R. 3. Mich. 38, 39 Eliz. B. R. in *Bloadwell's Caſe* agreed. * Br. Error, pl. 85. cites S. C. and if 10 have had the View and 2 have not, yet thoſe 2 are Quidam, and yet not Cauſe ſufficient to make the Aſſiſe remain; But if it had been Quod remanſit Aſſiſa pro Defectu Viſus it had been good, and alſo it is uncertain and repugnant, Quod Juratores comparuerunt & quidam non venerunt, and therefore Judgment was reverſed. ——— Br. Aſſiſe, pl. 85. cites S. C.

† Fitzh. Error, pl. 48. cites Mich. 1 R. 3. 4

4. In an Action in an Inferior Court, if the Parties are at Iſſue, and thereupon it is entered upon the Record Ideo venit inde Jurata &c. and a Jury is thereupon returned, and it is not expreſſed out of what Place the Jury ſhall come; this is (*) erroneous. Mich. 9 Car. between *Brodox and Coppinger* adjudged in a Writ of Error upon a Judgment in the new Court of Marſhalſea; and the Judgment reverſed accordingly; for this is a new Court by Letters Patent, and hath a limited Juriſdiction; and therefore though this is the Courſe of this Court in Banco, yet it is not good in ſuch inferior new Courts, where the Court hath Juriſdiction for 12 Miles from Whitehall. * Fol. 800.

5. If an Inqueſt of Office be awarded in this Manner, ſcilicet, Venire Facias 12 &c. in an Inferior Court, as in Norwich when a Verdict is for a Plaintiff, if a Venire Facias 12 &c. be awarded by the Cuſtom to inquire de vero debito, this is good. Hill. 11 Car. B. R. between *Watſon and Smith* adjudged in a Writ of Error, Trin. 11 Car. B. R. between *Slater and Lewis* adjudged in a Writ of Error out of Exeter.

6. In

6. In an Action in an Inferior Court, if the Parties are at Iſſue, and thereupon it is entered upon the Record Ideo præceptum fuit J. S. Servienti ad clavam quod Venire faciat hic ad proximam Curiam ſuch a Day tenendam &c. duodecim &c. per quos &c. & qui nec &c. ad recognoſcendum &c. quia tam &c. and that at the Day the Serjeant returned his Precept ſo to him directed, una cum quodam Panello de nominibus Juratorum in omnibus ſervitum & executum prout ei præceptum fuit, and thereupon the Jury appears and tries the Iſſue for the Plaintiff; this is not good, becauſe it does appear of what Place the Venue came; for though it be the Courſe of the Common Pleas and King's Bench, that have a General Juriſdiction to enter it with &c. yet Inferior Courts that are limited ought not ſo to do; for no Writ of Diminution or Certiorari lies to ſuch Inferior Courts to certify the Venire Facias, and therefore if it be not ſhewed in the Record from what Place it was awarded, it may be miſawarded; and yet there ſhall not be any Means to reverſe it, becauſe it is erroneous. Mich. 9 Car. B. R. between *Cawdwell and Nun* per Curiam, in a Writ of Error upon a Judgment in Norwich. Intratur Tr. 9 Car. Pal. 10 Car. B. R. between *Watſon and Cawſon* adjudged upon a Writ of Error upon a Judgment in Norwich, in two Actions. Intratur Trin. 9 Car. Rot 862. and the Judgment reverſed accordingly. Paſch. 11 Car. B. R. between *Richards and Hance* adjudged. Intratur Trin. 10 Car. Rot. 720.

7. If upon an Iſſue in a Borough Court a Venire Facias is awarded de Burgo, and does not ſay infra Juriſdictionem Curiæ, yet it is good, for it ſhall be intended all one. Mich. 9 Car. B. R. between *Noble and Tonny* adjudged upon a Writ of Error upon a Judgment in Reading. Intratur Trin. 9 Car. Rot. 1377.

*Cro. C. 323. pl. 11. Sankill v. Stocker, S.C. three Juſtices conceived, that after the Trial had it is but a Miſreturn, which is aided by the Statute 18 Eliz and upon Conference with the Juſtices of both Serjeant's-Inns, the greater Part conceived that it was aided by Stat. 18 Eliz. and 21 Jac. and though it was by two of the Tales it is not material to the Parties, but only to the Jurors who loſe their Iſſues; and Judgment accordingly. —— Jo. 245. pl. 4. S.C. and Judgment accordingly.

8. Upon a Venire Facias to try an Iſſue, if the Sheriff returns but Twenty-one, Sixteen of which appear at the Niſi Prius, and a Tales is there awarded de Circumſtantibus, and the Iſſue tried, this is erroneous, for that he hath not returned Twenty-four, for though the Venire Facias is per duodecim Legales &c. yet the Order hath always been to return Twenty-four, and inaſmuch as the Venire Facias is bad, the Tales is alſo. Mich. 7 Jac. B. between *Evans and Filpot.* Paſch. 7 Car. B. R. between * *Sainthil and Stocker* adjudged in a Writ of Error, and Judgment reverſed accordingly. 8 Car. between *Taylor and Nanly* adjudged in B. R. Pal. 11 Car. B. R. between *Hurſon and Hame* adjudged, this being moved in arreſt of Judgment.

9. If upon the Venire Facias twenty-four Jurors are returned, and upon the Habeas Corpora the Chriſtian Name of one of the twenty-four is miſtaken, ſo that he is by Intendment another Man, but he does not appear, and a Tales is granted and a Verdict; this is helped by the Statute. Paſch. 11 Car. B. R. between *Creed and Lucking* adjudged per Curiam. Intratur Trin. 10 Car. Rot. 1178.

10. So if an Iſſue be joined between a Denizen and Alien, and a Venire (*) Facias is awarded, and the Sheriff returns twelve Denizens and twelve Aliens; and but four Aliens appear, and they four with eight Denizens are ſworn of the Inqueſt, who try the Iſſue; this

* Fol. 801. See 2 Hawk. Pl. C. 419.

is

is erroneous; for there ought to be six Denizens and six Aliens, which ought to try the Issue; otherwise the Trial ought to remain for Want of Jurors. Pasch. 9 Car. B. R. between *Aileway and Shillinge*. This moved in arrest of Judgment, and after a new Venire Facias granted for this Cause per Curiam. cap. 43. S. 34. &c. to the End of that Chapter. ——See Tit. Trial (P c) pl. 2. S.C.

11. If an Issue be joined in Durham upon a Suit there, and upon this Process is awarded Ideo præceptum est &c. duodecim &c. per quos &c. qui nec &c. this is good, without shewing of what Place the Venue comes, for this is a County Palatine, and they have a General Jurisdiction within the County, as the Court of King's Bench hath here; and therefore it is good as in Banco. Mich. 10 Car. B. R. between *Rowlandson and Simpson* adjudged in a Writ of Error upon a Judgment before the Justices itinerant in Durham, and the Judgment affirmed accordingly. Intratur Hill. 9 Car. Rot. 201. Mich. 10 Car. B. R. between *Miller and Manwaring* per Curiam accordingly in a Writ of Error upon a Judg. ment in Chester. Intratur Trin. 10 Car. Rot. 321. Pasch. 13 Car. B. R. adjudged in a Writ of Error between *Rippon and Rampton*.

12. If an Issue be joined in an Inferior Court, scilicet, a Court of a Borough, and thereupon it is entered Ideo præceptum quod Venire faciat 12 &c. per quos &c. qui nec &c. and that the Bailiff returned Præceptum debito Modo servitum & executum cum Panello 12 Juratorum de vicineto Burgi & Villæ prædictorum eid' annexo; whether it be good Mich. 10 Car. B. R. between *Oakes and Chaplyn* dubitatur, in a Writ of Error upon a Judgment in Ipswich. Intratur Trin. 10 Car. Rot. 775. But Pasch. 11. the Judgment was reversed for this Cause.

13. *Assise against Tenant for Life of Land in three Vills, of which two were Franchises*, and the *Sheriff sent to the Bailiff of the Franchise to make all the Array, who did it accordingly, where the Sheriff ought to have made the Panell as to the third Vill* which was guildable, and *the Assise passed for the Plaintiff without Challenge*, by which the Plaintiff recovered, and he in *Reversion, who could not have Challenge to the Array, brought Writ of Error*, and assigned this Matter for Error, and because *it was not challenged, and is Matter which is not apparent*, therefore the Judgment was affirmed. Br. Error, pl. 34. cites 3 H. 4. 6. For per Freilby, if the Sheriff had returned none of the Hundred, and the Assise passed without Exception, Error does not lie Br.

Ibid. —— And if the Sheriff had been Brother of the Plaintiff, or had impannelled the Brother of the Plaintiff, and the Assise passed without Challenge, Error lies not of it; Per Rede. Nota, and it seems by the Case that the Sheriff ought to have made Part, and the Bailiff the rest, and not one the whole. Br. Ibid. —— Br. Pannel, pl. 1. cites S.C.

14. It was assigned for Error, because *at the Day of Assise a Panel was returned, and the Assise did not appear, and upon the Panel no Continuance was made, nor any Inrollment*, and the Court held this no Discontinuance, though nothing was indorsed upon the Panel. Br. Error, pl. 52. cites 11 H. 4. 67. 68.

15. *After a Habeas Corpora with Nisi Prius* awarded, a *Supersedeas was awarded to the Sheriff to stay the Return of it*; but yet *he returned the Writ* of Habeas Corpora at the Assises, *and thereupon the Trial was had*, and Judgment accordingly. It was held to be Error, and Judgment reversed. Cro. J. 43. Mich. 2 Jac. B. R. King's Case. Yelv 57. King v. Andrews, S. C. adjudged.

(M. c) In *Verdicts*.

1. IF a Judgment be given by Nihil dicit in an Inferior Court, and the Record is returned that the Writ of Inquiry of Damages was per Sacramentum Proborum & legalium, and not hominum; this is erroneous. Hill. 11 Car. R. R. adjudged in a Writ of Error, and reverſed accordingly. Intratur Trin. 11 Car. Rot. 1153.

2. If in a Writ of Error it be certified that the Jury who tried the Iſſue dixerunt pro querente &c. this is erroneous, for that it ought to be certified in the Preſent Tenſe, as it was at the Time of the Verdict given; for when it is dixerunt, it is not known when they gave their Verdict, and it may be a long Time before the Iſſue. It was ſo adjudged in B. R. in a Writ of Error upon a Judgment in *Barnſtaple*.

3. So in a Writ of Error if the Record be certified, that the Jury aſſiderunt damna to ſo much &c. this is not good. Trin. 8 Car. B. R. between *Booth and Rowe* adjudged in a Writ of Error, and the Judgment given in an Inferior Court reverſed for this Cauſe.

4. If in Treſpaſs the Place where &c. be aſſigned to be Parcel cujusdum peciæ terræ & cujuſdam foſſati, Anglice Ditch, perninentis cuidam Meſſuagio vocat' Falſtoff, the Place &c. and the Defendant pleads as to all the Treſpaſs in Loco in quo &c. præter in prædicta pecia foſſati prædicti fieri ſuppoſit' Not Guilty, and de hoc ponit ſe ſuper patriam, & querens ſimiliter, & quoad aliquam Tranſgreſſionem in prædicta pecia foſſati pleads a ſpecial Juſtification, upon which the Plaintiff takes Iſſue alſo, and the Jury find the Iſſue joined upon the Juſtification for the Plaintiff, and do not inquire of the other Iſſue, and after Judgment is given for the Plaintiff, this is erroneous; for theſe were two Iſſues for Parcel of the Place where (*) &c. might be Parcel of the Piece of Land, and other Parcel of the Ditch, and not Parcel of the Piece of Land; and the Jury ought to inquire of all the Iſſues joined, otherwiſe they do not well perform the Command of the Writ of Venire Facias. Trin. 9 Car. B. R. between *Morgan and Stint* adjudged in Camera Scaccarii in a Writ of Error, and the firſt Judgment reverſed accordingly; and there the Caſe was alſo, that there were three Iſſues, ſcilicet, the firſt, Not Guilty for taking of Bricks &c. and the Second, Not Guilty as before is alledged, and the Third, upon the Juſtification, and the Jury ſay, as to the firſt Iſſue Inter partes prædictas in forma prædicta junctum, for the Plaintiff, & quoad ſecundum exitum ſuperius in forma prædicta junctum for the Plaintiff alſo, where the Iſſue upon the Juſtification was the third Iſſue; and for this alſo held per Curiam not good.

* Fol. 802.

5. In an Action upon the Caſe againſt an Adminiſtrator upon his own Promiſe to pay 50l. due by the Inteſtate, and Non aſſumpſit pleaded; if the Jury find that he promiſed to pay 30l. Part thereof, and find nothing concerning the Reſt, and Judgment is thereupon given, this is erroneous. Trin. 14 Car. B. R. between *Kitchinman and the Biſhop of Oſſory* in Hibernia, in a Writ of Error upon a Judgment in Ireland; and this reverſed for this Cauſe among others. Intratur Hill. 13 Car. Rot. 1141.

See Trial (K. g. 2) pl. 27. S. C.

6. In

6. In Debt againſt an Adminiſtrator upon a Promiſe by the Inteſtate for 300 l. if the Defendant pleads four Judgments againſt him upon Obligations, one of 200 l. to A. the Second of 216 l. to B. the Third of 600 l. to C. the Fourth of 100 l. to D. and that he hath not Aſſets ultra 5 l. which is liable to the ſaid Judgments, and that he hath fully adminiſtred præter the ſaid 5 l. to which the Plaintiff replies as to the firſt Judgment, that the Defendant had paid to A. 100 l. of his Judgment, and that A. would accept 20 l. more in Satisfaction of his Judgment, but that it is kept in Force by Fraud to deceive him of his Debt; and ſo he pleads alſo as to the ſecond and third Judgments, and as to the fourth Judgment he acknowledges it is in Force not ſatisfied; but he farther ſays, That all the Money to the ſaid A. B. and C. paid, and by the Agreements aforeſaid to be paid with the 100 l. recovered by the ſaid D. amounted to 691 l. 5 s. and that the Defendant hath Aſſets ultra this, & hoc petit quod inquiratur per patriam, & defendens ſimiliter; and the Defendant rejoins and traverſes the Fraud alledged by the Plaintiff, upon which there are three ſeveral Iſſues joined, and the Jury find the three Iſſues joined upon the Fraud for the Plaintiff, and aſſeſs Damages to 310 l. and 40 s. Coſts, and do not inquire of the other Iſſue, ſcilicet, Whether the Defendant hath Aſſets ultra the 691 l. 5 s. which is acknowledged by the Plaintiff, ought to be paid without Fraud upon the Judgments; but Judgment is given upon this Verdict for the Plaintiff, to recover the Damages and Coſts de bonis teſtatoris ſi, &c. and ſi non, for the Coſts de bonis propriis; this Judgment is erroneous, inaſmuch as the Jury did not inquire of the ſaid Iſſue, nor find any Aſſets in the Hands of the Defendant. Trin. 9 Car. B. R. Intratur Hill. 7 Car. Rot. 571. between *Croyden and Otwaie* adjudged, and the Judgment given in Banco reverſed for this Cauſe.

7. In a Quare Impedit againſt the Patron and Incumbent, if an Iſſue be joined upon the Plea of the Patron, and another Iſſue upon the Plea of the Incumbent, and the Jury find the Iſſue againſt the Patron for the Plaintiff, and find nothing of the other Iſſue, and notwithſtanding Judgment is given for the Plaintiff, this is erroneous. Paſch. 11 Car. B. R. between *Burnet and Bleverhaſſet* adjudged in a Writ of Error, and the Judgment given in Banco reverſed accordingly. Intratur 9 Car. Rot. 977.

8. In a Writ of Dower, if upon Ne unque ſeiſie que Dower pleaded, the Jury find for the Plaintiff, and give Damages to the Plaintiff, and do not find that the Husband died ſeiſed, and the Court give Judgment accordingly for the (*) Damage, this is erroneous. Hill. 11 Car. B. R. between *Hodgſon and Cromer* adjudged in two Writs of Error upon the Judgments in Lynn, and the Judgments there given reverſed accordingly. Intratur Hill. 11 Car.

* Fol. 803.

9. But Nota, that ſuch Judgment for the Damages only was reverſed, becauſe it is given by the Force of the Statute; but the Judgment to recover her Dower of the Land, being at Common Law, ſtood not reverſed per Curiam, they being ſeveral and diſtinct Judgments; Between *Tye and Atkins*. Trin. 13 Car. B. R. between *Tye and Atkins*, Intratur Hill. 12 Car. Rot. 759. But note, The Judgment there was not given upon a Verdict, but Judgment given for the Land by Default, and a Writ awarded for the Damages, but not averred that the Baron died ſeiſed or found by the Jury; but Juſtice Jones after ſaid to me, that this was not to be taken for a Precedent, becauſe it was given upon the Letter of the King.

Sty. 290. Trin. 1651. S. P. cited by Roll Ch. J. to have been adjudged accordingly. — All. 75. S. C. cited by Roll as adjudged. — See (E. b.) pl. 7. S. C.

10. Waſte

10. Waſte againſt J. N *for Waſte in a Hall Price* 10 *s. and in a Kitchin Price* 12 *s. and in a Parlour Price* 14 *s.* and the Jury upon no Waſte pleaded *found Waſte in all to the Damage of* 20 *s. and did not ſever the Damages*, and yet the *Plaintiff recovered per Judicium*; Contra it ſeems in Detinue; For there the Judgment is to recover the thing if &c. and if not ſo much Damages &c. Br. Waſte, pl. 1. cites 18 H. 8. 1.

Ibid. 94. pl. 137. S. C. in totidem Verbis.

11. In *Treſpaſs* brought by Roſſe *for breaking of his Cloſe, and beating of his Servant, and carrying away of his Goods*; Upon Not Guilty pleaded, the *Jury found* this ſpecial Matter, viz. *That Sir Thomas Bromley*, Chancellor of England, *was ſeiſed of the Land where &c. and leaſed the ſame to the Plaintiff and one A. which A. aſſigned his Moiety to Cavendiſh, by whoſe Commandment the Defendant entred.* It was moved againſt the Verdict, that the *ſame did not extend to* all the Points in the Declaration, but only to the Breaking of the Cloſe, without Enquiry of *the Battery* &c. And for that Cauſe it was clearly holden by the Court, that the Verdict was void; And a Venire Facias de novo was awarded. 3 Le. 83. pl. 123. Mich. 26 Eliz. B. R. Roſſe's Caſe.

12. *Treſpaſs of Aſſault, Battery and Wounding*; The Defendant *as to the Wounding pleads Not Guilty*, and *Quoad Reſiduum juſtified by Warrant to Arreſt*, the *Iſſue was De ſon tort Demeſne*, and as to that the Jury *found that he aſſaulted, beat and wounded him De ſon tort Demeſne, but finds not any Thing upon the Not Guilty by itſelf*, but included it in the former Verdict. Reſolved notwithſtanding the Verdict was good. Cro. E. 854. pl. 16. Trin. 43 & 44 Eliz. B. R. Burper v. Baker.

13. Debt on Bond and Verdict for the Plaintiff; It was moved in Arreſt of Judgment, that the Verdict was ill, becauſe it was *Jur' dicunt pro Quer' without ſaying Super Sacramentum.* Powel J. ſaid this is not aided by the Statute of Jeofails, and Judgment was reverſed (wherefore it ſeems it was in a Writ of Error Quære.) Comb. 49. Paſch. 3 Jac. 2. B. R. Hardy v. Upwait.

14. A Verdict ought to be full and direct, and not to find a Matter prout patet by ſuch a Deed or Exemplification. 13 Rep. 72. Trin. 7 Jac. Weſtcott's Caſe.

15. *Dower of* 300 *Acres of Land*, 200 Acres of Paſture, and 100 Acres of Meadow. The Tenant pleaded Non-tenure. The Jury found him Tenant as to 320 Acres of Land, and as to the Reſt that he was not Tenant; And the Judgment that the Demandant ſhould recover Dower out of the 320 Acres. Error was aſſigned that the *Verdict and Judgment were for more Acres of Land than were demanded.* Per Curiam, Land in pleading ſignifies Arable only, and ſince they are diſtinguiſhed in the Count the Verdict and Judgment muſt be reverſed in the whole. And upon its being moved again they ſaid that the *Demandant might have taken Judgment for the* 300 *Acres only, nullo reſpectu habito to the Reſt, and releaſed all the Damages.* Vent. 260. 262. Trin. and Mich. 26 Car. 2. B. R. Silly v. Silly.

(N. c) In *Proceſs againſt Jurors*, *and* the *Entry* of ſuch Proceſs.

1. UPON an Iſſue joined in an Inferior Court, if a Venire Facias be awarded to the Officer to return 24 Jurors, this is not good. Mich. 14 Car. B. R. between *De Hunt and Steere* per Curiam.

2. But if the Venire Facias be to return twelve, and in the ſame Precept it is commanded Habere Corpora 24 to try the Iſſue, and thereupon twenty-four are returned, and the Iſſue tried by twelve of them, this is good; for the Command Habere Corpora 24 is but a Direction according to Law, for he ought to have returned twenty-four upon the Venire Facias. Mich. 17 Car. B. R. between *Ernely and Sage* per Curiam adjudged in a Writ of Error upon a Judgment in Bidiford; and the Judgment affirmed. Intratur Mich. 13 Car. Rot. 531.

3. In a Writ of Error upon a Judgment in an Inferior Court, if the Record be certified that an Iſſue was joined, and that 12 &c. de Vicineto de Burgo &c. and all duly done; but the Name of the Jurors are not returned, though the Uſe be to name them, yet it is well enough. Mich. 14 Car. B. R. between *Tingholme and Skinner* per Curiam adjudged in a Writ of Error upon ſuch Judgment in the Town of Boſton in the County of Lincoln; and the Judgment affirmed accordingly. Intratur Trin. 14 Car. Rot. 520.

4. If a Venire Facias awarded in an Inferior Court be to the Officer of the Court quod Venire faciat 12 &c. per quos rei veritas melius Scire, not Scire poterit, this is erroneous; though it was ſaid the Precedents were both Ways. M. 21 Car. B. B. between *Ludlow and Edgworth* adjudged, and a Judgment in Canterbury reverſed accordingly. Vide the Statute of 35 H. 8. cap. by which is ordained the Form of Writs of Venire Facias in the Courts of Weſtminſter, and there the Writ is (Sciri.) S. C. cited Raym. 417.

5. If a Venire Facias in an Inferior Court held by Charter, be quorum quilibet habeat 4 l. Terrarum Tenementorum vel Reddituum, this is erroneous; for the Statute of 27 Eliz. cap. 6. extends only to the Courts at Weſtminſter, and not to Inferior Courts; and therefore the Law in Inferior Courts is as it was before the Statute, ſcilicet 40 s. and it may be that there are not ſufficient Jurors within the Juriſdiction that have 4 l. Terræ, and then there will be a Failure of Juſtice, and they have not Power in ſuch Inferior Courts to alter the Form of ſuch Writs. Mich. 21 Car. B. R. between *Bond and Cartwright* adjudged, and a Judgment in the Marſhalſea reverſed for this Cauſe.

6. At a Court held in the City of York, before A. and B. Sheriffs of the (*) City of York, if the Plaintiff declares of a Treſpaſs for taking certain Goods apud civitatem Ebor' ac infra Juriſdictionem Curiæ, and upon Not Guilty pleaded, a Venire Facias is awarded to the Serjeants of the Mace in the City, and Miniſters of the Court to return 12 Probos &c. de Balliva dictorum Vicecomitum, and they return a Jury accordingly; this is not a good Award of the Venire, for it may be the Bailiwick of the Sheriffs extends beyond the City, as is uſual in ſeveral Cities; and alſo this is not the Form of Returns in the

* Fol 804.

Courts at Weſtminſter, and for that ſuch Inferior Courts ſhall not be permitted to award a Venire Facias in other Manner than our Courts here, though it be in Equivalent Terms, but more ſpecially not in Terms that are ambiguous and doubtful as to the Extent of them, and the uſe to award a Venire is, De vicineto civitatis, or De civitate, and not De Balliva. Mich. 22 Car. B. R. in a Writ of Error upon a Judgment given at York adjudged, and the firſt Judgment reverſed for this Error. Intratur Paſch. 22 Car. Rot. 251.

7. In an Action brought in an Inferior Court in the Town of S. and the Stile of the Court is Curia de S &c. and the Treſpaſs is ſuppoſed to be done apud S. in Warda de D. infra Juriſdictionem Curiæ, and upon Not Guilty pleaded, the Venire Facias is awarded de Warda de D. prædicta, without ſaying infra Juriſdictionem Curiæ, as was before; for all the Ward is laid to be within the Vill, and this is the Court of the Vill, which comprehends the Ward, and the Allegation before, that it was within the Juriſdiction of the Court, is not made to limit the Ward, or to imply that any Part of the Ward is out of the Juriſdiction, but is a cumulative Averment for the more Certainty, being mentioned, before to be within the Vill. Trin. 1649. between *Shephard and Parry* adjudged in a Writ of Error upon a Judgment in Ludlow. Intratur Vill. 24 Car. Rot. 217.

8. In an Indictment for ſcandalous Words againſt the Queen Mother of France &c. upon Not Guilty pleaded, a Venire Facias was awarded to the Sheriff at the Aſſiſes in Devon to return a Jury, upon which the Record is, ſuper hoc ſuch Jurors by Name, twelve Jurors per J. P. Vicecomitem Comitatus prædicti Impanellati electi triati & jurati dicunt per Sacramentum ſuum quod Defendens eſt Culpabilis &c. upon which Judgment is given againſt the Defendant; this is erroneous, becauſe as this is entered, the Sheriff elected, tried and ſwore the Jurors, which he could not do. Tr. 23 Car. B. R. *Plaiſes's Caſe* adjudged in a Writ of Error, and the Judgment given againſt him at the Aſſiſes at Exeter reverſed for this Error.

Sty. 170. Brooke v. Brooke is not the S P tho' by the Names, the Year, the Term, and Number of the Roll, it ſeems to be the S. C.

9. In an Action of Aſſault and Battery againſt two, if Judgment be given againſt one by Nihil dicit, and the other pleads to Iſſue, and thereupon there is an Award of a Venire Facias ad triandum exitum &c. and the Award is not tam triandum exitum quam ad Inquirendum de Damnis &c. as the Uſe is, and the Jury find the Iſſue for the Plaintiff, and aſſeſs Damages; this is not erroneous; for though it is good Policy to make the Award tam ad triandum exitum quam ad inquirendum of the Damages, becauſe if the Iſſue be found againſt the Plaintiff, the Jury cannot inquire of the Damages againſt the other without ſuch Award made; yet if the Iſſue be found for the Plaintiff then the Damages that the Jury give bind the other Defendant, and this as to him is not an Inqueſt of Office, but a Verdict upon which he may have an Attaint, and therefore the omitting of the Award, in this Caſe, the Iſſue being found for the Plaintiff, is not now material, and ſo not erroneous. Mich. 1649. between *Brooks and Brooks* adjudged, this being ſhewed for Error in a Writ of Error upon a Judgment in Banco. Intratur Mich. 24 Car. Rot. 287.

10. A Writ of Error was brought to reverſe a *Judgment* given in the Court *at Exeter*, in an Action of Debt for Rent. The Errors aſſigned were, 1ſt, That the *Names of the Jurors were not returned upon the Panel.* To this Roll Ch. J. anſwered, It is not neceſſary, though it was the old Way to do ſo. Sty. 154. Mich. 24 Car. Anon.

(O. c) *What Judgment* ſhall be given in this Writ.

* Fol. 805

1. THE Court where the Writ of Error is, ought to give the ſame Judgment as the Juſtices of the Inferior Courts ought if they had not erred, as if the firſt Writ be abated by Judgment, if it be reverſed in this Writ of Error, the Judgment ſhall be, that the Defendant ſhall anſwer to it there where the Writ of Error is, for ſo the Inferior Court ought to have done; So if Judgment be upon a bad Writ, and Error brought, and the Writ abated, all ſhall be reverſed; So where the Demandant is barred by Judgment, if in Error it be adjudged no Bar, Judgment ſhall be, that the Demandant ſhall recover Seiſin of the Land, for ſo the Inferior Court ought to have done. * 38 H. 6. 31. † 1 H. 7. 12. ‡ 9 H. 6. 38. b. || 21 E. 4. 82. Contra 9 H. 9 H. 6. 38. b. E. 4 81. S. C.

* Br. Error, pl. 105. cites 38 H. 6. 30. S. C. —— Fitzh. Error, pl. 38. cites S. C. † Br. Error, pl. 133. cites S C. ‡ Br. Error, pl. 7. cites S. C. || Br. Juriſdiction, pl. 78. cites 21

2. If Judgment be given upon a bad Declaration in Banco, and for this reverſed in Banco Regis, the Defendant ſhall anſwer to the Declaration, though it be a Formedon. * 21 E. 4. 82. 11 H. 4. 49.

* Br Juriſdiction, pl. 78. cites 21 E. 4. 81. S. C.

3. In an Aſſiſe, if a good Plea in Bar be pleaded, and notwithſtanding the Aſſiſe is awarded at Large, where the Plaintiff ought to be put to anſwer to the Bar, and the Aſſiſe found for the Demandant, and adjudged, if it be reverſed in Banco Regis for the Cauſe aforeſaid, the Tenant ſhall be put in the ſame State as he was before, and the Demandant ſhall be put to ſue on there if he will, or have a new Aſſiſe at his Pleaſure. 50 E. 3. 19.

Br. Error, pl. 30. cites 50 E. 3. 18. S. C.

4. So if the Tenant in the firſt Action recovers in a Writ of Error, he ſhall be reſtored by Judgment to the Land. * 18 E. 4. 11. And to the Meſne Profits, † 18 E. 4. 11. ‡ 4 H. 7. 11. || 9 H. 4. 6.

* Br. Diſceit, pl. 30. cites S. C. † Br. Diſceit, pl. 30. for the meſne

cites S. C. ‡ Br. Relation, pl 44 cites 4 H. 7 10 he ſhall not have Action for the meſne Profits; Per Keble. —— Br. Treſpaſs, pl. 425. cites S. C. but S. P. does not appear. || Br. Rediſſeiſin, pl. 1. cites 9 H. 4, 5. S. C.

5. If an Outlawry be reverſed in a Writ of Error upon an Indictment for Felony he ſhall be reſtored to the Common Law, and all that he hath loſt, for this Cauſe. 11 H. 4. 53.

Br. Reſtitution, pl. 28. cites S. C.

6. If a Man reverſes a Judgment in a Writ of Annuity, he ſhall be reſtored to all that he hath paid after the Judgment alſo. 11 H. 4. 48.

7. So he ſhall be reſtored to all that he hath paid by Force of a Scire Facias upon a Judgment. 11 H. 4. 48.

8. In an Action upon the Caſe for Words, if a Verdict be found for the Plaintiff in an Inferior Court, and after Judgment is given againſt the Plaintiff upon the Declaration Quod nil capiat per Billam, and after the Plaintiff brings a Writ of Error, where the Judgment is reverſed for an Error in the Entry of the Judgment, ſcilicet, for that it was Ideo conceſſum eſt, for the Word conſideratum eſt quod querens nil capiat per Billam, the Court ought to give Judgment either againſt the Plaintiff or againſt the Defendant, if upon the Declaration

tion and Proceeding the Inferior Court ought to have given Judgment againſt him, ſcilicet, if the Declaration be not good, the Court ought to give Judgment againſt the Plaintiff. Hill. 11 Car. B. R. between *Delamore and Heskins* adjudged in a Writ of Error upon a Judgment in Bath, and Judgment given againſt the Plaintiff accordingly, becauſe the Declaration was not good. Intratur Trin. 11 Car. Rot. 900.

9. If the Error be Error in Fact and not in Record, as for Infancy, the Judgment ſhall be Quod pro Errore prædicto Judicium prædictum revocetur, without ſaying & aliis in Recordo. D. 1. 2 M. 104. 10.

10. If a Judgment be affirmed in Banco Regis upon a Writ of Error, the Judgment ſhall be Quod Judicium redditum remanebit Stabile in perpetuum. 21 E. 4. 44.

(P. c) Equity.

How far Chancery will relieve after Error brought.

1. A Petition was to the Maſter of the Rolls for Leave *to file an Original after Error brought to reverſe the Judgment*, but upon ſpeaking with an ancient Officer of the Court he denied the doing it, and the rather in the Principal Caſe, becauſe the Action being on a Policy of Inſurance, the Plaintiff might *bring a New Action if this Judgment ſhould be reverſed.* Wms's Rep. 411. Mich. 1717. Anon.

2. *But* in a Qua. Imp. or in an Action againſt an Hundred for a Robbery *where the Suit muſt be commenced within a limited Time*, or if the Time had been ſo far elapſed, that the Statute of Limitations had been a Bar if the Judgment ſhould be reverſed, it would be otherwiſe; Per the Maſter of the Rolls. Wms's. Rep. 411, 412. Hill. 1717.

3. *And* in the Caſe of a *Judgment by Confeſſion*, As in ſuch Caſe the Defendant conſents that there ſhall be Judgment awarded againſt him, ſo does he likewiſe by Implication conſent to all thoſe Means, without which the Judgment cannot be effectual, and conſequently that an Original ſhall at any Time be filed, eſpecially if ſuch Judgment was *given* as a Security *for* Money or other *valuable Conſideration*; Per the Maſter of the Rolls. Wms's. Rep. 411, 412. Hill. 1717.

4. *Otherwiſe* where Judgment is given *upon Demurrer or by Default &c.* and there is alſo a *Difference* where the Omiſſion proceeds from the *Ignorance*, and where by the *Miſpriſion of* the *Clerk*; For in the former Caſe it is not to be helped; And that ſuch Leave to file an Original ought not to be given without very ſpecial Reaſon as being injurious to the Crown and the Officer; Per the Maſter of the Rolls. Wms's. Rep. 412. Hill. 1717.

5. *But* where the Omiſſion was occaſioned *by the Plaintiff's Attorney being ill and diſordered in his Head*, and a Writ of Error was brought to reverſe the Judgment, and Bail given thereon, the Maſter of the Rolls gave Leave to file the Original paying the Coſts of the Error hitherto, and that the Bail in Error be diſcharged. Wms's. Rep. 412. cites June, 1719.

For more of Error in General, See Abatement, Amendment and Jeofailes, Court, Falſe Judgment (B), Fine, Judgment, Nonſuit, Superſedeas, and other Proper Titles.

Eſcape.

(A) By Sufferance.

Fol. 806.

What is Eſcape.

1. IF a Man in Execution be ſuffered to go at Large for a Time out of the County, and to return, this is an Eſcape. Com. Platt's Caſe 36. b.—Co. 3. Boyton 44.——D. 13 El. 297. 24.

2. So if he be ſuffered to go at Large for a Time to any Place within the County, yet this is an Eſcape. Com. Platt's Caſe 36. b.—Co. 3. Boyton 44. D. 13 El. 297. 24.

3. If a Man in Execution be ſuffered to go at Large for a Time out of the County and to return, and this upon Bail or Mainprize, yet this is an Eſcape, for he ought to be kept in arcta Cuſtodia. Com. Platt's Caſe, 36. b. —Co. 3. Boyton 44. —D. 13 El. 297. 24.

4. So it is though he be ſo ſuffered to go at Large to any Place within the ſame County by Baſton for the Cauſe aforeſaid. Com. Platts Caſe 36. b. Co. 3. Boyton 44. D. 13 El. 297. 24. 2 Bulſt. 48. Mich. 11 Jac. B. R. Small's Caſe, and there Coke Ch. J. ſaid, that hereafter they would confine them to be Sub Ferris in Arcta Cuſtodia, and this will be a Means to make them pay their Debts.

5. If the Sheriff ſuffers him to go at Large by Baſton within the ſame Vill where the Priſon is in the County, this is an Eſcape. Hobert's Reports 273. [202] Viſcount of Eſſex Caſe. Letting a Priſoner walk abroad in the Town though the *Keeper* himſelf be *with him*, unleſs there be an *Habeas Corpus* is an Eſcape. Hob. 202. Balden v. Temple.——— And a Habeas Corpus warrants no more than he be brought out of Priſon only for ſuch particular Purpoſe, and for ſo much Time only as in Judgment of Law ſhall be convenient and neceſſary for the Execution of the Writ and no more, which in Privilegiis Odioſis muſt ever be ſtrict. Ibid. —— And a Reſolution agreeable to this was taken at a Meeting of all the Juſtices at the Ld. Keeper's Houſe. Cro. C. 14. Mich. 1 Car. and ibid. 466. Trin. 12 Car. S. P.

6. If *he who is let to Mainpriſe in B. R. eſcapes*, the Marſhal ſhall not be charged with the Eſcape; For he is not in Ward, quod nota, per Cur. Br. Eſcape, pl. 13. cites 9 E. 4. 2. Br. Bill, pl. 13. cites S. C.

7. The Marſhal *ſuffered one in Execution to go at Large*, and an Action being brought the Defendant *juſtified by the Licence of the Chief Juſtice, and Aſſent of the Plaintiff himſelf for ſo many Days*; afterwards the *Defendant returned* to the Priſon, *and was in Execution again*, after which the *Marſhal then ſuffered him to go at Large without any new Agreement*. The Plaintiff had Judgment to recover the Debt and Damages againſt the Marſhall. D. 275. a. pl. 46, 47. Paſch. 10 Eliz. Anon. Ibid. in Marg. it is ſaid that this Caſe is not Law by common Experience.

It is ſaid in Marg. That this Caſe is not Law by common Experience

8. The *Plaintiff at the Inſtance of the Ch. J. agreed to inlarge the Priſoner for certain Days, ſo that it ſhould not be prejudicial to his Execution &c.* The *Priſoner came back at the Day* and render'd himſelf again to Priſon, where he remain'd till the *Goaler permitted him to go at Large* (without any other Conſent of the Plaintiff.) The Plaintiff brought Action of Debt againſt the Marſhal, and had Judgment to recover the Debt and Damages. D. 275. a. pl. 46, 47. Paſch. 10 Eliz. Anon.

9. The *Deputy Marſhal ſuffered one* in Execution *to go into Norfolk for a certain Time with a Keeper*; in an Action of Debt brought againſt him Judgment was given for the Plaintiff. D. 278. b. pl. 5. Mich. 10 & 11 Eliz. Gawdy's Caſe.

D. 296. b. Marg. pl. 24. cites Hill. 19 Eliz. C. B. Moſten's Caſe who brought Debt againſt the Warden of the Fleet for the Eſcape of one Price, who was let out of the Fleet by the Command of the Ld. Treaſurer and Barons of the Exchequer, and adjudg'd that Moſten recover againſt the Warden.

10. A. was in Execution in the Fleet for the Debt of the Queen, and afterwards condemned in B. R. at the Suit of a Subject in a Bill of Debt in Cuſtodia Mareſchalli, (Quære by what Means he was brought there to anſwer) and being brought in by Hab. Corp. cum cauſa was remanded to the Fleet, and committed for the Debt of the Subject alſo. The *Warden, in Obedience to a Command of the Ld. Treaſurer and Chancellor of the Exchequer, ſuffered A. to go into his Country with a Keeper to collect and levy his Money, the ſooner to pay the Queen's Debt.* The Keeper brought back the Priſoner (the Queen's Debt not being ſatisfied) and the Plaintiff brought a Bill of Debt in C. B. againſt the Warden upon this Eſcape. Had this Commitment to the Fleet been good, which it ſeems it was not, being by B. R. which has no Authority to commit to the Fleet, it not being their Priſon, and had the Debt of the Queen been ſatisfied, before which the Execution of the Party cannot commence, the Matter of Excuſe above had not been ſufficient. For the Commandment of the Treaſurer and Chancellor are not ſufficent Warrant to licence one condemned in Execution to go with Keeper or otherwiſe at Large; for the Queen herſelf cannot do it. D. 296. b. 297. a. pl. 24. Mich. 12 & 13 Eliz Anon. ——— And ſo it was held by the Opinion of all the Juſtices of both Benches. Trin. 4 & 5 P. & M. &c. Ibid.

And that it was there rul'd alſo, that if *by Command of the Barons at any Day after the Term the Warden brings any Priſoner before them*, this is an Eſcape. ——— Ibid. 297. a. Marg. cites Trin. * 26 Eliz. Rot. 1343. where ſuch Command by the Barons of the Exchequer to Anſhan, Warden of the Fleet, who ſuffered one Darcet to go with a Servant of the Warden into the Country to ſatisfy the Queen the ſooner, Manſer, [the Plaintiff] in this Plea recovered againſt the Warden upon Demurrer. ——This laſt is the Caſe of **Manſer v. Annesley.** Bendl. 238. to 245. where the Reporter ſays he was of Counſel with the Defendant, and cites the ſame Roll, viz. Rot. 1343. but mentions the Year as the * 16. inſtead of the 26. as above. ——S. C. cited by Hobart Ch. J. Godb. 298. in Sir Edward Coke's Caſe. ——Keilw. 214. a. pl. 26. S. C.

11. The *Not Delivery* of a Priſoner over *by the old Sheriff to the New*, as ſoon as his Authority is determined, it is an Eſcape in the old Sheriff; Per Periam. 2 Le. 54. pl. 76. Trin. 29 Eliz. C. B. in Caſe of Smallman v. Lane.

12. Inaſmuch as Eſcapes are very penal to Sheriffs, Bailiffs of Liberties, and Gaolers, the Judges have always made ſuch a *benign and favourable Conſtruction*, as the Law will permit in favour of Sheriffs &c. and *that every one may bear his own Burthen*, the Juſtices will not adjudge a Thing to be an Eſcape by any ſtrict Conſtruction. 3 Rep. 44. b. Mich. 33 & 34 Eliz. in Boyton's Caſe.

S C. & S P. 3 Rep. 43. a. by the Name of **Boyton's** Caſe, or **Boyton v. Andrews**, and there a

14. J. S. was *taken in Execution by Ca. Sa.* by the Bailiffs of a Liberty in Suffolk, by Warrant of the Sheriff of the County. The *Bailiffs before the Return of the Ca. Sa. brought him to Weſtminſter in the County of Middleſex, and from thence at the Plaintiff's Requeſt carried him to Lambeth in Surry, where he remained under their Cuſtody till the Day of Return of the Writ, when they delivered him to the King's Bench*

according

according to the Writ; This, by the Advice of all the Juſtices was adjudged no Eſcape; For they thought that in whatever County *in the Way or out of the Way* to Weſtminſter the Sheriff detains or brings the Priſoner, if it be before the Return of the Writ, it is no Eſcape. Mo. 299. Mich. 34 & 35 Eliz. Burton v. Andrews.

Diverſity was taken *between the Cuſtody of one in Execution in a Franchiſe or County where the Common Gaol is, or the Office of the Sheriff or Bailiff extends*, and where the Sheriff or Bailiff has the *Cuſtody of one in Execution out of their Franchiſe or County.*

15. A Man was in Execution for Debt, and *broke the Priſon and eſcaped.* The *Sheriff made Freſh Suit and retook him.* It was adjudged in this Caſe no Eſcape. Mo. 660. pl. 902. Mich. 33 & 35 Eliz. B. R. Grills v. Ridgeway.

Cro. E. 439. pl. 55. S. C. held accordingly. —— Poph. 41. Geilles v. Rigeway S. C. held accordingly. —— Gouldsb. 18. pl. 114. Anon. S. C. held accordingly. —— 3 Rep. 52. a. b. Rigewaies Caſe S. C. held accordingly.

16. If the *Sheriff dies, and before another is made on one in Execution goes at large*, this is no Eſcape, for the Priſoners were in the Cuſtody of the Law till a new Sheriff made, and may be retaken in Execution at any Time after. 3 Rep. 72. b. Mich. 39 & 40 Eliz. the 4th Reſolution in Weſtby's Caſe.

17. B. was in *Execution in the Fleet* for 12000 l. at the Suit of Sir Thomas Shirley and one Swey, and being there he had the *Liberty of the Garden*, and to play at Bowles; And upon Motion for the Creditors it was *ordered* by the Court that he ſhould be *in ſtrict Cuſtody in his Chamber*; Then B. ſues a *Habeas Corpus to be brought to the Court*, and there prayed, that for diſpatching of ſome Neceſſaries, and to procure ſpeedy Payment, that he might have a *Habeas Corpus* to be *brought to the Chamber of ſome of the Juſtices to diſcourſe with his Creditors*, but it was denied by the Court, for he cannot have *Habeas Corpus* to any Place but to the Court when the Party is in Execution, and if the Warden of the *Fleet* ſo do, it ſhall be an Eſcape; And it was ſaid by Popham, which none denied, that if the Party be *confined to his Chamber by Order of Court*, and the Warden of the *Fleet* ſuffer him to have the *Liberty of the Houſe*, that that ſhall be an Eſcape, and yet it was ſaid that ſuch Liberty is granted to the *Fleet* Priſoners (paying a Fine for it) to have that *Liberty under the Great Seal and Patent*; Yet at that Time there was not allowed ſuch Liberty to B. Noy 38. Beecher's Caſe.

18. An Eſcape cannot be upon a *tortious Arreſt*; As where the Arreſt is in a wrong County. Cro. E. 877. Paſch. 44 Eliz. B. R. Eden v. Loyd.

19. The Defendant being in Execution, the *Sheriff voluntarily let him go at Large*; The Priſoner *returned to the Goal, and there remained till another Sheriff was made*, and *then he eſcaped*; Hobart Ch. J. at a Trial before him at Guildhall directed that the new Sheriff was not chargeable, becauſe by the Priſoner's being let go at Large voluntarily the Execution was diſcharged, and he could not be taken again, nor judged in Execution, though the Party would yield himſelf to it, and the Creditor allow him to do ſo. Hob. 202. pl. 253. Sheriff of Eſſex's Caſe.

This Caſe is denied per Cur. Vent. 270 Paſch. 27 Car. 2. B R in Caſe of James v. Pierce.

20. *Removing* Priſoners *out of the County* without a Command, or within the ſame County if for their Eaſe and *Delight*, as to a *Bear-beating*, per Harvey J. or to *go to Work for their Benefit*, per Hutton J. it is an Eſcape. Hetl. 32. Mich. 3 Car. C. B. Anon.

21. Where

21. Where a Priſoner eſcapes *without the Geoler's Conſent* it *is a Breach of Priſon*, and not an Eſcape, but an Eſcape is when it it is done with the Gaoler's Conſent; But in both Caſes the Priſoner is puniſhable. Cro. C 210. Hill. 6 Car. B. R. Sir Miles Hobart v. Stroud.

22. Nota, per Hale Ch. B. and the whole Court, upon a *Habeas Corpus to remove a Priſoner* in the Admiralty, though the Habeas Corpus be *returnable the next Term*, the Sheriff or Goaler muſt not *in the mean Time ſuffer him to go at large*, and if he does he is liable to an Eſcape; For the Writ impowers the Gaoler only to bring him directly to the Court, and if he gives him any Liberty in the mean Time it is at his Peril. Hardr. 476. pl. 4. Hill. 19 & 20 Car 2. in Scacc. Anon.

Pl. C. 37. a. S. P. per the Judges in Platt's Caſe.

23. *Feme Goaler marries a Priſoner* it is an Eſcape. Hetl. 36. Mich. 3 Car. C. B. cites it as Platt's Caſe.

———It was moved that Plaintiff had brought Eſcape againſt Sir J. L. the Marſhal, and had got Judgment and Execution, but Sir J. L. not attending the Court as he ought Plaintiff could not take him upon the Execution, and if he were preſent he doubted if he might take him for Fear the *taking him* would be an *Eſcape of the Priſoners* committed to him, and therefore prayed that Sir J. L. might be put out of his Place of Marſhal that ſo he might take him in Execution; Per Glyn Ch. J. this is very Miſchievous, let Sir J. L. ſhew Cauſe Friday next why he ſhould not pay the Money. Sty. 475. Mich 1655. Plummer v. Sir John Lenthall.———Sty. 465. Mich. 1655. Somes v. Sir John Lenthall, S. P. and ruled accordingly.———And per Cur. If he will take Advantage of his Privilege, and will not ſatisfy the Execution we will make a new Marſhal. Sid. 68. pl. 1. Hill. 13 & 14 Car. 2. B. R. Leviſton v. Lenthall.

24. Adjudg'd an Eſcape in the *Goaler* for *bringing one in Execution by Habeas Corpus ad Teſtificand'*; Cited by Twiſden J. Sid. 13. pl. 1. Mich. 12 Car. 2. B. R. Fitz-Jeffery's Caſe.

25. *Aſſumpſit* to Bailiff to *deliver one* then in Cuſtody the *next Morning* is good, and held no Eſcape. Sid. 132. pl. 4. Paſch. 15 Car. 2. B. R. Benskin v. French.

26. *Habeas Corpus* granted *to bring a Perſon into Court*, and the *Sheriff let him go into the Country*, it is Eſcape. 1 Mod. 116. pl. 16. Paſch. 26 Car. 2. B. R. Moſedell. v. Marſhall of B. R.

S. C. Mo. 257. Mich. 29 & 30 Eliz. B. R. Bennet v. Halſey. & al.'———3 Rep. 44. a. ſays it was ſo adjudged

27. A *Habeas Corpus* was to bring one in Execution to the King's Bench, Sheriff brings him to an Inn in Smithfield towards Weſtminſter, and *Priſoner of his own Head by himſelf goes to Southwark*, and the next Morning *returns* to Smithfield to the Sheriff, and at the Return of the Habeas Corpus the Sheriff delivers his Body into Court, this was no Eſcape. 3 Rep. 44. cited per Cur. in Boyton's Caſe, but mentions neither Name nor Year.

31 Eliz B. R. in Charnock's Caſe, and the Effect of the Command was performed, and that it ſtands with great Reaſon; for Sheriff &c. can more ſtrongly keep their Goal than an Inn, or other Place upon the Road, and the Writ does not command the bringing him the direct Way, but only to have his Body ſuch a Day in B. R. and if ſuch Command were to be made it might be very dangerous to the Sheriff &c.

A *Habeas Corpus* out of the Court to which, the Party was a Priſoner does juſtify the Goaler in Aſſiſe-Time; but otherwiſe if it be out of any other Court;

28. In an Action of Debt for an Eſcape, the Evidence was, at a Trial at Bar, (viz.) *upon a Habeas Corpus ad teſtificandum, the Priſoner went into the Country too long Time before the Aſſiſes, and ſtaid too long after, and went* 60 *Miles beyond the Place where the Aſſiſes was held before he returned* again for London; And per Hale Ch. J. though the Sheriff need not bring the Priſoner the direct Way for Fear of a Reſcous, yet he muſt not carry him too far round about, if he does it is an Eſcape; but in this Caſe he went 60 Miles beyond the Place where the Aſſiſes were kept, which is an Eſcape; ſo the Plaintiff had a Verdict. Mod. 116. Paſch. 26 Car. 2. B. R. Moſedell's Caſe.

But out of whichſoever if the Authority of the Writ be exceeded either in Time or Place

Place at the Pleaſure of the Gaoler or Priſoner, it is an Eſcape; Per Hale Ch J. 3 Keb. 306. pl. 47. Paſch. 26 Car. 2. B. R. in Caſe of Lutterel v. Moſedale.

29. 8 & 9 *W.* 3. *cap.* 27. *S.* 1. *All Priſoners either upon Contempt or meſne Proceſs, or in Execution, who ſhall be committed to the Cuſtody of the Marſhall of the King's Bench Priſon, or Warden of the Fleet, ſhall be detained within the ſaid Priſons, or the Rules of the ſame, until they be diſcharged by Courſe of Law; and if the ſaid Marſhall or Warden, or any other Keeper of any Priſon, ſhall ſuffer any Priſoner to go at large out of the Rules, (except by Habeas Corpus or Rule of Court, which Rule ſhall not be granted, but by Motion made, or Petition read in Court) every ſuch being out of the Rules ſhall be adjudged an Eſcape.*

30. 8 & 9 *W.* 3 *cap.* 27. *S.* 8. *Every Keeper* of any Priſon refuſing *after one Day's Notice* to ſhew *the Priſoner in Execution to the Creditor, or his Attorney, ſhall be adjudged an Eſcape.*

31. *Diſcharge* of a Priſoner *by a Juſtice of Peace* (the Debt for which he was committed being more than ſpecified by the Act of *Relief of inſolvent Debtors*) is an Eſcape, and the Diſcharge illegal and void, and the Priſoner was retaken upon an Eſcape Warrant. 1 Salk. 273. pl. 5. Mich. 4 Ann. B. R. Anon.

32. It is Eſcape though the *Proceſs* was *erroneous*. 1 Salk. 273. pl. 4 Trin. 1 Ann. B. R. Shirley v. Wright. Cro J. 289. pl. 5. Mich. 9 Jac. B R.

Burton v. Eyre.——*But* no Eſcape can be where the Arreſt is *illegal* (that is) out of the Juriſdiction. 11 Mod. 50. Paſch. 4 Ann. B. R. Luttin v. Benin.

33. If *upon the Return of a Habeas Corpus cum Cauſa* the Officer doth *not return all the Cauſes, or returns them falſely*, it is an Eſcape in him. 2. L. P. R. 2.

34. A. levies a *Plaint* in the Sheriff's Court of *London* againſt B. being in *Cuſtody* on a former Plaint by C. B. eſcapes; A. may bring Eſcape. 1 Salk. 273. pl. 6. Trin. 5 Ann. B. R. Jackſon v. Humphreyes.

35. Sheriff of H. has A. in Cuſtody in H. and the Sheriff is himſelf here in Town, and a Writ is delivered to him againſt A. he *is in Cuſtody* immediately upon that Writ; Otherwiſe if A. was out of the County at the Delivery of the Writ, As in Caſe he was bringing him to Weſtminſter on an Habeas Corpus; Per Holt Ch. J. 1 Salk. 274. pl. 6. Trin 5 Ann. B. R. Jackſon v. Humphreyes. S. P. and per Holt Ch. J. Inquiry ought to be made at the Sheriff's Office before any Priſoner be diſcharged. Cumb. 435. Trin. 9 W. 3. B. R. in Caſe of Britton v. Cole.

(A. 2) What other Act ſhall be ſaid to amount to an Eſcape.

1. IF *a Clerk Convict be made againſt his Will to go out of the Priſon of the Biſhop*, yet this is an Eſcape, as it is ſaid in a Nota; Quod mirum! Br. Eſcape, pl. 26. cites 29 Aſſ. 34.

2. 1. *R.* 2. *cap.* 12. *No Warden of the Fleet ſhall ſuffer any Priſoner there being by Judgment to go out of Priſon by Bail, nor by Baſton, without making Gree to the Parties of that whereof they were judged unleſs it be by Writ or* * *Command of the King, upon Pain to loſe his Office; And* This Statute is taken by Equity to extend to other Goal-

ers Pl. C. 36 b. Paſch. 4 E. 6. in Caſe of Platt v. London Sheriffs. *if ſuch Warden be attainted, that he has ſuffered ſuch Priſoner to go at large, the Plaintiff's ſhall have their Recovery againſt the Warden by* † *Writ of Debt.*

——2 Lev. 156. Hill. 27 & 28 Car. 2. B. R. in Caſe of Plummer v Whitchcott. S. P. ——2 Jo. 62. in S. C. cites Pl. C. Platt's Caſe adjudged that it extends to all Gaolers. ——S. P. Arg. Saund. 38.

* 2 Inſt. 187. ſays it was reſolved by all the Judges of England, that the King cannot do it by any Commandment but by Writ, or by Order or Rule of ſome of his Courts of Juſtice where the Cauſe dependeth according to Law. And Ibid. Ld Coke ſays, that all Reſolutions of Judges concerning the Commandment of the King are to be underſtood of Judicial Proceeding.

D. 162. b. at the End of pl. 50. Trin. 4 & 5 P. & M. ſays Quære bene upon this Statute, whether if the Warden has ſuch Writ or Commandment of the King, and according to the Statute he lets the Priſoner go at large with a Baſton, if this will excuſe him againſt the Party for the Condemnation, or only as to the Forfeiture of his Office to the King or not.

† There was no Action of Debt againſt the Gaoler at Common Law for an Eſcape, but the Party was driven to his ſpecial Action upon his Caſe, which was grounded upon a Treſpaſs or Wrong; but the Stat. of 1 R. 2. gave the Action againſt the Gardein of the Fleet. 2 Inſt. 382. ——Cro. Jac. 658. Arg. S. P. that Debt was not maintainable at Common Law for the Eſcape of a Debtor.

Though the Stat. 13 E. 1 Weſtminſter 2. cap. 11. and 1 R. 2. alſo doth ſpeak (per Breve), yet a Bill of Debt lieth alſo by the Equity of both the ſaid Statutes, albeit it hath been holden to the contrary; But it hath been often adjudged ſince that *a Bill of Debt is maintainable* upon the ſaid Acts. 2 Inſt. 382.

3. It was touched, that if a *Sheriff takes the Body* of any *and come by the Franchiſe of Weſtminſter, and the Priſoner claims the Franchiſe*, this is the Folly of the Sheriff to bring him there, and the Sheriff ſhall be charged of his Body notwithſtanding he return the ſpecial Matter, and therefore it ſeems that this is an Eſcape. Br. Eſcape, pl. 38. cites 2 H. 4. 15.

So in Capias for Felony, the Sheriff returned Cepi Corpus and had not the Body at the Day, by which he was amerced to 100 s. for the Eſcape; Quod Nota. Br. Retorn de Brief, pl. 79. cites 40. Aſſ. 43.

4. If Capias ad Satisfaciendum iſſues, and the *Sheriff returns Cepi Corpus and has not the Body at the Day*, the Sheriff ſhall be amerced, and it was ſaid, that the *Plaintiff may have Action* againſt the Sheriff, and this as it ſeems *upon the Eſcape*; For *his Return ſhall conclude him*; *Quære.* Br. Retorn de Brief, pl. 107. cites 7 H. 4. 11.

5. Where a Man is *impriſoned without Writ*, as *by Command for diſobeying the Statute of Vagrants* &c. he may be *diſcharged again without Writ, but he who is impriſoned by Writ ought to be enlarged by Writ and cannot be otherwiſe* enlarged *unleſs by Command of the King*; Quære if this Command ſhall be by Parol. Br. Eſcape, pl. 15. cites 14 H. 6. 8.

Br. Corone, pl. 4. cites S. C.

6. If *a Man who ought not to make his Purgation* is ſuffer'd to make his Purgation, this is no Eſcape; by all the Juſtices. Br. Eſcape, pl. 3. cites 27 H 6. 7.

7. Note, the Statute of *Articuli Cleri cap.* 8. wills that *he who abjures whilſt he is in the publick Street be in Peace of God and our Lord the King*, and therefore *the Conſtable who condemn'd him ſhall not be charged of Eſcape*; *For he cannot hold him* in Impriſonment by the Way. Br. Eſcape, pl. 46. cites Lib. Fundam. Legum.

Br. Corone, pl. 55. cites S. C.

8. If *the Biſhop ſuffers him who has his Clergy to make his Purgation, where he that confeſſed the Felony before*, and ought not to make Purgation, this is an Eſcape. Br. Eſcape, pl. 14. cites 9 E. 4. 28.

9. If the *Sheriffs take the Priſoner in another County* he may bring Writ of Falſe Impriſonment againſt them, for they are not Sheriffs there, therefore he ſhall be intended out of Ward when he is in another County, *unleſs it be by Mandate of the King or of his Chancellor, or other Juſtices*, and in thoſe Caſes he ſhall be intended in Ward. Br. Eſcape, pl. 11. cites 15 E. 4. 18.

10. The

10. The Priſoner may have Falſe Impriſonment, if the Sheriff takes him in another County unleſs by ſpecial Mandate; For it is againſt the Law; But the Party at whoſe Suit he is condemned has no Remedy; For as to him he *ſhall be ſaid always in Priſon.* Ibid.

11. A *Man* was *in Cuſtody of the Officer of the Sheriff on meſne Proceſs*, and *being outlawed after Judgment at the Suit of another*, the *Judgment-Creditor brought a Warrant upon a Capias Utlegatum, and delivered it to the Sheriffs Officer in whoſe Cuſtody he was, who refuſed to execute it, and afterwards the Sheriff ſuffered the Priſoner to go at large.* Reſolved, that when a Man is in Cuſtody of the Sheriff by Proceſs of Law, and another Writ is delivered to him to take him, he is in his Cuſtody immediately in Judgment of Law by Force of the ſecond Writ though he does not arreſt him, and to what purpoſe ſhould he arreſt him who was in his Cuſtody before; And the Writ is not only Quod capiat, but alſo Quod ſalvo Cuſtodiat, ita quod habeat Corpus. 5 Rep. 89. Trin. 41 Eliz. C. B. Froſt's Caſe.

12. If the *Marſhal is indebted*, and the *Court is prayed to have him in Execution*, they will appoint another Marſhal in his Stead if he will not pay his Debt and ſo commit him, elſe it would be an Eſcape of all the Priſoners; Per Curiam. Keb. 202 pl. 2. Hill. 13 Car. 2. B. R. Bendiſon v. Lenthall.

13. The Plaintiff having two Judgments in B R. *againſt* the *Defendant*, and Execution againſt him, and he actually *in the Cuſtody of the Marſhal, forged a Letter of Attorney to acknowledge Satisfaction*, which being delivered into the Office, the *Officer certified the Marſhal that he had received a Warrant between ſuch Parties and thereupon the Marſhal lets him go*; This per Cur. is an Eſcape unleſs the Attorney's Hand was to it, or a Superſedeas delivered, and the Court cannot award any new Execution Quia Improvide in neither Caſe without a Superſedeas. Keb. 873. pl. 24. Paſch. 17 Car. 2. B. R. Collet v. Purdieu.

13. In Action for an Eſcape the Evidence was, that P. ſuch a Day being in Execution at the Plaintiff's Suit 10 Feb. did eſcape, and *was abroad at the Play Houſe, and at Kenſington*, and it happened that that Day was in Term-Time, and there was a *Day Rule* for his coming abroad, and that he returned at Night as uſual; it was held by two Judges only in Court, that this was an Eſcape; for the Day-Rule is only Quod Mareſc' ducat ad Barram, and though now they go about Town any where, yet *the End of it Originally was only for coming to Weſtminſter about their proper Buſineſs*, and not to go any where elſe; then by Favour it was allowed they might go to any Inns of Court of Chancery, to ſpeak with Counſel and Attorney about their Concerns and Suits, but the letting them go abroad for their Pleaſure under Colour of this Day-Rule would be an Eſcape. 2 Show. 299 pl. 300. Paſch. 35 Car. 2. B. R. Cooling v. Glover.

14. If a *Habeas Corpus* is *delivered to the Sheriff in July to bring a Man in Execution to C. B. next Michaelmas Term*, the *Sheriff* may take a reaſonable Time, of which the Court will judge according to the Circumſtances; but he *cannot* bring him out of Priſon, and *keep him out of Priſon all the Vacation*; But Treby Ch. J. ſaid that he would not determine that Point. Ld. Raym. Rep. 241. Trin. W. 3. in Caſe of Holdroid v. Liddel.

15. 8 & 9 *W.* 3 *cap.* 2. *S.* 8. *If the Marſhal &c. or Keeper of any Priſon, or their reſpective Deputies, ſhall after one Day's Notice in Writing* refuſe to ſhew any Priſoner in Execution to the Creditor *at whoſe Suit ſuch Priſoner was charged, or to his Attorney, ſuch Refuſal ſhall be adjudged an Eſcape.*

In an Action brought upon this Act the Caſe was, that the Notice was given by the Creditor on the Friday to produce the Priſoner on the Tueſday following. At 12 o'Clock the

the Prisoner was demanded of the Turnkey, but not being produced the Action was brought. The *Court seemed inclined* to think *that the Marshal had all that Day for the producing of the Prisoner*; And likewise that by the Word *Deputy* was to be *understood a Deputy Marshal*, and not a more inferior Officer; but that however the Plaintiff could not suffer by their Non-Attendance; because a Demand at the Prison, though No body was there, would be sufficient; Adjornatur. In the following Vacation the Ld. Ch. J. was removed into the Chancery. 10 Mod. 394. Mich. 4 Geo. B. R. Parks v. Crawford.

Mr. Agar had obtained a Rule, that a Person taken on an Escape-Warrant and committed to Newgate might be redelivered to the Marshal in Execution, upon Account of his having escaped upon a Day-Rule; But now Motion was made, that that Rule might be discharged upon an Affidavit, that he was not out upon a Day-Rule when he did escape; and accordingly the Court granted the Motion. Barnard. Rep. in B. R. 437. Pasch. 4 Geo. 2. Binmore v. Bowler.

16. The Defendant being in the Marshalsea Prison of this Court upon meine Process at the Plaintiff's Suit for Debt escaped; He was *took upon the Escape Warrant before B. R. sate that Morning*, and after B. R. sate he was in the Petition among the other Prisoners, and a *Day-Rule* as usual was made, in which he was; And though there are to be no Fractions in a Day, yet the Court held, that they ought not to set him at Liberty, it appearing to them that *when he was arrested he had not any Day-Rule*. 2 Ld. Raym. Rep. 927, 928. Trin. 2 Ann. Daniel v. Morewood.

(A. 3) What shall be said an Escape, in regard of the Manner How the Defendant was taken, and the Legality of the Taking.

1. IN an *Officer* be *commanded to go with the Party, to take him who is condemn'd, and this without Writ*, and *he takes him* by the shewing of the Party, *and after lets him go* he shall not be charged of Escape, as a Sheriff shall be who takes him by Writ; For there is certain Notice by the Writ, and he has a Prison in which he may keep him, but in the other if the Party comes and will deny that he is the same Person, he shall go notwithstanding the Justices know the contrary. Br. Escape, pl. 5. cites 33. H. 6. 55.

2. If the Sheriff *takes one by Ca. Sa. in Debt* and after permits him to go at Large, and *returns not the Writ*, yet Debt lies upon this Escape against him; For there is a Record of which the Party shall take Advantage though the Writ is not return'd. Cro. E. 17. in pl. 8. Pasch. 25 Eliz. C. B. cited by Periam as adjudg'd, since he came to the Bench, in Clipton's Case.

3. In Debt &c. the Plaintiff had Judgment, and *after the Year* he *brought a Ca. Sa.* upon which the *Sheriff arrested the Defendant and suffered him to Escape*; now, though the Ca. Sa. was erroneous, being sued out after the Year, yet it was a sufficient Authority for the Sheriff to arrest him, and he might have justified under it if False Imprisonment had been brought against him; therefore he cannot let him go at Large. Cro. E. 188. pl. 14. Trin. 32 Eliz. B. R. Bush's Case.

4. Upon a Recognizance in Chancery the Conusee sued Execution by a Capias ad Satisfaciendum, by Force whereof the Conusor was taken and escap'd, and Debt was brought thereupon against the Sheriff. The Court held that the *Cap. ad Satisfaciendum was erroneously awarded*, but that the Party being taken by Force thereof it is a good Execution for the Party so long as it continues un-reversed, and the Sheriff

Sheriff is chargeable for the Eſcape; and Judgment accordingly. Cro. E. 576. pl. 22. Trin. 39 Eliz. C. B. Coniers's Caſe.

5. G had been in Cuſtody of the *former Marſhal who voluntarily ſuffered him to eſcape*, and *he after came voluntarily and returned, and being found in Cuſtody by the ſucceeding Marſhal, was detained by him*; Whereupon he having brought an Action of Falſe Impriſonment, the Court granted an Imparlance till the next Term, affirming at the ſame Time that *it was lawful to detain him*, and that to ſuffer him to go at Large would be an Eſcape in the ſecond Marſhal; and that Hales had been of the ſame Opinion. 6 Mod. 183. Trin. 3 Ann. B. R. Grant v. Southers.

(B) Chargeable. Who.

1. IF a Capias iſſues out of the Court of the Sheriff of London, to wit, the Counter directed to a Serjeant againſt A. and he takes him and ſuffers him to eſcape before he brings him to the Counter; In this Caſe the Action for the Eſcape lies againg the Serjeant and not againſt the Sheriff; for he never was in the Cuſtody of the Sheriff, inaſmuch as he never was brought to the Counter, for after he is there he is in the Cuſtody of the Sheriff, but not before; for the Sheriff is the Judge of the Court, and not Miniſter to execute the Proceſs of the Court, but he is the Gaoler of the Counter, and ought to anſwer for the Priſoners there. Mich. 15 Car. B. R. between *Dunn and Patie* per Curiam; and Bramſton ſaid, that he ruled this upon Evidence, that where it was alleged in the Declaration in Action upon the Caſe that A. was in Cuſtody of the Sheriff where he was not brought into the Counter, that it was not good inaſmuch as he was not in his Cuſtody.

If a Priſoner is taken on mean Proceſs in London founded on a Plaint before the Sheriff, in ſuch Caſe the Priſoner is in Cuſtody of the Serjeant, and Eſcape in this Caſe ſhall be brought againſt the Serjeant. Sid. 318. pl. 6. in a Nota there, Hill. 18 & 19 Car. 2. B. R. at the End of the Caſe of Husband v. Cole.

2. But if a Latitat be directed out of the King's Bench to the Sheriff of London to take J. S. and he makes a Warrant to a Serjeant to arreſt him, and the Serjeant arreſts him accordingly, and ſuffers him afterwards to eſcape before he brings him to the Counter, Action lies againſt the Sheriff for this Eſcape, becauſe he was in the Cuſtody of the Sheriff immediately by the Arreſt, for there the Sheriff was the Officer of the Court of King's Bench, and not the Serjeant. Mich. 15 Car. B. R. between *Dunn and Patie* per Curiam.

3. Debt doth *not* lie *againſt the Heir of the Gaoler* upon an Eſcape ſuffered by his Father, *unleſs there is a Specialty, which charges the Heir by expreſs Words*, and no Law or Statute will charge him for the Tort or Treſpaſs of his Father, and though there is Judgment in Debt againſt the Father, and he dies before Execution, the Land which he has ſhall be extended by Elegit upon a Sci. Fac. brought againſt the Heir as Tertenant of Land liable to Execution. D. 271. a. pl. 25. Hill. 10 Eliz. Anon.

D. 322 b. at the End of pl. 25. cites S. C. held accordingly.

4. The Duke of Norfolk being Marſhal of England, and having Authority to make a Deputy for Life, he made one G. his *Deputy*, who was ſworn in Court &c. After G. licenſed a Priſoner in upon Execution to go into Norfolk with a Keeper, for which the Plaintiff brought

Noy 70. cites S. C. and 39 H. 6. 34.

Debt againſt G. for the Eſcape, and recovered, notwithſtanding he was but the *Under Marſhal*, and notwithſtanding the Action brought in Middleſex ſuppoſing the Eſcape at Shoreditch and not in the County of Surry where the Marſhalſea is. D. 278. b. Mich. 11 Eliz. Gawdy's Caſe.

5. Action of Debt does *not* lie *againſt the Executor of Warden of the Fleet* for ſuffering a Priſoner in Execution to eſcape, *unleſs the Warden himſelf in his Life was convicted and adjudged* of the Eſcape; for the Offence is only a Treſpaſs by Negligence, and at Common Law Debt lay not as it ſeems, but an Action on the Caſe till 1 R. 2. cap. 12. D. 322. a. b. pl. 25. Hill. 15 Eliz. Whitacres v. Onſley.

6. A Capias ad Satisfaciend' to the Sheriff of B. to take J. S. who was then *in Cuſtody of the Mayor &c. of Windſor*, the Sheriff awarded a Warrant to the Mayor &c. to take him, and afterwards they let him eſcape; Debt on Eſcape lies againſt them, and not the Sheriff. So it is of a *Bailiff of a Franchiſe*. Cro. E. 26. pl. 8. Paſch. 26 Eliz. C. B. Mayor and Burgeſſes of Windſor's Caſe.

7. A. was in *Execution* in the Time of a *former Sheriff and eſcaped* alſo then, and afterwards Defendant being Sheriff, Plaintiff ſued a Sci. Fa. againſt A. upon the Judgment aforeſaid, upon which Execution was awarded by Default, and a Ca. Sa. iſſued, by which A. was taken and eſcaped; Adjudged that the *ſecond Sheriff* is liable. Le. 3. pl. 5. Mich. 25 & 26 Eliz. B. R. Gilbert v. Hart.

8. A. was in Execution for 100 l. at the Suit of B. and 200 l. at the Suit of C. The *old Sheriff by Indenture delivers over A.* to the new Sheriff, ſignifying the Execution of the 100 l. but ſays nothing of the 200 l. The old Sheriff, and not the New, ſhall be charged in Eſcape for the 200 l. if the new Sheriff ſuffers him to go at Large. Mo. 688. pl. 951. Hill. 34 Eliz. Rot. 169. Weſtby v. Skinner.

3 Rep. 71. S. C. adjudged, and though the Executions are of Record, yet the new Sheriff is not bound to take Notice thereof. ——— Cro. E 365. pl. 1 S. C. adjudged and affirmed in Error in the Exchequer Chamber. ——— Poph. 85. S. C. adjudged. ——— But Mo. 689. in S. C. ſays that the Juſtices ſeemed that Notice by Parol is ſufficient, though the Cauſe of Execution be not expreſſed in the Indenture.

9. *Debt* was brought *againſt the Defendants for an Eſcape ſuffered by their Bailiff of a Franchiſe*, where they had the Return of Writs; And adjudged, that it does not lie againſt them, but againſt the Bailiff himſelf; for the Writ is directed to him, viz. Ballivo Libertat'. Noy 69, 70. Dean and Chapter of St. Paul's Caſe.

10. A *Plaint* being *in the Court of B. before the Bailiffs of B. according to the Cuſtom there they directed a Warrant to the Under Bailiffs to take the Party, ita quod habeant Corpus ejus coram Ballivis ad prox' Cur'*. And the *Under Bailiffs* take him and *commit him to Priſon ſub Cuſtodia of the Gaoler* of the Priſon (the Defendant) if they have him not at the Day &c. an *Action lies againſt them, and not againſt the Gaoler*, for there was no Commitment to him by any lawful Authority; for the Under Bailiffs had Authority to take him, Ita quod, but not to commit him to any Priſon, and whomſoever they commit him to *is only as a Servant to the Under Bailiffs*. Cro. E. 743. pl. 20. Trin. 41 Eliz. B. R. Baldry v. Jolinſon.

Yelv. 57. S. C. but on a D. P.— S. C. cited Sid. 5.

11. A Man was *arreſted by a former Sheriff* upon a Latitat for 100 l. the Plaintiff intending upon his Appearance to declare againſt him, the *old Sheriff left him in Priſon, and delivered him to the new Sheriff* as his Priſoner. The *new Sheriff ſuffered him to go at Liberty, without finding Sureties for his Appearance*; Adjudged that this Permiſſion of him to go at Liberty was an Eſcape, and a juſt Cauſe of Action, for by this Means the Plaintiff is defrauded or delayed in his Action; And though it be found that the other Sheriff *returned Languidus* &c. which is more than

is

is in the firſt Declaration, yet that is not material to the Plaintiff, he remaining always in Priſon, and that was *to excuſe his bringing the Priſoner at the Day*; wherefore it was adjudged for the Plaintiff. Cro. J. 380. pl. 8. Mich. 13 Jac. B. R. King v. Andrews.

12. A Priſoner in Ludgate eſcaped, and the Plaintiff brought an *Action* for this Eſcape *againſt P. one of the Sheriffs of London*, and had a Verdict againſt him. It was moved in arreſt that the *Plaintiff declared that the Party was in Cuſtody of both the Sheriffs*, and yet the Action is brought againſt one of them, but Judgment was given for the Plaintiff. Sty. 297. Mich. 1657. Drinkwater v. Pack.

13. J. S. was *in Execution when A. was Sheriff, and* was *left in Gaol when B. was Sheriff* who ſucceeded A. but *A. did not turn J. S. over to B. by Indenture*; afterwards *C. was ſucceeding Sheriff to B. but J. S. was not turned over to C.* but continued in Gaol, and *was charged with a new Execution* there. The Court held, that as to the firſt Execution J. S. ſtill remains in the Cuſtody of A. Sid. 335. pl. 21. Paſch. 8 Car. 2. B. R. Hanmer v. Winmer.

2 Keb. 224. pl. 75. Hanmer v. Warner S. C. but by Keeling Ch. J. on Omiſſion of any Cauſe there is no Eſcape ſo long as the Party remains actually in Cuſtody.

14. A Priſoner *eſcapes in the Time of a former Gaoler*, and afterwards *comes back into Priſon*, where he *remains till the Time of a new Gaoler*, and *to whom he was turned over*, and afterwards the *new Gaoler permits him to go at Large*. The Court were of Opinion, that the Plaintiff might charge either the new Gaoler upon the laſt Eſcape, or the old Gaoler upon the firſt Eſcape, by admitting the Priſoner to be out of Execution; but no Judgment was given. 2 Lev. 132. Paſch. 27 Car. 2. B. R. James v. Peirce.

Vent. 269. S. C adjudged per tot. Cur (abſente Twiſden) for the Plaintiff.

15. If a Priſoner eſcapes *out of one of the Counters*, the Action muſt be brought againſt *both the Sheriffs*. Carth. 145. Trin. 2 W. & M. in B. R. Ryding v. Edwin and Fleet.

Show. 162. Ridings v. Edwin, S. C. argued; ſed adjornatur.

16. And ſays that in Co. Ent. 436. it appears that both the Sheriffs have the Cuſtody of all the Priſoners in both Counters, and by Conſequence the Action is well brought. Ibid.

17. If a Priſoner eſcape *out of Ludgate*, it ſeems both Sheriffs of London are liable; but if an Eſcape be out of *one of the Compters* Quære if both are anſwerable, or that Sheriff only to whom ſuch Compter belongs; Adjornatur. Show. 162. Trin. 2 W. & M. Ridings v. Edwin.

18. In Norfolk there were *two Coroners*, the *one ſubſtantial, the other poor, who arreſts a Man without the other's Privity*, and *he eſcaped*; *Debt was brought againſt both*; and Holt Ch. J. (by Conſent of Parties) ſign'd a Bill of Exceptions to ſave the Charge of a ſpecial Verdict, and ſaid he heard it had been argued in C. B. and that it is very difficult and very hard, for he fears if Execution by one be Execution by both, the Eſcape will be ſo too, and that it is miſchievous; Cited by Holt Ch. J. Comb. 435, 436. Trin. 9 W. 3. B. R. in Caſe of Britton v. Cole.

S. P. by Holt Ch. J. it is very hard to charge the other with it; The Caſe came before me once, and I would not take upon myſelf to determine it, though my Brother Levinz reports that I would have over-ruled him in the Exception; And that Caſe has been argued ſeveral Times in C. B. but not adjudged; but the Court thought it hard to charge the other. 6 Mod. 37. Mich. 2 Ann. B. R. Anon. —— 3 Lev. 399. Paſch. 6 W. & M. in C. B. Taylor v. Clerk, S. P. dubitatur; & adjornatur.

19. For a *voluntary Eſcape* Action lies as well againſt the Gaoler as the Sheriff; but for a *negligent Eſcape* it lies only againſt the Sheriff. The Reaſon of its lying in the firſt Caſe againſt the Gaoler is, that he is chargeable as a Wrong Doer, not as an Officer; Per Holt Ch. J. 1 Salk. 18. in pl. 8. Paſch. 12 W. 3. B. R. in Caſe of Lane v. Cotton & al'.

20. An

S P. accordingly by Holt Ch. J. obiter. 2 Salk 441. pl 2. Mich. 10 W. 3. at Guildhall.

20. An Action lies *againſt the Gaoler as well as againſt the Sheriff for a voluntary Eſcape*; for it is in Nature of a Reſcue, and he is *not chargeable as an Officer but as a Wrong Doer*; But for a *Negligent Eſcape* the Action lies only againſt the Sheriff; Per Holt Ch. J. 1 Salk. 18. Paſch. 12 W. 3. B. R. obiter.

21. 1 *Annæ, Stat.* 26 *S.* 2. *If a Priſoner* taken on an Eſcape Warrant, *and committed to the County Gaol eſcapes thence, the Sheriff is chargeable.*

(C) How the Priſoners ought to be demean'd in Execution.

* Fol. 807. S. C. cited 3 Rep 44. per Curiam. Mich 34 & 35 Eliz. B. R. in Boyton's Caſe.

1. By the Law a Priſoner in Execution ſhall not go at his Liberty within the Priſon nor out of it with his Keeper, but ſhall be held ſtrict in Ward. D. 8 Eliz. 249. 84. ſays that Tr. 24 H. 8. a Decree and Order was made in the Star-Chamber by Advice of Fitz-James and Norwich Ch. Juſtices of the Benches, Fitzherbert and Spilman J. accordingly, and Injunction of this given to the Keepers of Priſons in all London, to obſerve the ſaid Order and Decree upon Pain of 100 l.

There is great Difference between the Reſtraint of Priſoners in Execution

2. The Gaoler ought to keep Men in Execution in ſalva & arcta Cuſtodia; and the Stat. W. 2. 11. ſaith that Carceri mancipentur in Ferris, ſo that the Sheriff may keep them that are in Execution in Irons and Fetters, to the Intent that they ſhould the ſooner ſatisfy their Creditors. 3 Rep. Boyton 44.

for Debt, and thoſe who are impriſoned by this Act for Arrears of Rent, which directs that they ſhall be arreſted &c and Carceri mancipentur in Ferris, but this the Gaoler could not have done at the Common Law, neither was it ever practiſed or allowed by the Law, that a Priſoner ſhould be ſo uſed who is in Execution for Debt, unleſs he be unruly and endeavours to eſcape; but it is expreſsly againſt the Law to do it where there is no ſuch Reaſon, becauſe a Priſon is for the ſafe Cuſtody of Men, and not to puniſh them, cites 1 Inſt. 260. a. So that it appears by this that a ſtricter Remedy was provided for Executions in Account than for thoſe in Debt. 2 Mod. 124. Mich. 28 Car. 2. B. R. in Caſe of Plummer v Whitchcot.

3. If a Man in Execution in Priſon acknowledges himſelf to be bound in a Bill obligatory to J. S. without his Aſſent, to the Intent that J. S. ſhall ſue in Bank (another Court) by which Judgment may be there againſt him by Confeſſion, upon which he may be removed by Corpus cum Cauſa, and there put in Execution in the Priſon there, which is not ſo ſtrict as the other Priſon, and does this accordingly, and upon this is committed in Execution accordingly, yet upon underſtanding of this Deceipt by the Court he ſhall be remanded. D. 8 Eliz. 249 [b. pl] 84. per Cur. adjudged; and Fine for the Deceipt to 10 l. and Vacat made of the Record.

4. So if a Man be in Execution in a Priſon at the Suit of a Common Perſon, and becauſe he will have more Eaſe and Liberty he acknowledges himſelf voluntarily, and upon a fained Cauſe, to be a Debtor to the King, upon which he may be adjudged to the Priſon of the Fleet to have more Liberty, and ſo to delay the Creditor of his Recovery, the Recognizance ſhall be received, but if he be not otherwiſe indebted to the King he ſhall be remanded to the firſt Priſon till Satisfaction of the Party, and afterwards he ſhall be ſent to the Fleet to ſatisfy the King. 1 R. 2. cap. 12.

5. If

5. If a Man be *in Priſon for Execution in a County or in a Liberty*, the *Gaoler cannot bring him out of the County or Liberty, unleſs in ſpecial Caſe*; and if he does it, the Priſoner may have Action of falſe Judgment, unleſs he has ſpecial Authority, *as by Privy Seal to be at Weſtminſter*, or the like. Br. Eſcape, pl 44. cites 30 H. 6. 6.

6. A Man in Priſon by Proceſs in Law *ought to be kept in ſalva & arcta Cuſtodia, and* by the Law ought *not to go out, though it be with a Keeper, and with the Leave and Sufferance of the Gaoler*; but yet Impriſonment muſt be Cuſtodia & non Pœna; for Carcer ad homines cuſtodiendos, non puniendos, dari debet. Co Litt. 260. a.

7 A Motion was made on the Behalf of S. that the *Defendant being in Execution* at his Suit for a Debt to him due, and he *having more Liberty than was convenient* for a Priſoner to have, *and that he lived at his Pleaſure without any Reſtraint*, and therefore for the more ſpeedy Payment of his Debt the Court was *moved to have him kept in arcta Cuſtodia*, viz. to be kept in Fetters. The whole Court agreed in this clearly, that he *ſhould not have Fetters but for criminal Offences*, but ordered that he *ſhould be reſtrained of his Liberty*. Bulſt 145. Trin. 9 Jac. Scriven v. Wright.

8. Gaoler may *put Irons* on an unruly Debtor Priſoner; Per Roll Ch. J. Sty. 339. Trin. 1652. Colonel Keyes's Caſe.

9. Motion for Habeas Corpus to remove a Priſoner in N. Gaol that was convicted of Felony, and had been burnt in the Hand, on an Affidavit that the Gaoler *uſed the Priſoner hardly*; but per Roll Ch. J. that cannot be, but they may either *indict the Gaoler* or bring an Action againſt him. Sty. 432. Hill. 1654. Anon.

(D) What Act or Thing will excuſe an Eſcape.

Fol 807.

1. If the Sheriff arreſt a Man upon a Latitat or other Proceſs, if the Priſoner be reſcu'd from him before he can carry him to Priſon, and he returns the Reſcous againſt thoſe who made the Reſcous, this ſhall excuſe the Sheriff from the Action upon the Caſe for the Eſcape, becauſe he is not bound, nor is it convenient for him to bring Poſſe Comitatus with him to ſerve every mean Proceſs. By Reports 14 Jac. * *May v. Proby and Lumly* adjudged. 16 E. 4. 3. per all the Juſtices. Contra 44 El. B. R. † *Fallow v. Lambert.*

* Cro. J. 419 pl. 10. S. C. adjudged for the Defendant. —— Mo. 852. pl. 1162, May v. the Sheriffs of London, S. C. all the Court held it no good Plea, but that the Reſcous will excuſe the Contempt againſt the King. —— Roll Rep. 388 pl. 9. S. C. adjornatur. —— Ibid. 440. pl. 5. S. C. ſays that the Court ſeveral Times inclined that the Action lay, but afterwards upon Deliberation it was adjudged that it did not lie for the Reaſon mentioned in Roll ſupra. —— 3 Bulſt. 198 S. C. adjudged for the Defendant. —— S. C. cited 3 Lev. 46. — See Reſcous (F) pl. 7. and the Notes there.

† Cro. E 868. pl. 1. Waldo v. Lambert, S. C adjudged no Plea. —— Noy 40. Walde v. Lambert S. C. adjudged no Plea; For he might have had a Poſſe Comitatus as well for ſerving the ſame Proceſs as an Execution —— S C. cited Mo. 852. in pl. 1162. —— S. C. cited Roll Rep. 389. in pl. 9. — S. C. cited 3 Bulſt. 198.

2. But if the Sheriff takes a Man upon an Execution as upon a Capias ad Satisfaciendum, and he is reſcu'd from him before that he can carry him to the Priſon though he returns the Reſcous, yet this ſhall not excuſe him in an Action upon the Caſe for the Eſcape, becauſe that he is to take Poſſe Comitatus to ſerve it at his Peril, and the Party cannot have new Execution. By Reports 14 Ja. per Cur. *May v. Proby and Lumley.* 16 E. 4. 3. 6 H. 7. 12. D. 7 El. 241. 47.

Cro. J. 419. pl. 10. S. C. & S. P. held accordingly obiter. —— Roll Rep. 440, 441 pl 5. S. C. & S. P. reſolved per tot. Cur —— 3 Bulſt. 198. 201. S. C. & S. P. held accordingly. —

So if it was on a Capias Utlagatum after Judgment. Cro. J. 419. in S. C per Cur. —— Roll Rep 389. Arg. cites D. 1 Eliz. 241 and 4 Eliz. ..... S. P.

Cro. J. 419. pl. 10. S. C. & S. P. held accordingly. —— Roll Rep. 441. pl. 5 S. P. resolved accordingly per tot. Cur.

3. If a Sheriff takes a Man upon a Process and carries him to the Gaol, and after is rescued out of the Prison and he returns the Rescous, yet this shall not excuse him in an Action upon the Case against him for the Escape, for he must keep his Gaol at his Peril. By Reports 14 Jac. per Cur.

Fol 808.

So if the Sheriff returns Languidus &c. Noy 39. Bolls v. Lassels, S. C. & S. P. held accordingly. —— Cro E. 852. pl 8. Boles v Lassels, S. C. adjudged accordingly. —— S. C. cited Mod. 244. Arg and Ibid. 245. per Cur. who said it was a strong Case to govern the Point in the principal Case, which was the Case of Page v. Tulse. And see Tit Return (R) pl. 10. and the Notes there.

4. If a Sheriff upon Capias in Mesne Process takes the Party and bails him upon an Obligation with Sureties for his Appearance according to the Statute of 23 H. 6. and at the Day of Appearance returns a Cepi Corpus, and the Defendant does not appear, yet no Action lies against the Sheriff, because that he was bound by the Statute to bail him, and the Party has not any Remedy but to procure him to be fin'd if he does not bring in his Body. Mich. 43 & 44 El. B. R. per Cur. between *Bowles and Lassells*. And there said that a Judgment in Point was then vouch'd accordingly.

Cro. E. 815. pl. 4 Pasch. 43 Eliz. B. R. in S. C. per Cur. cited 33 H. 6. 1. S. P —Br. Escape pl. 10. cites S. C. —— Br. Dette, pl. 22. cites S. C. —— S. P. by Hale Ch. J. obiter in delivering the Opinion of the Court. Vent. 239. Hill. 24 & 25 Car. 2. B. R.

5. If the Prison be broken by the Enemies of the King by which the Prisoners escape; This shall excuse the Escape, because the Gaoler could not resist it nor has Remedy over. D. 3 E. 6. 66. 15. 7 El. 241. 47. 4 Rep. 84. *Southcot's Case.*

6. So if the Prisoners escape upon sudden Fire, this shall excuse the Escape, for it is the Act of God. D. 3 E. 6. 66. 15.

Cro. E. 815. pl. 4 S. C. & S. P. per Cur. obiter cites 33 H. 6. 1. —— S. P. by Hale Ch J. obiter in delivering the Opinion of the Court. Vent. 239. Hill. 24 & 25 Car. 2. B. R. —— S. C. & S. P. cited Arg. 2 Mod. 28. —— Ld. Raym. Rep. 651. Pasch. 13 W. 3. S. P. by Holt Ch. J. cites 33 H. 6. 1.

7. If a Prison be broke by Rebels and Traytors within the Realm by which the Prisoners escape, this shall not excuse the Escape, because there the Gaoler may have his Remedy over. D. 3 E. 6. 66. 15. 4 Rep. 84. *Southcot's Case.*

8. If a Man be in Execution in the Fleet or other Place at the Suit of the King and a common Person, and the Warden or Gaoler by the Command of the Lord Chancellor and Treasurer suffer him to go into his Country with a Keeper to collect and levy Money the the sooner to pay the King, and he goes accordingly and comes back again to the Prison, yet this is an Escape as to the common Person; For this Act of the Chancellor and Treasurer cannot excuse the Escape; For the King himself cannot licence any Man to go with a Keeper or otherwise at Large. D. 12 & 13 El. 297. 24.

9. If a Man in Execution in the Fleet procures a Habeas Corpus in Trinity Term returnable in Mich. Term next following in any Court of Westminster, and in the mean Time goes into the Country about his Business or Recreation, and out of Prison, but with a Keeper or Baston, yet this is an Escape. 1 Car. Regis resolv'd in the lower House of Parliament, though upon a Conference between

between the upper and lower Houſe of Parliament, it was pray'd by the Priſoners of the Fleet that Way ſhould be given for an Habeas Corpus to this Purpoſe for this Vacation in reſpect of the great Plague now in London, yet the lower Houſe of Parliament would not aſſent to give any Way to it againſt the Law, though two Parts in three Parts divided would aſſent to it, becauſe it was againſt the Law, and ſo excuſe themſelves to the Lords, and upon this nothing done by the Lords to whom the Petition was exhibited. Hobart's Reports, 273.

10. Trin. 12 Car. B. R. declared by the Juſtices of B. R. that it was referred to them by the King, whether in Regard of the Plague Habeas Corpora might be granted for the Priſoners in Execution in the Priſon of this Court and in the Fleet upon Judgment in Banco and the Exchequer, and that upon Conference had between all the Juſtices and Barons, it was reſolved and ſo certified by them to the Ld. Keeper, That if upon Habeas Corpora granted the Goaler ſuffers Priſoners to go at Large with a Baſton it is an Eſcape, and that no Habeas Corpus ought to be granted by the Law to this Purpoſe, and they ſaid that when the King was informed of their Opinions he well approved it, and commanded that it ſhould be obſerved, and Juſtice Jones ſaid, that in the Time of Popham it was ſo reſolved by all the Juſtices, and ſo alſo at Reading Term 1 Caroli, and ſo alſo reſolv'd in 34 H. 8. Cro. C. 466. pl. 4. is a Memorandum of this, and the Proceedings thereupon. —And the like Hutt. 129, 130.

11. D 296. b. Marg. pl. 24. cites Hill. 19 Eliz. C. B. Moſtin's Caſe, where the *Ld. Treaſurer and Barons of the Exechequer commanded* the Warden of the Fleet to let out the Priſoner, it was adjudged that Moſtin ſhould recover againſt the Warden, and it was ruled alſo, that if at any Day after Term the *Warden brought the Priſoner before them* that it is an Eſcape.

12. Defendant brought an Attaint to reverſe the Judgment, and the *Judges bailed him to proſecute the Attaint* Cum Effectu. But the *Bail was not entered of Record*; and in Debt againſt the Marſhal for an Eſcape Judgment was for the Defendant. Cro. E. 5. pl. 4. Paſch. 24 Eliz. B. R. Vaſt v. Gawdy.

13. Action *againſt the Sheriffs of London for diſcharging one who was arreſted coming to defend a Suit depending there.* It was held that the Court cannot diſcharge one arreſted, except he be arreſted in the Face of the Court. Brownl. 15. Hill. 17 Jac. Wilſon v. London Sheriffs. Caſe againſt the Sheriff of N. for an Eſcape, who pleaded that he received a Writ of Privilege from the Marquis of Newcaſtle, reciting that he was a Juſtice of Peace, and Cuſtos Rotulorum of that County, and that the Priſoner was convened before the Juſtices at their Seſſions, and by the Law ought not to be moleſted eundo & redeundo during the Time he had any Cauſe there depending, and commanded the Sheriff to diſmiſs him, which he did accordingly; and upon Demurrer this ſeemed an ill Plea, for the Juſtices cannot cauſe a Perſon arreſted to be diſmiſſed. Raym. 16 & 17 Car. 2. B. R. Clerk v. Molineux. ——— Sid. 269. pl. 22. S. C the Court doubted on the ſecond Motion, whether the Privilege ſhould extend to ſuch Inferior Courts, or only to the Courts here; whereupon the Defendant offered to waive his Plea and to plead Not Guilty. ——— Lev. 159. S C. Windham and Twiſden inclined that the Privilege ought to be allowed, otherwiſe the Buſineſs of the King would remain undone. But per Keeling the Juſtices of Peace cannot grant a Habeas Corpus; & adjornatur.

14. If J. S. is in Execution and a *Habeas Corpus ad Teſtificandum is directed to the Gaoler where J. S. is in Cuſtody to bring him* (who is his Priſoner) *to be an Evidence*; if the Gaoler by Virtue thereof brings the Priſoner, it is an Eſcape; ſaid by Twiſden J. to have been adjudg'd by all the Judges. Sid. 13. Mich. 12 Car. 2. B. R. Fitz-Jeffery's Caſe.

15. In

2 Mod 214. S. C. and Jones and Rainsford held this Payment no Diſcharge to the Plaintiff, but Wild J. e contra —— 2 Lev 203. Taylor v Bekon, S C

15. In Debt on a Judgment the Defendant *pleaded that he was* taken on a Capias and committed to the Marſhal *in Execution*, where he was *for more than a Year, and afterwards endeavour'd to find the Plaintiff by all the Ways he could that he might ſatisfy the Plaintiff his Money, but that the Plaintiff concealing himſelf purpoſely to detain the Defendant in Priſon, he paid it to the Marſhal to the Uſe of the Plaintiff*, whereupon the Marſhal let him go at Large The Plaintiff *replied that he was commorant at Weſtminſter, and that the Defendant well knew it.* The Court held the Plea not good. And Judgment for the Plaintiff. 2 Jo. 97. Mich. 29 Car. 2. B. R. Tailer v. Baker.

and the Plea adjudged to be ill. —— 2 Jo 98 at the End of the principal Caſe, the Court held that this Caſe differed much from that of Payment to the Sheriff on a Fieri Facias, for there he is commanded to levy the Money of the Goods of the Defendant by the King's Writ, but no ſuch Au hority is given to the Marſhal. —— See tit. Sheriff (F).

Dedit conſenſum to the Sheriff that the Priſoner ſhould go at large, was a good

16. *Precedent Aſſent of Plaintiff* will excuſe Eſcape, but ſubſequent Aſſent will not make it an Eſcape with Aſſent of the Plaintiff, and therefore he has either Remedy againſt the Sheriff, or may retake the Party. 1 Salk. 271. pl. 1 Mich. 4 W. & M. in B. R. Scott v. Peacock.

Plea in Debt brought againſt the Sheriff, though it was urged that he ſhould plead it by way of Licence. Goldsb 81. pl. 20 Hill. 30 Eliz Cunney v. Harrington. —— Diſcharge of one in Execution may be by Parol only, As where J. S. is in Execution at my Suit in the Cuſtody of the Gaoler, and I bid the Gaoler let him go at large out of the Priſon, it is a good Diſcharge. Brown's Anal. 29.

17. A *Juſtice of Peace did* by Virtue of the Stat. of 22 & 23 Car. 2. cap. 20. *diſcharge a Priſoner who was in Cuſtody for* 100*l.* though the Diſcharge was illegal, yet upon an Eſcape brought againſt *the Sheriff* in C. B. he *was excuſed, becauſe the Juſtice of Peace had a Juriſdiction* and Authority *by the Statute to diſcharge a Priſoner in ſuch Manner as is therein directed, and though he had exceeded his Power, yet the Sheriff is not to be puniſhed.* 4 Mod. 353. Mich. 6 W. & M. Arg. cites Sir Tho. Orby's Caſe, who was Sheriff of Lincoln.

18. 8 & 9. *W.* 3. *cap.* 27. *S.* 6. *No* re-taking *ſhall be given in Evidence in Action of Eſcape, unleſs Specialty pleaded, and Oath that ſuch Eſcape was without the Goaler's Conſent, and gives* 500*l. Forfeiture for falſe Oath.*

Lutw. 582. 587. S C. adjudged per totam Curiam.

19. *Debt* was brought *by the Plaintiff Executor of A. againſt the Defendant as Executor of B. formerly Sheriff* of the County of D. Upon Nil Debet pleaded, the *Jury found* a Special Verdict, viz. *That A. recovered a Judgment againſt F. and ſued a Capias ad Satisfaciendum directed to B.* then Sheriff &c. *which Writ* of Capias ad Satisfaciendum *was executed by the Under-Sheriff; and F. being in Cuſtody aſſign'd a Term for Years to the Under-Sheriff in Satisfaction of the Money recovered by the Judgment, and to be diſcharged out of Execution; and this Aſſignment was to be void upon Payment of the Money recovered by the Judgment at a Day after the Office of B. to be Sheriff ſhould determine*; and *upon this F. was diſcharged* out of Execution, *and at the Day &c. he paid the Money to the Under-Sheriff*; but the *Under-Sheriff did not pay the ſaid Money to A. B. died*; and *A. died*; and the Plaintiff as Executor of A. brought this Action againſt the Defendant, and it was adjudged that it did not lie; becauſe the Releaſe of F. out of Cuſtody was an Eſcape in the Sheriff, and the Receipt of the Money afterwards could not purge it. Ex relatione M'ri Place. Ld. Raym. Rep. 399. Mich. 10 W. 3. C. B. Langton v. Wallis.

20. If

20. If the *Plaintiff orders the Sheriff to let a Man who is in Execution at his Suit to go at Large*, and he does ſo accordingly; it is a good Bar in Debt for the Eſcape; Arg. cites Dalt. 77. and 3 Bulſt. 98. * **Blamford v. Blamford**, that if in ſuch Caſe the Sheriff refuſes to let him go at Large, an Action of Falſe Impriſonment lies againſt him; and there the Ld. Coke ſays, That the Sheriff is bound to take Notice of the Plaintiff; And cites 2 Cro. 379. **Withers v. Henly** to the ſame Purpoſe. Arg. Ld. Raym. 555. Paſch. 12 W. 3. in Caſe of the King v. Toler.

* This is miſprinted it being on a very different Point, but it ſhould be the very preceding Caſe of Withers v. Henly.

21. If the Court grants an *erroneous Execution*, yet that *will not excuſe the Sheriff* where there is Eſcape. Brown's Anal. 29.

(E) Taking upon freſh Suit, and what ſhall be ſaid freſh Suit.

1. **IF a Man** in Execution **eſcapes** without the Aſſent of the Gaoler, **and the Gaoler makes freſh Suit after him, and** retakes him before any Action brought againſt him by the Party, **this ſhall excuſe him againſt the Party to whom the Party was in Execution.**

If one in Execution eſcape out of Gaol and *flies into another County, and is there retaken upon freſh Suit*, notwithſtanding it may be ſaid that the Sheriff cannot have the Cuſtody of him in another County, he having no Authority there, yet becauſe that he did all that he could do, and by this Freſh Suit retook him, and this before any Action brought, the Judges will adjudge this no Eſcape. 3 Rep. 44. b. in Boyton's Caſe. ——— Barnard. Rep. in B. R. 555. Trin. 3 Geo 2. in the Caſe of **Stonehouſe v. Mallins**, the Court ſaid that it had been ſo often reſolved that the Retaking muſt be before the Action brought that the would not enter into any Argument of that Point now.

2. But **in the ſaid Caſe, if the Party at whoſe Suit he was in Execution brings his Action againſt him for the Eſcape, and** after Action brought the Sheriff retakes him upon freſh Suit, **that this ſhall not be any Bar of the Action well attached before. Mich. 2 Car. adjudged upon a ſpecial Demurrer between** *Harvey and Sir G. Reynell.* **The which Intratur Tr. 2 Car. B. R. Rot. 1179.**

Fol. 890.

Jo. 144. pl. 2. S. C. & S. P. reſolved. ——— Noy 93. S. C. & S. P. and the Retaking was held to be too late though it was before Plea pleaded, and Judgment for the Plaintiff. ——— Lat. 200. S. C. & S. P. held accordingly per tot Cur. and Judgment for the Plaintiff. ——— Godb. 433. pl. 497. Harley v. Reynolds. S. C. adjudged ——— 12 Mod. 31 Mich. 4 W. & M. Ball v. Briggs S. P. though the Retaking was the ſame Day, and cites Jo. 145. ——— The Goaler may not retake the Priſoner as to be in Execution again for the Plaintiff, but *only for his own Indemnity.* Goldsb. 180. pl. 114. Paſch. 36 Eliz. Anon.

3. **If a Priſoner** eſcapes **out of Priſon** by Negligence of the Keeper, **and is** abſent for a Day and a Night, **and the** Keeper knows not of it, **but after** when he has Notice of it he makes freſh Suit **after him, and retakes him, this is a freſh Suit to excuſe him. Mich. 10 Car. B. R. between** *Hinton and Sir J. Lenthall* **adjudged per Cur. upon Evidence at the Bar, where the Iſſue was, whether he immediately after the Eſcape made freſh Suit; and per Cur. ruled that this ſpecial Matter was good Proof of the Iſſue, ſcilicet, that he made the freſh Suit according to the Iſſue. Intratur Tr. 10 Car. B. R. Rot. 627. P. 11 Car. B. R. between** *Elton and Sir J. Lenthall*, **in Debt upon an Eſcape ſuch Iſſue being joined and Evidence given that the Priſoner** eſcaped at Nine of the Clock of the Night, and the next Day immediately after Notice, **ſcilicet**, at Five o'Clock the next Morning freſh Purſuit was made, **and upon this the Priſoner**

See tit. Trial (D. f) pl. 4. S. C. and the Notes there.

Priſoner taken, and per Cur. this was a freſh Suit within the Iſſue.

See pl. 2. ſupra S. P. and the Notes there. —And ſee Rigeway's Caſe infra pl. 7. 8.

4. If a Priſoner in Execution eſcapes by Negligence of the Keeper, though he be taken upon freſh Suit after an Action brought againſt the Sheriff for this Eſcape, by which he is in Execution again, yet this ſhall not excuſe the Keeper, but the Plaintiff ſhall recover againſt him. Mich. 13 Car. B. R. between *Burford* Plaintiff *againſt Some and Gaier* Sheriffs of Middleſex, adjudged upon a Demurrer in an Action of Debt againſt them for the Eſcape. Intratur Tr. 13 Car. Rot. 1107.

5. *A Feme in Priſon in a Caſtle leaped over the Caſtle Wall into the Ditch of the ſaid Caſtle*, and the Warden of the Caſtle levied the Cry and retook her, and yet it was adjudged an Eſcape. Br. Eſcape, pl. 14. cites Itin. Canc. 6 E. 2.

6. A Man made *Attachment in one County*, and the *Party reſcued it, and went with it into another County*, and *the Officer freſhly purſued and retook it*, and well per Cur. therefore it ſeems that the ſame Law is of a Priſoner, as long as the Officer freſhly purſues and *retakes*, it is no Eſcape, though it be *in a foreign County*. Br. Eſcape, pl. 4. cites 33 H. 6. 2.

3 Rep 52. b. Ridgway's Caſe S. C reſolved that the Sheriff may

7. If Plaintiff recovers againſt the Sheriff, the Sheriff after this cannot retake the Priſoner, but is chaſed to his Action on the Caſe. And it ſeems he ought to *retake him before the Return of the Writ.* Mo 660. pl. 902. Mich. 34 & 35 Eliz. B. R. in Caſe of Grills v. Ridgway.

retain and detain after Action brought againſt him.——Show. 70. Mich. 1 W. & M. it was ſaid per Cur. that the Reſolution in Ridgeway's Caſe 3 Rep. 52. that the Sheriff may retake and detain, though ſo Poſitively laid down there, is not in Poph. Rep. 42. and in Mo. 660. is the clear contrary delivered for Law.

Mo. 660. pl. 902. Grills v. Ridgway. S. C. & S. P. agreed as to the loſing the View, and that the ancient Precedents are not to plead Freſh Suit within the View but only Freſh Suit. —Cro. E. 439. pl. 55. Grills v. Ridgway S. C. & S P. as to the Freſh Suit agreed; But

8. In Debt againſt the Sheriff of Devon for ſuffering C. in Execution at S. to eſcape in London. The Defendant *pleaded* in Bar *that C. was in his Cuſtody in Execution until he broke the Priſon at S. againſt the Will of the Defendant, and eſcaped; upon which he made freſh Purſuit, and retook him* at S. The Plaintiff by Proteſtation that the Defendant did not make freſh Suit, pleaded, that after the Eſcape, and before he retook him, he ſuffered him to be a whole Day and Night out of his View at London. Upon Demurrer it was agreed per tot. Cur. that *though he was out of Sight, yet if he is re-taken upon a freſh Purſuit, he ſhall be in Execution at the Suit of the Plaintiff*; and that if he fly into another County, the Sheriff may retake him there upon a freſh Purſuit, becauſe the Eſcape was of his own Wrong, of which he ſhall never take Advantage; and the Plaintiff not denying the freſh Purſuit but by Proteſtation has relied only upon the Matter of the being out of his View, ſo the Eſcape at London not anſwered, the Court will not intend other Matter than he himſelf has ſhewn; but had the Plaintiff demurred upon the Bar he ſhould have had Judgment. 3 Rep. 52. Paſch. 36 Eliz. B. R. Rigeway's Caſe.

if before he is retaken the Party brings his Action of Debt, then the *Retaking of him afterwards ſhall not avoid the Plaintiff's Action*, although the Retaking is upon Freſh Suit.——S. P. as to the bringing an Action againſt the Gaoler before the Retaking the Priſoner, that now the Gaoler cannot retake him ſo as to be in Execution for the Plaintiff again, but only for his own Indemnity; And Popham compared it to Waſte, which if repaired before Action brought the Party ſhall not have Action.——Gouldsb. 180. pl. 114. ſeems to be S. C. ——Poph. 41. S. C. accordingly.——S. C. cited Jo. 145. pl. 2.

9. The Defendant being in Execution in Norfolk brought his *Habeas Corpus to come before a Judge at the Lent Aſſiſes, and eſcaped to London*, and in Eaſter Term following was retaken, and thereupon he brought an Action of falſe Impriſonment againſt the Bailiff; but the Court held, that

that the *Re-taking on a freſh Purſuit was good*, though he had not taken him at the End of the Year, if Inquiry were made after him. Godb. 177. pl. 247. Mich. 8 Jac. C. B. Stone's Caſe.

10. Judgment againſt Husband and *Wife*, and ſhe was *taken in Execution.* The Plaintiff brought *Debt againſt the Marſhal, for that he ſuffered her to go at Large*, his Debt not being ſatisfied, who *pleaded that ſhe broke the Priſon, and he took her in freſh Purſuit, and now hath her in Execution*; Adjudged no good Plea, becauſe the Plaintiff had alleged that the Defendant *voluntarily ſuffered her to go at Large*, which was not anſwered or traverſed, and if ſo, then he *cannot retake her.* Cro. J. 657. pl. 8. Hill. 20 Jac. B. R. Whiting v. Sir Geo. Reynell.

11. *Voluntary Eſcape* by the Gaoler without Aſſent of the Plaintiff *ſhall not prejudice the Plaintiff*; but that he may bring a new Execution; Adjudged. Lev. 211. Paſch. 19 Car. 2. in B. R. Alanſon v. Butler. Sid. 330 pl. 12. S. C. the Sheriff cannot retake him but the Party may, becauſe otherwiſe by the Death or Inſufficiency of the Sheriff, or other Officer who had the Cuſtody of the Priſoner, he may be without Remedy.

In Caſe of an Eſcape *againſt the Will of the Sheriff*, either Plaintiff or Sheriff may *retake*; But on Eſcape *with Conſent of the Goaler* the Party has only Remedy to take, not the Sheriff; if with *Conſent of the Plaintiff*, then neither Plaintiff nor Sheriff can retake him, though the Debt be unſatisfied. Show. 177. cites Alanſon v. Butler and ſayes it is true Law and ſettled. —— 2 Mod. 136 Mich. Car. 2. C. B. Baſſet v. Salter, S. P. and the Court would not ſuffer it to be argued becauſe it had been lately ſettled that it was at the Plaintiff's Election to do either, and upon a Writ of Error brought in the Exchequer Chamber the Judges there were of the ſame Opinion; But ſays, that in the Ld. Ch. J. Vaughan's time the Court of C. B. were divided, but it is ſince ſettled. —— Freem. Rep. 213. pl. 220. S. C. & S. P. held clearly by the whole Court, and cites it lately reſolved accordingly in the Caſe of Crune v. King.

12. If there be a *voluntary* Eſcape in the Officer who takes the Party again in Execution, (which he ought not to do) yet the Plaintiff may have him in Execution if he will; Per Holt Ch. J. Comb. 396. Mich. 8 W. 3. B. R. Ettrick v. Brewell.

(E. 2) In what Caſes the Perſon may be retaken without Freſh Suit.

Eſcape-Warrant &c.

R. 8 & 9 W. 3. 26. S. 7. *IF any Priſoner committed in Execution to either or any of the Priſons ſhall eſcape by any Means whatever, the Creditor at whoſe Suit he is charged in Execution may retake ſuch Priſoner by a new Capias or Ca. Sa. or ſue forth any other Kind of Execution on the Judgment as if ſuch Priſoner had never been taken in Execution.*

2. 1 *Ann. Stat.* 2. *cap.* 6. *S.* 1. *If any Perſon committed, rendered or charged in Cuſtody in the Queen's Bench or Fleet, in Execution, or on meſne Proceſs or Contempt, ſhall go at large, upon Oath thereof in Writ before a Judge of that Court where the Action, Judgment or Execution were, or where the Party was committed or charged, ſuch a Judge is required to grant one or more Warrants, reciting the Action, Execution or Contempt, with which ſuch Perſon ſtood charged, which Warrants ſhall be in Force in all Places in England, Wales, and Town of Berwick, directed to all Sheriffs, Mayors, Bailiffs, Conſtables &c. in their reſpective Precincts, to retake and commit ſuch Perſon eſcaped, to the common Goal* A. was committed by Chancery for a *Contempt in reſcuing another taken on Ld. Chancellor's Warrant*; it was held that A. not being him-

of

ſelf committed, but only aſſiſting another who was committed was not within the Statute, ſo as that an Eſcape-Warrant would lie againſt him, though it lay againſt the Perſon reſcued by him. Wms Rep. 439. Trin. 1718. in B. R. Pain's Caſe.

of the County where retaken, there to remain without Bail or Removal, until Satisfaction be made of the Debt, or diſcharged by due Courſe of the Law.

3. The Defendant being in Cuſtody upon meſne Proceſs eſcaped, and was retaken upon an Eſcape-Warrant, by Virtue of the Stat. 1 Ann. cap. 6. and B. R. was moved, that upon bringing the Money into Court he might be diſcharged, but the Court ſaid they could not do it. 6 Mod. 21. Mich. 2 Ann. B. R. Hetherſhall v. Bowes.

4. The *Plaintiff in Debt on a Bond to come to an Account had been a Priſoner in the Fleet and eſcaped* was *retaken upon an Eſcape-Warrant*, according to the late Act of Parliament, and *committed to Newgate*, and upon *Affidavit made that nothing was due, and* the Plaintiff *by being in Newgate being diſabled from coming before a Judge to ſhew his Cauſe of Action*, and that Diſability coming *from his own Wrong*, viz. his Eſcape, the Court ordered common Bail, but if he had not eſcaped he might have got out by a Day-Rule. 6 Mod. 63. Mich. 2 Ann. B. R. Cotton v. Martin.

2 Salk. 626. pl 7. S. C. held accordingly, and that the Party is in ſtill upon the old Commitment continued down.—3 Salk. 148, 149 pl. 1. Moor's Caſe S. C & S. P. held accordingly —2 Ld. Raym. Rep. 1028. S. C. held that this retaking is not within the Meaning of the Statute 29 Car. 2. and that he might have been retaken on a Sunday without a Warrant.——6 Mod. 3 Salk. and Ld. Raym. Rep. ſays that it was held otherwiſe in C. B. and the two laſt Books ſay that the Barons of the Exchequer were equally divided. —— And Ld. Raym. Rep. ſays that the like Motion was made before in the ſame Term in B. R. and the Court was then of the ſame Mind.

5. A Priſoner *eſcaped* and *was retaken on a Sunday by* Virtue of *a Judge's Warrant*, called an Eſcape-Warrant. The Queſtion was, whether this taking was ſuch Service of Proceſs as was againſt the Act of 29 Car. 2. cap. 7. Per tot. Cur. this is a Taking in Nature of a Freſh Purſuit, and is no original Proceſs, and the Gaoler or Party might have taken him upon a Freſh Purſuit on a Sunday before this Statute. 6 Mod. 95. Hill. 2 Ann. B. R. Parker v. More.

6. A Priſoner in the King's Bench *eſcaped* and was *retaken upon an Eſcape-Warrant purſuant to the late Act by Perſons of whom none was an Officer as the Act directs.* The Sheriff was ordered to return the Warrant who returned it thus, (viz.) that he was brought to him in Cuſtody of one R. and others to him unknown, by Virtue of the Warrant &c. and that he detained him in Cuſtody juxta exigentiam Warranti prædict'. It was moved that this new Act being in Aid of the Execution of Juſtice, for that Reaſon ought to be favourably extended; But per Holt Ch. J. the Party being brought to the Sheriff by a *Warrant illegally executed*, it is as if there had been no Warrant at all, and therefore he *cannot detain him*, eſpecially ſince it doth not appear that any of the Perſons who brought him was a Conſtable, or other Officer of the Peace, or affirmed himſelf to be ſo, for it is from ſuch only that the Sheriff is to receive him, and from no other. Afterwards the Return being filed the Court adjudged it inſufficient, and granted an Hab. Corp. to bring the Priſoner back to the King's Bench Priſon. 6 Mod. 154. Paſch. 3 Ann. B. R. Rich v. Doughty.

7. One was *taken up by the Defendant on an Eſcape-Warrant about eight in the Morning*, and *long before the Court ſate*; on a Motion for an Attachment it was inſiſted that he could not have a Day-Rule at that Time; But this was over-ruled; becauſe in this Caſe there ſhall be no Fraction of a Day, and the Opinion of the late Ch. J. Holt was now mentioned, (viz.) That where a Perſon is taken upon an Eſcape-Warrant

Warrant, who had obtained a Rule for that Day, that the Proſecutor ſhall be committed; and that it was ſufficient if the Party had delivered his Name in Writing to the Clerk the Night before the Day he moved for a Day-Rule, as ſoon as the Court ſhould ſit; but it appearing in the principal Caſe, that the Day-Rule was obtained after the Party was taken upon the Eſcape-Warrant, on Purpoſe to avoid the Commitment by Virtue of that Warrant, and that his Name was not delivered to the Clerk the Night before, but a little Time before the Court ſate, it was ruled, that he ſhould continue in Cuſtody. 8 Mod. 80, 81. Trin. 8 Geo. Wilkinſon v. Matthews.

7. Defendant had been a Priſoner in Woodſtreet Compter in 1732, upon meſne Proceſs at the Suit of Brown, Plaintiff's Inteſtate, and being at that Time a Serjeant at Mace, the *Keeper of the Compter ſuffered him to have the Liberty of the Gate*, (as it is called) that is, to have his Liberty *upon Promiſe to return* into Cuſtody *whenever called upon by the Keeper*; The ſaid Action having never been diſcharged upon the Books of the Compter, and Brown in his Life-time having obtained Judgment, the Plaintiffs revived the ſame by Scire Facias, and having obtained an Award of Execution, charged the Defendant (ſtill a Priſoner on the Books) with a Capias ad Satisfaciendum as a Priſoner in Cuſtody of the Sheriffs of London; whereupon the Keeper of the Compter endeavoured to perſwade the Defendant to return into Cuſtody, which he refuſing, the Keeper on Sunday Nov. 9th *retook the Defendant* at George's Coffee-houſe Temple Bar, *without any Warrant*, and Defendant moved againſt the Keeper to be diſcharged, inſiſting that as the Eſcape was voluntary, the Keeper could not retake him, and alſo inſiſting, that the Debt was paid to Brown in his Life-time. The Keeper, on ſhewing Cauſe, could not controvert the firſt Thing inſiſted on, viz. that the *Eſcape was voluntary*, and as to Payment of the Debt, that was out of his Knowledge; Brown's Action never was diſcharged from the Books, and the Plaintiffs were not Parties to this Motion, but there had been a former Motion this Term by Defendant to be diſcharged, the Debt being paid; The Plaintiffs had anſwered that Fact, and ſhewn ſufficient Cauſe to keep him in Cuſtody. The Eſcape on all Hands being admitted to be volutary, Mr. Juſtice Denton, and Mr. Juſtice Forteſcue, were of Opinion that the Keeper could not retake the Defendant and that he ought to diſcharge him; Had the Eſcape been real, the Keeper might have retaken Defendant on a Sunday, and is not reſtrained by the Statute 29 Car. 2. Mr. Juſtice Reeve was of the ſame Opinion in Point of Law, but thought it too much for the Court to relieve Defendant, who appeared to have acted (at leaſt very diſhonourably with Regard to the Keeper) in this Summary Way upon Motion, and that Defendant ſhould be put to his Action, or an Audita Querela. Defendant was ordered to be diſcarged. Notes in C. B. 264, 265. Mich. 9 Geo. 2. Featherſtonehaugh, and Wife Adminiſtratrix of Brown v. Atkinſon.

8. *A Priſoner in B. R.* charged in Execution there was *turned over to the Fleet*, and there likewiſe charged in Execution at the Suit of the ſame Party, and on the 30th of Jan. laſt was *taken on an Eſcape-Warrant* ſigned by a Judge of B. R. He *inſiſted on a Day-Rule, but on ſearch there was none for that Day*; thereupon *as he was carried through the Old Baily towards Newgate, the Officers of the Fleet reſcued him.* It was held upon the Words of the Stat. 1 Ann. cap. 6. That any Judge of the Court where the Action was brought may grant an Eſcape-Warrant, and that a Judge of C. B. may grant it though the Priſoner is turned over and charged in Execution in B. R. and ſo Vice Verſa; And as to the *Entry of his Name in the Petition for a Day-Rule* it *ſignifies little unleſs it is read in Court*; And therefore

an Attachment was granted againſt the Reſcuers, and ruled that he ſhould be taken out of the Fleet and ſent to Newgate. 8 Mod. 240 Paſch. 10 Geo. The King v. Dunbarr.

(E. 3) Remedy againſt the Eſcaper, the Sheriff or the Gaoler.

1. IF a Man *recovers Debt or Damages againſt one who is in Priſon by way of Execution, and he eſcapes*, he ſhall have Debt againſt the Gaoler or againſt him; Per Skrene. But the Reporter ſays not againſt the *Priſoner*; For he was in Execution before, quod nota by him that this ſhall be Execution to the Party, though, he did not elect it, and if it be awarded after Judgment that he be diſmiſſed, this is a Bar of Execution, quod nota ibidem by Award. Br. Executions, pl. 33. cites 11 H 4. 12. 44, 45.

2. Where a *Man* whoſe Body is *in Execution eſcapes*, the Party has no Remedy but againſt the Gaoler; Per omnes in B. R. Br. Eſcape, pl. 12. cites 14 H. 7. 12.

3. If a *Priſoner in Execution eſcapes with the Permiſſion of the Gaoler* the Execution is utterly gone and extinguiſhed, and the Plaintiff at whoſe Suit he was taken in Execution ſhall never reſort to him who eſcapes but ſhall hold himſelf to the Gaoler for his Remedy; *But if ſuch Priſoner eſcapes of his own Wrong without the Privity or Conſent of the Gaoler*, the Gaoler may well take him again for his Indemnity, until the Plaintiff has determin'd his Election whether he will have his Remedy againſt the Gaoler, or that he will maintain the Execution; Per Curiam. 2 Le. 119. in pl. 162. Mich. 29 & 30 Eliz. B. R. in Caſe of Phillips v. Stone. cites 13 H. 7. 1. 2.

4. The *Body, Lands and Goods of J. S. were in Execution*, and *the Body eſcaped*, yet he could not be diſcharged of the Reſidue by Audita Querela; And in ſuch Caſe it ſeems, that if the Sheriff ſuffers the Body to eſcape, yet the *Dettee cannot have Action of Debt for all the Debt againſt the Gaoler, but an Action upon the Caſe*; For the Land and Goods which is ſatisfaction is Sufficient. Roll Rep. 204. in pl. 6. Trin. 13 Jac. cites it as Roade's Caſe.

5. A. *Scire Facias quare Executionem* habere non debet would lie *againſt one that made a voluntary Eſcape*, and there is no Reaſon, but that he may as well be *taken by the Party again without a Scire Facias*, for the Party *has an Intereſt in the Body of the Pledge until his Debt is ſatisfied*; Though if the Priſoner ſhould bring Treſpaſs againſt a Gaoler that detained him after a voluntary Eſcape, he could not defend it; the Miſchief would be exceeding great if the Sheriff &c. might at his Pleaſure put the Plaintiff to an Action only againſt himſelf; For this laſt Vacation the Warden of the Fleet turned as many Priſoners at large as their Debts came to 80000 l. and ran away himſelf; Cited per Hale Ch. J. Vent. 269. as held per tot. Cur. 9 Car. in Caſe of Roberts v. Trevilian.

Cart. 212. Paſch. 22 Car. 2. C. B. Vintner v. Allen S. C. adjudged for

6. *Executor brought Sci. Fac. on a Judgment in Debt for the Teſtator* againſt the Defendant *Quare Executionem habere non debet.* The Defendant *pleaded that he was taken in Execution by Ca. Sa. upon this Judgment and committed to the Fleet, and that the Warden permitted him to go at large*, and demanded Judgment; And upon Demurrer

Judgment

Judgment was given for the Plaintiff as to this Point per tot. Cur. præter Vaughan, who totis Viribus was againſt the Judgment. 2 Jo. 21. Caſes in C. B. Allen v. Vinter.

the Plaintiff. —S C. cited per Cur. Freem. Rep. 213. pl. 220.

ſa adjudged in C. B. and affirmed in Error in B. R.

7. If *one in Execution* eſcape, the Plaintiff has his Election to ſue Sheriff upon an Eſcape, or elſe the Defendant, but he *cannot have a Capias* againſt the Defendant *without a Sci. Fa.* 12 Mod. 230. Mich. 10 W. 3. Anon.

(F) In what Caſes the Sheriff or other Officer ſhall be charged for an Eſcape.

1. IF I recover againſt J. S. and the Sheriff takes him before any Writ of Execution comes to him, and ſuffers him to go at Large, he is not chargeable for this. 18 E. 3. 35. b. Fitzh. Barre, pl. 248. cites S. C.

2. If A. brings a Scire Facias againſt B. upon a Recognizance in Chancery, and has Judgment againſt B. and after it is entered upon the Record, that Elegit habere Executionem per Fieri Facias, and this is returnable Nihil, and then it is entered that A. proſecutus fuit a Writ of Capias againſt B. upon which B. is taken by the Sheriff, and after ſuffered to eſcape; in this Caſe no Action lies againſt the Sheriff upon this Eſcape, becauſe there is not any Award of the Capias by the Court, but is taken out without the Warrant, and no Capias lies upon a Recognizance by the Law, and for this there not being any Award of the Capias (which would be a Judgment tho' erroneous if there had been ſuch Award) the Sheriff may well take Advantage of it; Adjudged in a Writ of Error in the Exchequer-Chamber between the *E. of Cumberland and Weaver.* Intratur P. 44 El. Rot. 453. B. R. and the Judgment in B. R. reverſed. Cro. J. 3. S. C. in B. R. by the Name of Weaver v Clifford, but adjourned. — Yelv. 42. S. C. reports it held by 3 Juſtices as here, but that Fenner J. hæſitavit. — 2 Bulſt. 63. S. C. adjudged for the Plaintiff.

— Brownl. 83. S. C. but ſeems only a Tranſlation of Yelv — Capias lies at Common Law to execute a Recognizance. Mo. 274. per Clerk, Gent. and Manwood Ch. B. Ugnoll v. Paſton. — S. P. by Manwood Ch. B. much inforced. See 2 Le. 88. in Caſe of Ognell v. Paſton. — Cro. E. 576. S. P. that though the Capias was erroneouſly awarded, yet the Party being taken by Force thereof, it is a good Execution for the Party as long as it continues unreverſed, and the Sheriff is chargeable for the Eſcape. Coniers Sheriff of Durham's Caſe. — S. P. Cro. E. 707. in Caſe of Leighton v. Garnon, and the Sheriff ſhall not diſpute nor take Advantage of this erroneouſneſs of the Proceſs, admitting it to be ſo; for it was a good Warrant to him to take him, and falſe Impriſonment lies not againſt him, and by their Aſſent the Plaintiff had Judgment Cro. E. 164, 165. Ognell v. Paſton. — So where a Ca. Sa. was ſued out after the Year, and the Sheriff took him and let him eſcape. Cro. E. 188. pl. 14. Trin. 32 Eliz. B. R. Buſhe's Caſe.

3. In an Action upon the Caſe in B. R. againſt an Officer of an Inferior Court for an Eſcape, if the Plaintiff declares that he brought an Action againſt J. S. in the ſaid Inferior Court (as in Kingſton upon Hull) upon an Obligation made at Halifax in the County of York, and does not allege it to be within the Juriſdiction of the ſaid Inferior Court; and that upon this Judgment was given, and Execution granted, and Defendant took him in Execution, and ſuffered him to eſcape, and for this he has brought this Action. This Declaration is not ſufficient to charge the Defendant, becauſe it is not alleged that the Obligation was made within the Juriſdiction of the Court, for tho' the Action be tranſitory, yet it is an Inferior Court

Fol. 810.

Mar. 8. pl. 20. Paſch. 15 Car. A. non, S. P. and ſeems to be S. C. — S C. cited by Powell (John) J. Mich 4 W. & M 2

Lutw. 1567 and obſerves that the Reaſon of the Judgment in this Caſe was, becauſe it appears in the Body of the Declaration, that the Place where the Obligation was made was in the Body of the County, out of their Juriſdiction; But ſays, that where nothing of this appears by the Plaintiff's Declaration, it ought to be notified to the Court by the Plea of the Defendant to the Juriſdiction of the Court, which Plea if the Court refuſes or accepts it and proceeds after, if the Plea is offered as it ought to be, before Imparlance and upon Oath all Proceedings after ſhall be void. ——— S. C. cited by Atkins and Scroggs J. 2 Mod. 197. ——— S. C. cited 3 Lev. 23.

Court which has a limited Juriſdiction of Things ariſing within the Juriſdiction, the Proceedings there were Coram non Judice, **and all utterly void,** of which the Office ſhall take Advantage **in this Action upon the Eſcape. P. 15 Car. B. R. between** *Richardſon and Barnard* **per Cur. adjudged in arreſt of Judgment after a Verdict for the Plaintiff upon ſuch Declaration. Intratur Tr. 14 Car. Rot. 1590.**

S. C. cited by Coke Ch. J. Roll Rep. 205. Trin. 13 Jac. B. R. in pl. 2. and Ibid. Arg. is cited the Caſe of 34 H. 6. S. P. ——— S. P. agreed by Doderidge J. Roll Rep. 205. ——— 2 Bulſt 322. Hill. 12 Jac. S. P. by Coke Ch. J. who ſaid it is a plain and clear Caſe, and cites 34 H. 6.

4. **If A.** recovers againſt two jointly, **and** takes both in Execution, **and after** one is ſuffered to eſcape, **though the other continues in Priſon, yet Debt lies on the Eſcape againſt the Sheriff, in which** all the Debts ſhall be recovered **againſt him;** *Norgate's Caſe* **adjudged cites Tr. 13 Ja. B. R. per Coke.**

Roll Rep. 204. pl. 6. S. C. adjornatur. ——— Ibid. 293. pl. 8. Wood v. Sutcliffe S. C. ——— 2 Bulſt. 320. S. C. three Juſtices, contra Doderidge, held the Action well brought, but by reaſon of ſome Error in Proceedings no Judgment was given, and the Matter was ended by Agreement.

5. **If a Man** recovers againſt Baron and Feme, and takes both in Execution, **and after** the Feme is ſuffered to eſcape, **though the Baron continues in Priſon, yet Debt lies upon this Eſcape againſt the Sheriff, in which all the Debts ſhall be recovered, for this was the Debt of the Feme, and ſhe is as fully in Execution as the Baron. Tr. 13 Ja. B. R. between** *Dr. Sutcliff and Sir George Reynell.*

Palm. 425. Paſch 2 Car. B. R. Dickſon v. James S. C. & S. P. ——— Noy 78 Dixon v. James S. C. & S. P. and a Judgment in C. B. was affirmed in B. R. ——— So in Caſe of an Eſcape ſuffered by the Sheriff, and an Action brought againſt him, he pleaded that no Capias iſſued to him; but per Cur. he ſhall not take Advantage of an erroneous Proceſs. Sty. 232. Mich. 1650. Martin v. Hendley.

6. *A Recovery was erroneous,* and the Party being in Execution was ſuffered by the Gaoler to eſcape, *and afterwards* the Recovery was *reverſed for Error,* yet the Action lay againſt the Gaoler. Godb. 27. in pl. 36. cites 13 E. 3. Barr 253.

7. If an *Officer having a Warrant to arreſt a Man, ſees him ſhut up in a Houſe, and challenges him as his Priſoner, but never actually had him in his Cuſtody,* and the Party gets free, the Officer cannot be charged with an Eſcape; for there muſt be an actual Arreſt. 2 Hawk. Pl. C. 129. cap. 19. S. 1. cites Corone 9 H. 6. 1. pl. 3. 17 Aſſ. pl. 1. Fitzh. Corone 249.

8. If a Gaoler *ſuffers a Man condemned to go at Large* and retakes him again, yet Action of Debt lies for the Eſcape; for per Billing, where he is ſo retaken he *is not in by the firſt Execution.* Br. Eſcape, pl. 34 cites 10 E. 4. 10. 11.

9. By the *Statute of Weſtminſter 2. cap.* 11. *de Servientibus Ballivis* &c. That if the Bailiff be found in Arrear in Action of Account, and committed to Ward, and the Warden permits him to eſcape, *Debt* lies againſt him thereof, and *by the Equity* Debt lies *againſt every other Warden*

upon

upon every or Condemnation in other Action; Per Choke and Pigot. Br. Parliament, pl. 19. cites 15 E. 4. 20.

10. When a *Man* is *acquitted* he *is no Priſoner*; for if he eſcape the Sheriff ſhall not be charged of the Eſcape. Br. Fees, pl. 6. cites 21 H. 7. 16.

11. *Judgment was had againſt the Defendant in B. R. and another Judgment againſt him in C. B. at the Suit of the ſame Party*, upon which he *was taken in Execution, and committed to the Fleet*; he brought an Habeas Corpus cum Cauſa, and was *removed into the King's Bench*; if the *Marſhal ſuffers him to eſcape he is liable for Both Debts*. D. 152. a. pl. 6. Mich. 4 & 5. P. & M. Anon.

12. Where a *Reſcous* is *made after the Arreſt* on a Ca. Sa. at the ſame Time whereby the *Party arreſted eſcapes*, the Sheriff ſhall be charged for the Eſcape with the Condemnation, and he ſhall have his Remedy againſt the Reſcuer by an Action on the Caſe. D. 241. a. pl. 47. Trin. 7 Eliz. Anon.

13. If *one who has a Protection from the King is taken in Execution* and eſcapes, the Gaoler ſhall anſwer for the Eſcape; Cited per Cur. Le. 277. in pl. 377. Paſch. 26 Eliz. in the Exchequer as one Hale's Caſe.

14. If the Sheriff at the Requeſt of the Plaintiff makes J S. a *ſpecial Bailiff* to execute Proceſs, *and* in Conſideration thereof *promiſes not to take Advantage againſt the Sheriff in caſe of an Eſcape*; if the Party charges the Sheriff for an Eſcape an Action on the Caſe lies for the Sheriff upon the Promiſe. Ow. 97. Trin. 30 Eliz. Dabridgecourt v. Smallbrook.

Le. 132 pl. 180 Palmer v. Smallbrook, S. C. adjudged for the Sheriff, though it was inſiſted that the Promiſe was againſt Law and void. —— 3 Le. 227 pl. 305. S. C. in totidem Verbis. —— Cro. E. 178. pl. 9. S. C. adjudged accordingly. —— Ibid. 271. pl. 2. Smallbroke v. Dabridgecourt, S. C. and Judgment affirmed in Error in Cam. Scacc. Hill. 34 Eliz.

15. If a *Sheriff takes one in Execution by* Force of *a Capias*, an Action of Debt will lie againſt him though he *returns not the Writ*. Ow. 43. Mich. 31 & 32 Eliz. ſaid by Periam to have been ſo adjudged in Tymberman's Caſe.

16. If a *Sheriff has* in his Cuſtody *ſeveral Priſoners in Execution and dies*; and after a *new Sheriff* is made he *is bound to take Notice of all Executions againſt any Perſon he finds in the Gaol*, for there is no Perſon to make Delivery or give him Notice thereof. 8 Rep. 72. b. Mich. 39 & 40 Eliz. B. R. the 3d Reſolution in Weſtby's Caſe.

17. Caſe lies againſt the Sheriff for letting one go at Large who was taken on a *Cap' Utlag'* on meſne Proceſs in Debt, the Plaintiff not being ſatisfied, becauſe he is hereby delayed of his Debt. Cro. E. 652. pl. 9. Hill. 41 Eliz. B. R. Bonner v. Stokeley.

If Sheriff takes one by Cap' Utlag' after Judgment and lets him eſcape, though he returns not the Writ, yet he is liable to Debt on the Eſcape. Cro. E. 107. cites 17 Eliz. Auſtrey's Caſe.

18. Caſe &c. wherein the Plaintiff declared, that he had brought an Action againſt M. for 30 l. and he not appearing, was outlawed, and was afterwards *taken by the Defendant*, being Sheriff, *upon a Capias Utlagatum, who returned Cepi*, and afterwards ſuffered him to eſcape; Adjudged, that the Action lay againſt the Sheriff, and that the Jury ought to give the Value of his Debt in Damages. Mo. 641. pl. 882. Mich. 43 & 44 Eliz. C. B. Evans v. Williams.

19. If a *Capias ad Satisfaciendum* be iſſued out *againſt a Nobleman*, (where it ought not ſo to be) *and he is taken* by Force of this, and afterwards ſuffered to eſcape and go at Large, an Action of Debt for the *Eſcape well lies*; for though de Jure he ought not to be taken, but he being

being once taken, he ought not to ſuffer him to eſcape; Per Coke Ch. J. 2 Bulſt. 65. Hill. 11 Jac. in Caſe of Weaver v. Clifford.

20 If the Sheriff *arreſts one by erroneous Proceſs*, and hath him in Execution, and ſuffers him to eſcape, he ſhall be charged; as where the *Capias was by a wrong Name*, and he *was taken upon a Teſtatum*, in which he was named *by his right Name*, and had him in Execution, and afterwards ſuffered him to eſcape; per tot. Cur. 2 Bulſt. 256. Mich. 12 Jac. Keiſar v. Tyrrel.

21. The *Commiſſioners* upon the Statute of Bankrupts *committed a Bankrupt* to the Cuſtody of the Sheriff *for refuſing to be examined upon Interrogatories*, and they let him eſcape; whereupon Action upon the Caſe was brought againſt them. It was objected the Action did not lie, becauſe he was not committed till Satisfaction of the Debt; But reſolved, the Action did well lie, the Commitment being only for refuſing to be examined upon Interrogatories, although it does not appear what the Interrogatories were, ſo as the Court might judge whether they were lawful or not, for they ſhall be intended lawful till the contrary appears. Mo 834 pl. 1123. Trin. 12 Jac. B. R. Briſtol Sheriff's Caſe.

22. The Defendant was taken in Execution by the old Sheriff, who in Exitu ab Officio by Indenture debito Modo confect' delivered him to the new Sheriffs, virtute cujus he was in Execution under them, and upon an Habeas Corpus brought was delivered to the Marſhal, who ſuffered him to eſcape, againſt whom an Action was brought, and upon Demurrer to this Declaration Exception was taken, becauſe *it was not ſhewn that the old Sheriff's delivered him in Execution to the new Sheriffs with the Cauſe of his Impriſonment*; for it may be that he was delivered per Indenturam debito Modo confectam for other Cauſes, and that this Cauſe was not mentioned, and then it was an Eſcape in them and not in the Marſhal. The Court was divided & adjornatur. Cro. J. 587. pl. 11. Mich. 18 Jac. B. R. Dowſewell v. Sir Geo. Reynells.

2 Roll Rep. 282 S. C. adjornatur.

23. *Judgment was given againſt Husband and Wife*, and *ſhe was taken in Execution, and permitted to go at Large*, for which an Action of Debt was brought againſt the Marſhal; It was inſiſted for him, that the Plaintiff was not wholly deprived of the Debt, becauſe her Husband was liable to the Execution; But adjudged, that the Action did lie, becauſe the Feme only was committed to Priſon and not the Baron, and ſhe is the ſole Debtor who is impriſoned. Cro. E. 657. pl. 8. Hill. 20 Jac. B. R. Whiting v. Reynell.

A Committitur upon the Roll is Evidence of the Perſon's being in Priſon ſo as to charge the Marſhal with an Eſcape, though

24. A Committitur entered on the Roll was *vacated* on the Motion of the Plaintiff, *to the Intent the Plaintiff* (the Defendant having never been in Cuſtody) *might take what Execution he pleaſe*; And the Court ſaid, that the Entry of the Committitur upon the Roll does not charge the Marſhal for Eſcape unleſs after the Entry the Party be actually in the Marſhalſea. Sid. 220. pl. 5. Mich. 16 Car. 2. B. R. Conny v. Jacob.

ſuch Committitur be not entered in the Marſhal's Book; Adjudged. Ld. Raym. Rep. 704, 705. Mich. 13 W. 3. B. R. Spencely v. Sutton.

Freem Rep. 398. pl 519. S. C. adjudged accordingly, and that the Party may either have a Sci. Fa or a Ca. Sa.

25. *Debt againſt the Son*, who was *Marſhal of the King's Bench*, *for the Eſcape of one in Execution in the Time of his Father*, who was likewiſe Marſhal, *and by whoſe Death the Office deſcended to the Defendant*; Upon the Trial the Caſe upon the Evidence was, *the Father ſuffered a Priſoner voluntarily to eſcape, who in a little Time after returned to the Priſon, and was actually in Cuſtody at the Death of the Father, and ſo continued in the Time of the Son till he permitted him to eſcape again.* And whether he ſhould be chargeable for the Eſcape in his own Time after the voluntary

Eſcape

Eſcape permitted by the Father, was the Queſtion; It was inſiſted, that he ſhould not, becauſe after the voluntary Eſcape ſuffered by the Father he could not take him again in Execution, though the Creditor might if done without his Conſent, and though he returned to the Priſon, yet neither the Father or Son could detain him; but adjudged for the Plaintiff per tot. Cur. upon a ſpecial Verdict finding all this Matter. 2 Lev. 109. Trin. 26 Car. 2. Lenthal v. Lenthal.

26. Eſcape &c. in which the Plaintiff declared, that he *ſued T. S. in the Court of Ely, upon a Bond made infra Juriſdictionem of that Court, upon which T. S. was taken*, and the Defendant ſuffered him to eſcape; Upon Not Guilty [non eſt factum] pleaded, the *Jury found that* there was ſuch Bond and ſuch Proſecution and Eſcape, but *that the Bond was not made infra Juriſdictionem Curiæ*; and the Queſtion was, Whether an Action of Eſcape would lie? becauſe ſince the Bond was not made within the Juriſdiction of the Court, all the Proceedings were coram non Judice; and per three Juſtices, Ellis e contra, this is no Eſcape, and though the Party had *admitted the Juriſdiction by pleading Non eſt factum*, yet that could not give the Court any Juriſdiction where originally it had none. 2 Mod. 29. Paſch. 27 Car. 2. C. B. Squibb v. Hole.

Freem. Rep. 193. pl. 97. Squib v. Holt, S. C. North Ch. J. conceived, that as this Caſe is it ſhall be ſaid to be Coram non Judice as to the Plaintiff to excuſe the Officer from his Action; becauſe it was a Thing that lay in his own Cognizance that the Bond was made out of the Juriſdiction of the Court, and ſo the Court had nothing to do with it; But perhaps if an Executor had brought the Action it might have been otherwiſe, becauſe he ſhall not be preſumed to know where the Bond was made; and the other Judges ſeemed to agree with him; ſed adjornatur.

27. If a Man is *arreſted tortiouſly*, and afterwards delivered to the *Gaoler*, who *is afterwards informed of the tortious Taking* (without any Fraud in the Caſe) he ought nevertheleſs to detain the Priſoner delivered to him on the Arreſt, though the Execution of it was illegal; for if ſuch Information be falſe, and he lets the Priſoner go, he is liable to be ſued for an Eſcape. Arg. Comyns's Rep. 155. and cites it as ſo agreed by the Court 2 Jo. 214. [Trin. 34 Car. 2. B. R.] in Caſe of Olliet v. Beſſey.

28. Caſe lies againſt the Gaoler for *Eſcape on meſne Proceſs*. Cumb. 69. Mich. 3 Jac. B. R. Pettley v. North.

Cro. E. 625. pl. 19 Mich. 40 & 41 Eliz. B. R. Bennion v. Elwick, S. P. held accordingly.

29. An Action of Eſcape will not lie againſt the Sheriff for the Eſcape of a Priſoner *taken upon a void Judgment*; Admitted. Carth. 148. Trin. 2 W. & M. in B. R.

30. *But* there is a Difference where the Judgment is merely void, and where it is *erroneous only*, and this depends upon *another Diſtinction*, viz. where the *Court, where the Judgment was obtained, had Cognizance* of the Cauſe *and where not*; for in the firſt Caſe, if the Plaintiff obtains a Judgment, and by his own ſhewing *had no Cauſe of Action*, yet becauſe the Court had Juriſdiction of the Cauſe, this is only an erroneous and not a void Judgment; but it is otherwiſe where the Court had no Juriſdiction of the Cauſe. Carth. 148. Trin. 2 W. & M. in B. R. in Caſe of Gold & al' v. Strode.

When a Perſon is in Execution upon an erroneous Judgment and eſcapes, and then an Action is brought againſt the Gaoler or Sheriff, and Judgment and Execution thereon, though the firſt Judgment upon which the Party was in Execution ſhould be afterwards reverſed, yet the Judgment againſt the Gaoler being upon a collateral Thing executed ſhall remain in Force. 3 Mod. 325. in S. C.

31. *Plaintiff outlawed J. S. after a Judgment on a Ca. Sa. ſued out within the Year*, and *two Years after the Outlawry J. S. was taken* upon a Capias Utlagatum, and the Sheriff let him eſcape. In Debt brought by the Plaintiff againſt the Sheriff the Court held that the Defendant

5 Mod. 209. 203. S. C. adjudged for the Plaintiff.

was

Comb. 373. S. C. and Holt Ch. J. ſaid he never underſtood the Difference taken in the Caſes within the Year or after, and that it was taken ſuddenly.

was in Execution at the Plaintiff's Suit, though after the Year, and that without Prayer, becauſe he would have been ſo if taken within the Year, and here is no Difference; for the Plaintiff was at the End of his Proceſs at the Exigent, and no Continuance nor Sci. Fa. lies after Cap. Utlag. and *the very Cap. Utlag which is ſued at his Charge imports an Election of the Body.* N. B. The Defendant died, ſo no Judgment was given, but Holt Ch. J on hearing thereof ſaid they were inclined to give Judgment for the Plaintiff. 1 Salk. 319. pl. 2. Paſch. 8 W. 3. B. R. Wolf v. Daviſon.

The Court inclined to give Judgment for the Plaintiff; Sed adjornatur.

2 Ld. Raym. Rep 788. in C. B. the S. C. the Plaintiff brought a ſpecial Action on the Caſe for this Eſcape, and adjudged unanimouſly by all the Judges of C. B. that the Action well lay.

32. If *one taken upon* a Writ of *Excommunicato Capiendo upon a Sentence in the Spiritual Court*, for Non-payment of Money decreed for Tithes and Coſts, eſcapes, an Action will lie againſt the Sheriff; for though this is founded upon a Matter merely Spiritual, yet the Proceſs iſſues out of a Temporal Court, and is directed to, and executed by a Temporal Officer, and the Damages conſequential thereupon Temporal, Adjudged per totam Curiam, though it was confeſſed to be the firſt Action in this Caſe. Lutw. 121, 122. Hill. 6 W. & M. Slipper v. Maſon.

——— A Perſon excommunicated was charged in Cuſtody of the Sheriff upon an Excommunicato Capiendo, and committed to the Fleet charged therewith, and from thence by Habeas Corpus, where he was ſuffered to eſcape. It was agreed, that if the firſt Writ was not returned they might take a new one, and thereupon take him up de Novo; otherwiſe if it were returned. 6 Mod. 78. Mich. 2 Ann. B. R. The Queen v. Ball.

33. Gaoler is *a known Officer in Law*, and his Cuſtody is the Cuſtody of the Sheriff to many Purpoſes; Per Cur. 1 Salk. 348. pl. 2. Trin. 7 W. 3. B. R. in Bethel's Caſe.

34. Marſhal is *not chargeable* in Eſcape *till Notice of the Committitur.* 1 Salk 272. pl. 3. Mich. 13 W. 3. B. R. Watſon v. Sutton.

35. If the *Sheriff of Northumberland has a Man in Cuſtody in Northumberland*, and the *Sheriff is* himſelf here *in London, and a Writ is delivered to him againſt that Perſon*, he is in his Cuſtody immediately upon that Writ; otherwiſe if the Man was out of the County at the Delivery of the Writ, as in Caſe the Sheriff was bringing him to Weſtminſter on a Habeas Corpus; Per Holt Ch. J. 1 Salk. 274. Trin. 5 Ann. B. R. in Caſe of Jackſon v. Humphreys.

1 Salk 201. pl. 5. Lucking v. Denning, S. C. in B. R. (but mentions no Year) adjudged for the Plaintiff.

36. In an Action for an *Eſcape againſt a Servant of the Compter*; Upon Not Guilty pleaded, it was given in Evidence for the Defendant, that *the Cauſe of Action aroſe out of the Juriſdiction of the Court, and* that *the Defendant had Notice of it*; and this Matter being found ſpecial, Judgment was given for the Plaintiff, for the Officer ſhall not take upon himſelf to examine that Matter. Comyns's Rep 156. Paſch. 7 Ann. cited by Serjeant Richardſon to have been reſolved in B. R. Lucking v. Benning.

37. An Officer is chargeable for an Eſcape of a Perſon, where the *Action ariſes out of the Juriſdiction of the Court by whoſe Proceſs he was taken.* Comyns's Rep. 153. pl. 103. Paſch. 7 Ann. C. B. Higginſon v. Sheif.

(F. 2) In what Caſes where the Inferior Officer is not ſufficient, the Head Officer ſhall be charged.

Reſpondeat Superior.

1. 13 *E.* 1. *cap.* 11. *Weſtm.* 2. ENACTS, that *Servants, Bailiffs, Chamberlains, and all Receivers which are accountable being found in arrear by Auditors aſſign'd by their Maſters, they ſhall be committed to Gaol till they ſhall have ſatisfied the Maſter; and let * the Sheriff or Gaoler take heed, that he do not ſuffer him to go at Large by Replegiare, or otherwiſe, † without the Aſſent of his Maſter.*

* This Act *extends to all Keepers of Gaols*, and therefore if one hath the keeping of a Gaol by Wrong, or *de Facto*, and ſuffereth an *Eſcape*, he is within this Statute, as well as he that has the keeping of it de Jure. 2 Inſt. 381, 382

† And this Aſſent may be *by Parol*, and ſhall be a ſufficient Bar in an Action of Debt brought for the Eſcape. 2 Inſt. 382.

W. 2. *cap.* 11. *And if he do, he ſhall anſwer to the Maſter the Damages, and the Maſter ſhall have his Recovery thereof by a * Writ of Debt.*

There was *no Action of Debt* againſt the Gaoler *for an Eſcape at the Common Law*, but the Party was driven to his ſpecial Action upon his Caſe, which Action was grounded upon a Treſpaſs or Wrong, and not upon any Contract in Deed or in Law, but this Act firſt gave the Action of Debt againſt the Gaoler which had let one to Eſcape, which was committed to Priſon by Auditors for Arrearages of Account, but it lies not againſt the *Gaoler's Executors* becauſe it is a Treſpaſs, and before any other Act of Parliament by the Equity of this Act an Action of Debt do lie againſt the Gaoler for an Eſcape in Court of Pipowders, and ſo in all other Caſes. 2 Inſt. 382.

Afterwards the Statute of 1 R. 2. for a further Declaration gave the Action againſt the Gardein of the Fleet. 2 Inſt. 382.

But albeit this Act and the Statute of 1 R. 2. alſo doth ſay *Per Breve*, yet a *Bill of Debt lies alſo* by the Equity of this and that Statute, albeit it has been holden to the Contrary, but ſince it hath been often adjudg'd that a Bill of Debt is maintainable upon the ſaid Acts. 2 Inſt. 382.

Now, foraſmuch as the Statutes do give Recovery by Writ of Debt, incidently they do give *Damages* alſo. 2 Inſt. 382.

This Act *extends to Feme Coverts and Infants* that are *Keepers of Gaols*, to charge them in an Action of Debt for the Eſcape of one in Execution. 2 Inſt. 382.

And if the Gaoler have not wherewithal his Superior ſhall Anſwer. This is to be underſtood, when one that hath the Cuſtody of a *Gaol of Freehold or Inheritance*, commit the ſame to another that is not ſufficient, his Superior ſhall anſwer for the Eſcape of the Priſoner; But he ſhall not have the Action of Debt againſt the Superior as long as the *Inferior is ſufficient*. 2 Inſt. 382.

The Mayor and Citizens of *London* have the Sherivalty of London in Fee, and the Sheriffs of London are Gardeins under them, and removable from Year to Year, in this Caſe the Sheriffs of London are Gardeins, and the Mayor and Citizens their Superiors; and though the Sheriffs appoint a Keeper under them, yet he is not within this Statute, becauſe it is intendable when the Gardein comes in by him that he hath the Freehold or Inheritance in the Cuſtody, for this Act does extend but unto two ſuch Degrees, for there cannot be two Superiors within this Act, but one Superior and one Inferior. 2 Inſt. 382.

The Duke of Norfolk being *Marſhal of England* of Inheritance, and having Authority to make a Deputy, who has the Cuſtody of the Gaol, he is the Gardein, and the Duke of Norfolk his Superior within this Act. 2 Inſt. 382.

2. *One* condemn'd for Debt in the Admiralty Court was committed to the Priſon of Sir John Arundel, he *having the Liberty of a Gaol*, and the *Under-Gaoler* promiſed [*permitted*] him to *eſcape*. It was held, that Sir John was chargeable in Debt, and that two or three Eſcapes ſuffer'd by

Sav. 11, 12. pl. 30. Trewynyard v. Windell. S. C. but not ſo clear.

by the Under-Gaoler forfeits his Office and the Liberties. D 278. b. Marg. pl. 5. cites Mich. 23 & 24 Eliz. Sir John Arundel's Caſe.

3. In Debt upon Eſcape &c. againſt the Sheriff of Nottingham, he pleaded Nil debet, and gives in Evidence that the *Bailiff which made the Arreſt, was made upon Condition that he ſhould not medale with ſuch Executions without ſpecial Warrant of the Sheriff himſelf*, and his Conſent, but it was reſolved (this notwithſtanding) that the Sheriff ſhould be charged in all. 2 Brownl. 283. Mich. 7 Jac. C. B. cites the Sheriff of Nottingham's Caſe.

4. Note, That if Execution be directed to a Sheriff to arreſt any Man, or to make Execution within a Liberty, and the *Sheriff directs his Warrant to a Bailiff of the Liberty for to make Execution of the Proceſs, who makes it, and after is a Fugitive*, and not able to anſwer for that, the *Lord of the Franchiſe ſhall anſwer* for that, and ſhall be liable to anſwer for his Bailiff by all the Juſtices. 2 Brownl. 50. Hill. 8 Jac. C. B. Anon.

Bridgm. 6. S. C. adjudg'd that the Action was good either Way.

5. *Debt* upon an Eſcape, where the Party was condemn'd in Debt and taken upon an Outlawry after Judgment; upon Demurrer Exception was taken, becauſe the Action was *not brought tam pro Domino Rege quam pro ſeipſo* for ſuffering an *outlaw'd Perſon* to eſcape, but adjudged, that the Plaintiff might bring Debt for what he had loſt. Cro. J. 619. pl. 5. Mich. 19 Jac. B. R. Moor v. Sir Geo. Reynells.

Ibid. cites Vent. 318. 2 Mod. 119. S. C. but that the Caſe in the other Books is much better reported.

6. An Action of Debt was brought againſt W. as Guardian of the Fleet in Fee, for the Eſcape of H. in Execution for 2000 l. at the Plaintiff's Suit, out of the Cuſtody of D. to whom W. had granted that Office for his own and two other Lives; On Nihil debet, a ſpecial Verdict was found, That *W. was ſeiſed in Fee* of the Office, and *made a Grant for three Lives to D.* that *H and divers others in Execution* for great Debts *did eſcape* out of the Cuſtody of D. and that he being a Man of deſperate Circumſtances, ſuffered them to eſcape, and went with them; and that *D. at the Time of the Grant and Commitment of H. and of his Eſcape was inſufficient*; and the Queſtion referred was, Whether W. on the Statute of Weſt. 2. quod Reſpondeat Superior, ſhould be obliged to anſwer this Debt? And this having been ſeveral Times argued at the Bar, Wild, from the Bench took an Exception, that the *Verdict* was inſufficienty found, becauſe it *did not find D. inſufficint at the Time of the Action brought*; and on that Exception a Venire Facias de novo was awarded. Gilb. Equ. Rep. 257. per Gilbert Ch. B. cites 2 Lev. 158. and 2 Jo. 60. [Hill. 27 & 28 Car. 2. B. R.] Plummer v. Whitchcot.

7. No Action will lie againſt a Deputy for an Eſcape, but againſt the Maſter, and the Statute provides that if the Gaoler be not ſufficient, Reſpondeat Superior, and a *Deputy is not a Gaoler* but a Servant of a Gaoler, Arg. 2 Lev. 159. Hill. 27 & 28 Car. 2. B. R. in Caſe of Plummer v. Whitchcott.

2 Show. 308. pl. 315 Croſle v. Lenthal. S. P. held accordingly, and ſeems to be S. C.

8. Action was brought againſt L. upon an Eſcape ſuffered by C. who had *a particular Eſtate in the Office of Marſhal* of B. R. and at the Trial the Plaintiff was nonſuit, for the Eſtate of L's own ſhewing was not in him; Wherefore a Motion was made in Court, that L. might bring in his Deeds, and make it appear in whom the Eſtate was. The Court ſeemed to think it hard in ſuch a Caſe as this; but if L. was to put in an Officer, they might make him ſhew his Title; and it was ſaid *it ought to be of Record in the Court who is the Officer*, that the Party grieved may know againſt whom to bring their Action; but as for bringing in the Deeds the Court could not order it; but ſaid they might go into Chancery. Skinn. 113, 114. pl. 5. Trin. 35 Car. 2. Lenthal's Caſe.

9. If any one has an *Eſtate for Life in the Office of Marſhal* and ſuffers an Eſcape, he who has the Inheritance is not chargeable; and the Superior then ſhall not anſwer for the ſame. 2 Show. 308. pl. 315. Trin. 35 Car. 2. B. R. Croſs v. Lenthall. Skinn. 113. Lenthal's Caſe. S. C. and ibid. 114 S. P. by Jones J.

(F. 3) What Action lies againſt the Sheriff, Gaoler &c. And what of his is liable to anſwer for Eſcapes. And How.

1. 1 *R.* 2. *cap.* 12. GAVE *Action of Debt for ſuffering Eſcapes.* See (A. 2) pl. 15. and the Notes there.

2. The Statute of Weſtm. the 2d. if *Sheriff permits an Accountant to eſcape*, Action of Debt lies, and this is of him who is found in arrear. Br. Dette, pl. 103. cites 15 E. 4. 19.

3. *And by the Equity* of the ſame Statute, if any who is condemn'd and *impriſon'd upon the Condemnation eſcape*, Action of Debt lies againſt the Warden, and *not to recover the firſt Duty, but the Penalty given by Statute.* Br. Dette, pl. 103. cites 15 E. 4. 19.

4. *But* where a Man is *taken by Capias ad Computandum*, and after the Sheriff permits him to go at large, Action of Debt does not lie; For he is not in Priſon for any Duty, but Action upon the Caſe lies. Br. Dette, pl. 103. cites 15 E. 4. 19.

5. And where *Debt upon Eſcape is brought in Surry, inaſmuch as the Sheriffs of L. had the Party in Ward and permitted him to eſcape into Surry*, there he *ought to allege that he was in Ward in Surry* and eſcaped there; For it *is no Eſcape but where he is in Ward*; Quod nota. Br. Dette, pl. 103. cites 15 E. 4. 19.

6. Action upon the Caſe by the Earl of Kent againſt Shaw and another Sheriffs of L. that where the *Plaintiff had brought Writ of Account* againſt M. and *Judgment given that he ſhall account*, and *Capias ad Computand' awarded to the Sheriffs of L. by which they took him and held him in Ward till ſuch a Day, when they ſuffered him to eſcape* &c. And note, that Action upon the Caſe was brought, for he *cannot have Debt till it be certain, and it is not certain till he has accounted in Fact.* Br. Eſcape, pl. 37. cites 16 E. 4. 23. Br. Action, ſur le caſe pl. 98. cites S. C.

7. Either Action of *Debt* or *Caſe* lies for ſuffering an Eſcape of one in *Execution for Debt* due to the Plaintiff. Cro. E. 767. pl. 8. Trin. 42 Eliz. B. R. Hertford v. Garnon.

8. *But* where one is taken upon *meſne Proceſs* Action of Debt does not lie againſt the Sheriff, but only an Action upon the Caſe. Vent. 7. Hill. 20 & 21 Car. 2. B. Anon.

(F. 4) Actions. Brought where.

1. A Man was *condemned and in Execution in the Cinque Ports* and *eſcaped in London*, and he who recovered in the firſt Action brought Debt of the Eſcape in London and well, per Judicium; And per Priſot *it is an Eſcape in every County where he comes*, and he may have

have Action of Debt for the Eſcape in any of the Counties. Br. Lieu pl. 83. cites 30 H. 6 6.

2. Debt upon Eſcape *lies in London where the Party was committed to Priſon in Execution in the Cinque Ports and eſcaped into London*; Quod nota per Judicium. Br. Eſcape, pl. 44. cites 33 H. 6. 6.

3. *And* per Priſot it *lies in any County where he comes after the Eſcape*; Quære inde if he was not in Ward in thoſe Counties. Ibid.

4. A Man was *in Ward of the Sheriff of London upon Execution* of a Statute-Staple, and the *Sheriff permitted him to eſcape into Surry*, and the *Action* was brought in London, and the beſt Opinion was that it *ſhall be brought in Surry*. Hoddy ſaid, when he was in Priſon in London and eſcaped into Surry, the Plaintiff ought to Allege that he was in Ward in Surry and there eſcaped, if he will bring the Action there; For *where he was firſt in Priſon and eſcaped*, in this County the Action ſhall be brought; For if he was in Priſon in Middleſex and eſcaped and went into Kent, and after into Surry, the Action ſhall be brought in Middleſex. Br. Eſcape, pl. 11. cites 15 E. 4. 18.

Br. Lieu, pl. 72 cites S. C.

5. Debt upon Eſcape was brought in London, inaſmuch as A. B. was condemned *in London* at the Suit of the Plaintiff and was there *in Ward*, and the Defendant *Sheriff permitted him to eſcape* ſuch a Day *in Southwark*, of which he brought the Action, and they were at Iſſue and found for the Plaintiff, and it was alleged in arreſt of Judgment inaſmuch as the Action was brought in London where the Eſcape was in Southwark, and yet the Plaintiff recovered per Judicium; For the *Action is well brought*, per Catesby, *in the one County or the other*. Br. Eſcape, pl. 36. cites 14 E. 4. 3.

Noy 22. Parkinſon v. Powell. S C adjudged accordingly.

6. *Debt in Middleſex againſt the Sheriff of Denbigh*, wherein the Plaintiff declared, that he recovered againſt O. in C. B. 40 l. Debt, upon which the ſaid O. was afterwards outlawed, and that the *Plaintiff delivered a Capias Utlagatum againſt* the ſaid *O. to the Defendant then Sheriff, and that he having been in his Preſence the Defendant would not arreſt him though required* to do it, *but returned Non eſt Inventus*; upon Not Guilty pleaded it was found againſt the Defendant, but it was moved in Arreſt of Judgment that this Action ſhould not have been brought in Middleſex, becauſe the Fault in not arreſting the Party was in Denbighſhire; But adjudged for the Plaintiff becauſe the falſe Return, which is in Middleſex, was alſo wrong, and therefore the Plaintiff hath his *Election to bring his Action in either County*. Hob. 209. pl. 264. Mich. 15 Jac. Packhurſt v. Powell.

(G) To whom it ſhall be ſaid an Eſcape.

[*To the King, or the Party, or both.*]

Br. Execution, pl. 25. cites S. C.— Br. Eſcape, pl. 7. cites S. C. accordingly, though Defendant pleaded to the Writ, becauſe the Party was impriſon'd at the Suit of the King; ſed non allocatur.

1. IF a Man be taken upon a Capias pro Fine for denying his own Deed in Action of Debt, and is ſuffered to go at Large, he who recovers ſhall have Debt againſt the Sheriff, becauſe the Capias is ad reſpondendum tam Nobis quam Parti. 7 H. 4. 4. b. adjudged.

2. So

2. So in Recovery for forging of falſe Deeds if the Defendant be impriſoned for the Fine at the Prayer of the Attorney of the King, if he be ſuffered to go at Large before Satisfaction to the Plaintiff, he may charge him for the Eſcape, becauſe he is in Execution to the Party upon the taking at his Election. For he ought to be in Execution to the Party before Suit to the King, becauſe the Suit of the Party is the Original, and the Fine but acceſſory by reaſon of the Suit. 7 H. 6. 6. b. Br. Execution, pl. 47. cites 7 H. 6. 5 S. C. and there by ſome he is not in Execution, for the Party unleſs he prays it;

and Brook ſays, it does not appear there whether he was *impriſoned pro fine Regis within the Year* after Judgment given; For within the Year, then he ſhall remain for the Execution of the Party, as it ſeems, contra if *after the Year*. Quære.

3. But if a Man be taken upon a Capias pro Fine for the King where no Capias lies in the Original, and ſuffered to eſcape before Prayer of the Party to be in Execution for his Damages; as for a Fine in Aſſiſe the Party ſhall not have an Eſcape againſt the Sheriff, becauſe he was not in Execution to him before Prayer. Contra 18. H. 6. 19. See tit. Execution. (D. a) and (E. a)

4. If a Capias ad Satisfaciendum iſſues upon a Judgment in Action of Debt, and the Sheriff returns Non eſt inventus, and after iſſues a Capias Utlagatum upon which he is taken and impriſoned, and after he is let to go at Large, the Party who recover'd may have an Action of Debt for this Eſcape againſt the Sheriff, for he was in Execution for him alſo, becauſe he cannot have a new Capias ad Satisfaciendum. M. 41 & 42 El. B. R. per Cur. between *Leighton and Walwyn*. He was taken within the Year, and therefore was *in Execution without Prayer*. Mo. 566. Layton v. Garnonce. — 5 Rep. 88.

Garnon's Caſe, S. C. reſolv'd. —— Cro E. 706. pl. 28. S. C. reſolv'd. —— S. C. cited Sid. 380. —— Yelv. 20. cites S. C —— S. C. cited 5 Mod 201. Arg. but ſays, That three Years afterwards in the ſame Term, Popham and Fenner ſeemed to be of another Opinion in an Action of Debt brought againſt an Adminiſtrator upon a Judgment had againſt the Inteſtate. The Defendant pleaded that the Inteſtate was outlawed after the Judgment, and taken upon the Capias, and died in Priſon; and upon Demurrer to the Plea thoſe two Judges held, That he was not in Execution at the Suit of the Plaintiff without his expreſs Prayer, and the Court awarded it; But Gawdy J. was of a contrary Opinion in that Caſe. And according to his Opinion and the Reſolution in Garnon's Caſe, there have been ſubſequent Judgments in this very Point, That when the Party is taken upon the Capias Utlegatum, he ſhall be in Execution for the Plaintiff if he will, although his Body was never brought into Court. This Caſe came in Queſtion again in this Court in Michaelmas Term, 20 Car. 2. it was Debt upon an Eſcape, wherein the Plaintiff declared, That he recovered a Judgment in the 13th Year of that King, that the Party was outlawed the 15th and taken up the 18th Year of the ſame King, and eſcaped; but he had not declared that he was in Cuſtody, and prayed to be ſo at his Suit, without which his Impriſonment upon the Capias did not make him in Execution at his Suit; for it may be, he was not contented with that, but intended to have another Execution than his Body. But the Judgment in this Caſe is not reported, only the Opinion of Popham and Fenner is there cited, that he ſhall be in Execution at the Suit of the Party until he diſclaimed it.

5. If a Man is condemn'd in Debt and is *taken pro fine Regis* and eſcapes, Debt lies of the Eſcape againſt the Warden, quod nota. Br. Dette, pl. 199. cites 7 H. 4. 4.

6. Debt againſt the Warden upon Eſcape of a Man condemn'd being in his Ward, the Defendant *ſaid he was committed to the Fleet*, and the Attorney of the King pray'd Fine for the King, inaſmuch as the Condemnation was *in Forger de faits* and not at the Execution of the Plaintiff; Judgment ſi Actio. And the Opinion of all was, that the Warden ſhall be charged; For the Entry in the Roll is Pretextu cujus judicii jam mittitur ad Priſonam de le Fleet, and then it is as well for the Party as for the King as it ſeems; But it was much argued and not adjudg'd, but *there is no Mention there if he was taken within the Year or not*; For it ſeems that this is not material, but that if he be taken he ſhall remain for the Plaintiff. Br. Eſcape, pl. 41. cites 7 H. 6. 5.

7. If the Defendant be *convicted in Treſpaſs Vi et Armis*, and the Defendant be *taken after Judgment by Capias pro fine awarded for the King*, he ſhall remain for the Suit of the Party if he will, and if he *eſcape by Command of the King or otherwiſe*, the Plaintiff ſhall have Debt upon the Eſcape, and recover his Debt in Damages &c. and this was ſo adjudg'd by good Advice 7 H. 6. as it was ſaid there. Br. Eſcape, pl. 33. cites 4 E. 4. 16.

8. If a Man be *condemn'd in Debt or Treſpaſs, or Fine is to be made for denying of the Deed* &c. *and* the Defendant *is taken by Capias pro fine Regis within the Year at the Suit of the King, and committed to Gaol*, if he ſuffers him to eſcape the Party ſhall have Debt upon the Eſcape; For *the taking him for the King within the Year ſhall ſerve the Party alſo*; For the King is intitled by the Party, *contra after the Year*; For there it ſhall be intented that the Demandant has agreed with the Party, and therefore after the Year he ſhall ſue Scire Facias; quod nota good Diverſity. Br. Eſcape, pl. 47. cites F. N. B 121.

Cro. E. 295 S. C. 9. *Negligent* Eſcape is not Eſcape between the Sheriff and Priſoner, but between the Sheriff and the Plaintiff in the Action at whoſe Suit the Priſoner is in Execution. Mo. 597. pl. 816. Intr. Hill. 34 Eliz. Rot. 613. Savage v. Becham.

(H) Gaols.

In what Places Priſoners may be kept.

1. THE Marſhal of B. R. **cannot keep his Priſoners** in other Place than where the ancient Priſon is appointed **without the Licence of the Court, though it be** in Time of the Plague. Tr. 11. Car. B. R. Per Cur.

See Cro. C. 466. pl. 4. Trin. 12 Car. the Reſolutions and Directions of the Judges to this Purpoſe. 2. But the Court of B. R. may by Rule of Court appoint the Priſon to be in any Place of England, **and upon this the Marſhal may carry his Priſoners there, but he ought to keep them there in Priſon as before, and the Extent of the Priſon ought to be limited by Rule of the Court alſo. P. 11 Car. B. R. per Cur. and then Liberty given to Sir John Lenthall to make his Priſon at Biceſter in the County of Oxford and the Extent of it limited.**

——And ſee Hutt. 129, 130. their Opinions upon the ſame Occaſion.

D 278. b. Marg. pl. 5. cites Mich. 23 & 24 Eliz. Sir John Arundel's Caſe S. C. held, 1ſt. that the Admiral may hold his Priſon where he will. 3. T. was ſued in the Admiralty and condemned in 100l. and was committed to the Cuſtody of the Bailiff of the Liberty of P. of which A. was Lord. It was adjudged that the *Admiral may chuſe his Priſon at his Pleaſure*, and that T. ſhall be in Execution. Sav. 11. 12. pl. 30. 23 Eliz. Trewynyard v. Windell.

S. C. cited per Cur. Cro. E. 367. 4. D. Sheriff of W. had one in Execution whom he kept *in a private Priſon by himſelf*, and when he was diſcharged of his Office, and a new Sheriff made, D. *told the new Sheriff that he had ſuch a one in his Cuſtody and offered to put him into the Indenture amongſt his other Priſoners delivered to* the new Sheriff, but the new Sheriff refuſed to receive him unleſs D. would deliver him into the common Goal of the County, which was in the Town of W. whereupon afterwards the Priſoner eſcaped;

eſcaped, and D. was charged with this Eſcape, and not the *new Sheriff*, for he *is not compellable to take the Priſoners of the Delivery of the old Sheriff, but in the Common Gaol of the County*, and the old Sheriff remains chargable with the Priſoner until he be lawfully diſcharged of him. Poph. 85. Hill. 37 Eliz. B. R. cites Dabridgecourt Sheriff of Warwick's Caſe.

5. *Sheriffs in London* may make *their Houſes* their Priſons if they will as well as the Counters. Sid. 318. pl. 6. Hill. 18 & 19 Car. 2. B. R. in Caſe of Husband v. Cole.

(I) What Remedy the Sheriff has.

1. IT was moved, where a Man is in for Felony, or condemned and eſcapes, and the *Warden makes Freſh Suit*, he *may retake him if it be ſeven Years after*; *contra* * *without Freſh Suit*. Brian ſaid, if he has made Fine for the Eſcape, or if Action be ſued againſt him for the Eſcape of him was condemned, then it is to no Purpoſe to take him after, and Contrary to the Record, which is, that he was at large. Br. Eſcape, pl. 35 cites 13 E. 4. 9. * Orig (ſome.)

2. Where a *Man* whoſe Body is *in Execution eſcapes*, the Party has no Remedy but againſt the Gaoler, and if he Eſcapes and is out of View, yet the Gaoler may retake him; Quod nota. Br. Eſcape, pl. 12. cites 14 H. 7. 1.

3. *Action lies by the Sheriff upon a Reſcous and Eſcape from his Bailiffs before the Party ſues them*; For the Party arreſted did Wrong to them by the Eſcape and Reſcous, and they are always chargeable to the other Party; And if they ſtay till they are ſued, perhaps the Party that eſcaped may die in the Interim, or will fly the Country that they cannot hear of him; and in * **Holt and Hill's Caſe** in this Court, it has been adjudged that an Action lies for this Eſcape, and the Party ſhall not take Advantage of his own Tort; Per Cur. Cro. E. 53. pl. 3. Hill. 29 Eliz. B. R. in Caſe of The Sheriffs of Norwich v. Bradſhaw. * S. C. cited Cro E. 237. in pl. 3.

4. *A. in Execution eſcapes.* The *Sheriff pays the Debt.* The *Plaintiff acknowledges Satisfaction on the Record*; Yet the Sheriff ſhall have Action. Le. 237. pl. 321. Mich. 32 & 33 Eliz. B. R. Offley v. Paine. Cro. E. 237. pl. 3. Salteſton and Pavne v. Offley S. C. & S. P. held accordingly, but the Defendant having pleaded that the Plaintiff in the original Action had acknowledged Satisfaction of Record *which might be by his Means*, which is not denied, and ſo the Plaintiffs are to have no Loſs and ſo no Cauſe of Action, it was adjudged that the Plaintiffs nil capiant per Billam; But they *might have ſhewn the ſpecial Matter* by Replication.

5. The Sheriff may have an *Action on the Caſe againſt the Priſoner* for an Eſcape. Cro. E. 293. pl. 1. Hill. 35 Eliz. B. R. Scavage v. Beauſham. For the Priſoner by Law is to remain in the Place whereto he is committed. Ibid. cites it as ruled in the Caſe of Holt v. Hill.

6. Debt was recovered againſt the Defendant by J. N. who ſued Execution, and the Plaintiff was *Sheriff* and *had the Defendant in Execution, and he eſcaped*, and the *Sheriff paid the Condemnation, and brought an Action againſt the Defendant*, who pleaded that the Gaoler licenced him to eſcape; but adjudged no Plea. Mo. 404. pl. 541. Trin. 37 Eliz. B. R. Belchamber v. Savage.

(K) Writ and Count. How.

1. IN *Debt upon the Statute of Labourers* againſt a Gaoler for letting at Large; the *Writ was General, and the Count Special upon the Statute.* Thel. Dig. 86. lib. 9. cap. 7. S. 11. cites Trin. 39 E. 3. 18. —— And *ſo upon other Statutes.* Ibid. cites Mich. 5 E. 4. 118. and 27 H. 8. 23.

2 Le. 29. pl. 33. S C. adjudged accordingly.

2. In Debt upon an Eſcape the Plaintiff declared, that whereas he had obtained a *Judgment againſt one in London*, and a Capias ad Satisfaciend' againſt him, which was returned Non eſt inventus, for which one of his Bail being in Priſon there upon a Plaint there under Cuſtody of the Defendant was *detained in Execution ſecundum Conſuetudinem Civitatis præd'*, and afterwards eſcaped; Upon Demurrer it was objected, that it is *not expreſly alleged that there was ſuch Cuſtom*, but only ſecundum Conſuetudinem &c. and that if the Cuſtom had been expreſly alleged it is not good, becauſe the Plaintiff ought to have a Sci. Fa. againſt the Bail; for it is unreaſonable to take him in Execution without Anſwer, becauſe he might plead a Releaſe of the Principal, or other Matter, to diſcharge himſelf; and alſo that *the Recognixance of the Bail is joint and only one is commanded to be detained in Execution.* And the Declaration was held not good and the Cuſtom unreaſonable; and Judgment for the Plaintiff. Cro. E. 185. pl. 7. Trin. 32 Eliz. B. R. Devered v. Ratcliff.

3. Caſe for ſuffering E. a Priſoner to eſcape who was arreſted by a Capias upon an Original Writ; Error was aſſigned, that the *Sheriff directed his Warrant to the Bailiff of the Franchiſe, who arreſted him and delivered him to the Under Sheriff in ea Parte Authorizat'* &c. and *no Place is ſhewed where the Bailiff delivered the Priſoner, for it may be it was out of the County.* It was the Opinion of the Court, that ſhewing of the Place is but an Inducement to the Action, and when he pleads Not Guilty, the Eſcape is the Matter material and affirmed the Judgment. Cro. E. 289. pl. 5. Mich. 34 & 35 Eliz. B. R. Appleton v. Bur.

4. This *Difference* was agreed by the Court, that in Action of Eſcape againſt the Sheriff *upon an Arreſt by meſne Proceſs*, as a Cap. ad reſpondend' &c. the *Writ ought to ſurmiſe that Ad largum ire permiſit, et non comperuit ad Diem*; becauſe the Party was bailable and ſo the Sheriff might ſuffer him to go at Large; *but* if it is *on an Execution*, as upon a Ca. Sa. there ad largum ire permiſit is ſufficient. Noy 72. Sheriff of Nottingham's Caſe.

Nov 45. S. C. but S. P. does not apear.

5. In Debt againſt the Sheriffs of Y. on a Judgment againſt L. there for the Plaintiff; Exception was taken becauſe it was *not alledged that the ſaid L. was arreſted*, and if he was not arreſted, there cannot any Action be brought for his Eſcape; ſed non allocatur. For when the *Serjeant returned Cepi Corpus & Paratum habeo it is to be intended that he was arreſted*; but if he was not arreſted yet *the Record being that he is committed per Curiam to Priſon is ſufficient, the Party being preſent in Court* without an Arreſt. Cro. E. 893, 894. pl. 9. Trin. 44 Eliz. B. R. Colſton v. Roſs and Levet.

Cro. E. 893. Trin. 44 Eliz. B. R. S C. but S. P. does not appear. but ſee (N)

6. In Debt upon an Eſcape againſt Defendants as Sheriffs of the City of York, the Plaintiff counted *upon a Judgment given in the Court of York for the Plaintiff upon an Obligation made by one R. L.* but did *not ſhew that it was made within the Juriſdiction of that Court.* Notwithſtanding

ſtanding this, Judgment was given for the Plaintiff. Noy 45. Paſch. 3 Jac. B. R. Colſton v. Roſſe and Levet.

7. Caſe againſt the Sheriff of Briſtol for an Eſcape, in which the Plaintiff declared, that on a Petition of himſelf and other Creditors a *Commiſſion of Bankruptcy* was taken out *againſt J. D.* and the *Commiſſioners offered to examine him* upon Interrogatories, which *he refuſed to anſwer*, and thereupon they committed him, and the Defendant ſuffer'd him to eſcape; It was objected, that this Declaration was ill, becauſe the *Plaintiff* had *alleged, that the Defendant ſuffered the Bankrupt to eſcape, but did not ſay that the Debt was not ſatisfied*; But per Curiam, it ſhall be intended, that it was not ſatisfied, and it is the Eſcape which is the Tort. Roll Rep. 47. pl. 16. Trin. 12 Jac. B. R. Barnes v. Carey. Mo. 834. 835. pl. 1123. The Caſe of the Sheriffs of Briſtol, S. C. but mentions the Declaration to be, that he is committed &c. and that the Defendants ſuffered him to eſcape, the Plaintiff not being ſatisfied; and that the Court held that the Words (the Plaintiff not being ſatisfied) are only Surpluſage —— 2 Bulſt. 236. S. C. adjudged for the Plaintiff.

8. *Debt* againſt the Sheriff *for ſuffering one, againſt whom the Plaintiff had recovered as Executor of W. S. to eſcape; and in reciting the firſt Action it is alleged that he recovered againſt him as Adminiſtrator*, which cannot be that one ſhould die Inteſtate and have an Executor, and the Action of Debt upon the Eſcape ought to purſue the firſt Action. The Court held the Action not well brought, and reverſed the Judgment. Cro. J. 394. pl. 6. Hill. 13 Jac. B. R. Slingsby v. Lambert 3 Bulſt. 112. S. C. the Plaintiff after the Judgment recovered by him as Adminiſtrator found a Will by which he was made Executor. The Court was divided; and the Reporter ſays that he heard it was ended by Agreement. —— Roll Rep. 276. S. C. adjornatur, but the Reporter ſays that (as he heard) the Caſe was moved again the next Term, and Coke Ch. J. being then preſent, it was adjudged that the Action was not maintainable. —— Godb 262. pl. 361. Lambert v Slingsby, S. C. and ſays it was the Opinion of the Court that the Action of Debt againſt the Sheriff would lie upon the Eſcape, and that the ſame Debt ſhould be Aſſets in the Executor's Hands; And it was holden clear that the Executor of an Executor might have Debt on the Eſcape, for that he is Executor to the firſt Teſtator, and therefore a fortiori the Action would lie in the principal Caſe.

9. In Action on the Caſe on an Eſcape it was moved in arreſt of Judgment, that the *Declaration* was inſufficient, becauſe *it does ſhew that the Party was arreſted that made the Eſcape, but* does *not* ſhew *by what Proceſs he was arreſted.* 2dly, *Says that he was arreſted Virtute Querelæ*, which cannot be; for he is arreſted by Virtue of the Writ and not of the Plaint. 3dly, It does *not ſhew by what Authority the Priſon was kept*, out of which the Eſcape was made. Roll Ch. J. ſaid, that the 2d Exception was material, and then if the Party be not well arreſted, there can be no Eſcape, and ſo the Action lies not. And therefore Nil capiat per Billam, niſi Cauſa &c. Sty. 162. Mich. 1649. Philips's Caſe.

10. In Action of Eſcape the Plaintiff *declared that the Principal rendered himſelf in diſcharge of his Bail after Judgment againſt him, and that afterwards he eſcaped, and that this Render was to the Marſhal*; Per Roll Ch. J. he cannot render himſelf to the Marſhal in diſcharge of his Bail; for only a Judge can take and diſcharge Bail and not the Marſhal; but *if it is ſaid he did it in Court it is well enough*; for he may render himſelf to the Marſhal in Court, though out of Court he cannot; and Judgment for the Plaintiff. Sty. 330. Trin. 1652. Child v. Lenthall.

11. *Debt* for an Eſcape *againſt the Sheriff*; *for that W. R. and his Wife were in Execution and eſcaped*; Upon Nil debet pleaded, the *Jury found that the Husband was in Execution and eſcaped, but that the Wife never was in Execution*; and notwithſtanding this did not agree with the Declaration, yet the Plaintiff had Judgment, for it is as if the Wife had not been mentioned at all. And a *Difference* was taken *between* Skinn. 583. in pl. 3 Trin. 7 W. B. R. the S. P. cited by Holt Ch. J. as ruled be-

fore Bridgman Ch. J. to be the ſame Eſcape.

Actions founded on a Wrong and on a Contract; for where it is founded on a Wrong, as on a Treſpaſs or an Eſcape &c. it is maintainable if any Part of it is proved; ſo in Debt for Rent, if 20 l. is demanded a leſs Sum may be found, becauſe it may be apportioned; but where an Action is founded on a Contract, there it is entire. Sid. 5, 6. pl. 1. Mich. 12 Car. 2. C. B. Roberts v. Herbert.

Lev 191. S. C. and the counting only upon the Writ and Eſcape was held an incurable Fault, the Judgment being omitted; whereupon Leave was given to the Plaintiff to diſcontinue, though after Argument; for the Sheriff ſhall not go unpuniſhed for the Eſcape for the Default in the Declaration. —— Sid. 305 pl. 14. S C. held accordingly, the Declaration being Quod cum recuperaſſet againſt the Party prout patet per Recordum, and that thereupon a Capias iſſued, and the Party was taken by the Defendant and eſcap'd &c. which was too General.

12. In an Action of Debt for an Eſcape of one in Execution, it is *not ſufficient to ſhew only that a Capias ad Satisfaciendum iſſued, by Virtue of which he was taken* &c. *but* the Plaintiff *muſt ſhew how he recovered Judgment, and thereupon a Ca. Sa. iſſued* &c. for as to the Judgment, the Defendant may plead Nul tiel Record; and though if there was no Judgment, the Sheriff was bound to execute the Writ, and perhaps might be fined for the Eſcape; yet if there was no Judgment, there was no Debt or Duty to the Plaintiff; Per totam Curiam. 1 Saund. 38, 39. Mich. 18 Car. 2. Jones v. Pope.

13. Caſe &c. upon an Eſcape on meſne Proceſs was brought in Exeter againſt the Sheriff of Devon; Plaintiff declared *of the taking at Topſam*, which is *in Devonſhire, and that the Defendant ſuffered him to eſcape at Exeter*; It was moved in arreſt of Judgment, that Plaintiff declared of the taking in Devon for an Eſcape at *Exeter*, which *is a City and County of itſelf*, and not Part of the County of Devon; but it being after a Verdict, the Court all but Twiſden held, that it ſhall be intended that the Defendant had the Cuſtody of the Priſoner at Exeter either upon an Habeas Corpus, or upon freſh Purſuit; But Twiſden thought this a very foreign Intendment. Sid. 364. Paſch. 20 Car. 2. B. R. Hopping v. Holmy.

14. If a *Judgment be given for* 100 *l.* and the *Party ſues out a Ca. Sa. but for* 50 *l. Part of the ſaid* 100 *l.* and the Sheriff takes the Priſoner, and ſuffers him to eſcape; now the *Party* who ſued out the Execution *ſhall recover* on the Eſcape *but for the* 50 *l.* for which the Priſoner was taken in Execution, and not the whole 100 l. contained in the Judgment; Arg. 2 Saund. 101. Paſch. 22 Car. 2. in Caſe of Jaques v. Ceſar.

15. In Action for an Eſcape if the Plaintiff *declares of Cauſe of Action to* 40 *s.* and *proves* 30 *s.* this is ſufficient; Per Hale Ch. J. but the Reporter ſays Quære de hoc, it being ſpecial. 2 Lev. 85. Paſch. 25 Car. 2. at Guildhall.

16. In Eſcape the Plaintiff *declared upon a Latitat in Placito Tranſgreſſionis*, whereas the *Writ produced was in Placito Tranſgreſſionis ac etiam Billæ* 20 *l.* Hale Ch. J. held this an incurable Fault. 2 Lev. 85. Paſch. 25 Car. 2. at Guild-hall. Gunter v. Clayton.

17. *Caſe* upon an Eſcape *againſt the Defendant being Marſhal of B. R. for the Eſcape of a Priſoner formerly in the Fleet; and upon an Habeas Corpus brought before a Judge of this Court, and turned over to B. R.* After Verdict it was moved in arreſt of Judgment, that it was ſaid Virtute Brevis de Habeas Corpus directed to the Warden of the Fleet he was debito Modo commiſſus to B. R. which is repugnant. And the Court took this Exception as material, becauſe it *does not appear that he was committed*; for he cannot be committed by an Habeas Corpus; and Judgment was thereupon arreſted. 2 Show. 17, 18. pl. 10. Trin. 30 Car. 2. B. R. Bourne v. Cooling.

18. Action againſt the Sheriffs for ſuffering one to eſcape that was in the Counter upon a Plaint there levied, and ſays that whereas ſuch a one was indebted to him &c. he being in their Cuſtody by Virtue of the ſaid Plaint, they ſuffered him to eſcape. Exceptions were taken, that there *were no Continuances entered, nor Proceedings from the Entry of the Plaint to the Time of the Eſcape*; *nor* was it *ſaid that the Cauſe of Action aroſe within the Juriſdiction.* Et per Curiam As to the firſt Exception, In London we never uſe it as it is done in Inferior Courts And to the 2d, Upon Evidence, it is true, we make them prove it within the Juriſdiction, but it is well enough if it does not appear to the contrary. Judgment pro Quer'. 2 Show. 424. pl. 391. Hill. 36 & 37 Car. 2. B. R. Cole v. Daniel.

19. In Caſe againſt the Marſhal for the Eſcape of A. B. the Count was, *that A. B. Priſonario in Priſona prædict' ſuch a Day exiſtent' the Plaintiff obtained Judgment, and* that the Plaintiff, *intending to charge him, the Defendant permitted him to eſcape*; but the Evidence was of an Eſcape before the Time of the Judgment; ſo the *Count is of an Eſcape after Judgment* obtained, *but the Evidence of an Eſcape before the Judgment*, ſo it does not maintain the Declaration; ſed non allocatur; for it is all one in Effect; for though after an Eſcape the Plaintiff cannot charge him in Execution upon the Judgment, yet he might proſecute him to Judgment, as well as if he had remained in actual Cuſtody; and *this Action is* not *brought* for an Eſcape after being charged in Execution, but *for an Eſcape to prevent the Plaintiff charging him*; and this is all one, be it before or after Judgment obtained. Skinn. 583. Trin. 7 W. 3. B. R. Key v. Briggs.

(M) Pleadings by the Perſon that eſcaped.

1. IF the *Plaintiff by Parol diſcharges the Defendant himſelf* it is a good Diſcharge without any writing. D. 275. a. Marg. pl. 47. cites Pl. C. 36. and 30 Eliz. C. B. and 34 Eliz. B. R. and That the ſame was agreed 1 Car. B. R. in one **Smith's Caſe**; but that it was ſaid there, that after an Eſcape ſuffered by the Sheriff a Diſcharge to him by Parol is not ſufficient.

2. In Treſpaſs and *Impriſonment* the Defendant *juſtifies by* Virtue of a *Capias, and the Plaintiff did afterwards eſcape, and he being Sheriff did follow him by Virtue of the ſaid Warrant taken upon the Capias*; The Plaintiff *replies that he eſcaped by Licenſe of the Sheriffs, and traverſes the latter taking* by Virtue of the Warrant; and the Court held the Traverſe idle, becauſe the Plaintiff had ſufficiently confeſſed and avoided, and if he eſcaped by the *Sheriff's Licenſe* that *ought to be the Thing put in Iſſue*, and not the Traverſe. Brownl. 197, 198. Trin. 13 Jac. Hatton v. Hunn.

3. Scire Facias by Executors, to have Execution of a Judgment obtained by their Teſtator unde Executio reſtat faciend'; the Defendant confeſſed the Judgment, but ſays that a Ca. Sa. iſſued againſt him, and that he was taken and committed to the Fleet, and *that he paid the Sum mentioned in the Condemnation to the Warden of the Fleet, who ſuffered him to go at large.* Upon a Demurrer this was held no Plea, but that this was a voluntary Eſcape in the Warden; and Judgment for the Plaintiff. Mod. 194. pl. 26 Hill. 26 & 27 Car. 2. C. B. Compton v. Ireland.

4 To

4. To a Scire Facias quare Executionem non upon a Judgment the Defendant pleaded, *that he was formerly taken in Execution upon a Ca. Sa. upon the ſame Judgment, and the Sheriff ſuffered him to eſcape, to which Eſcape the Plaintiff then and there conſented*; Sed non allocatur; For the *ſubſequent Aſſent* will not make it an Eſcape with the Conſent of the Plaintiff, and therefore he may either retake the Party or bring his Action againſt the Sheriff. 1 Salk. 271. pl. 1. Mich. 4 W. & M. in B. R. Scott v. Peacock.

(N) Pleadings by Sheriff, Gaoler &c.

1. A Felon eſcaped out of the Caſtle of D. which belonged to the Lady D. and Proceſs was made againſt her to anſwer to the Eſcape, who came and *preſcribed to have the Ward of Priſoners taken within her Franchiſe by three Days and three Nights, and they ſhould be delivered to the King's Gaol, and ſaid that the Party was there and impriſoned by three Day's and three Nights, within which Time he did not eſcape*, and demanded Judgment, and becauſe ſhe did not anſwer to the Eſcape generally, ſhe was charged of the Eſcape. Br. Eſcape, pl. 23. cites 27 Aſſ. 27.

Br. Lien &c. pl. 2. cites S. C. where it appears that this Action was brought in Bank.

2. *Debt* upon Eſcape *againſt the Mayor of the Staple becauſe he ſuffered a Priſoner condemned in* 100 *l. to eſcape*, and the *Defendant demanded Judgment if the Court will take Conuſance*, becauſe there is a * *Statute* which *wills that the Mayor of the Staple ſhall hold Plea of all Things touching the Staple*, and that the other Mayor was removed &c. and yet becauſe this Action was of an Offence done by the Mayor, and does not touch the Staple, therefore the Defendant was awarded to anſwer. Br. Eſcape, pl. 2. cites 9 H. 6. 19.

* 27 E. 3. 1.

Br. Eſcape, pl. 53. cites 9 H. 6. 20. and is *Debt upon Eſcape* permitted *by ſuch a Warden*, he *ſaid that he took him by another Precept, and not by Execution of this Condemnation of which the Plaintiff counts*, and the others e contra, and ſo *the Iſſue* was, *if he was taken by this Condemnation or for another Cauſe*.

3. By which the *Defendant ſaid, that he who eſcaped was taken by a Plaint of Debt affirmed againſt him, abſque hoc that he was taken and impriſoned by way of Execution* modo et forma, and the others e contra. Ibid.

Br. Eſcape, pl. 53. cites 9 H. 6. 20.

2 Le. 89. in pl 112. S.C. Manwood Ch. B. cited 19 H. 6. S.P.

4. A Gaoler ſuffered an Eſcape, and *Plaintiff after the Eſcape releaſed to the Defendant all Executions*, and yet brought Debt againſt the Gaoler, who would have pleaded the Releaſe and could not becauſe he is not Party; Per Manwaood Ch. B. Mo. 276. in Caſe of Ognell v. Paſton cites 9 H. 6.

5. Debt againſt J. M. becauſe he *ſuffered W. S. who was bound to the Plaintiff in* 40 *l. by Statute-Staple to eſcape at large out of his Cuſtody*, and the *Defendant ſaid that he was in his Keeping by Virtue of a Plaint affirmed againſt him by a Stranger, abſque hoc that he was* arreſted and in *Ward by the ſaid Statute*, and the others e contra, and it was admitted for a good Iſſue. Br. Dette, pl. 188. cites 11 H. 6. 49.

Keilw. 18. b. Arg. S.P.

6. If *A is in Execution at the Suit of B. upon erroneous Judgment, and after eſcapes, and then Judgment is reverſed by Writ of Error*, the Action on the Eſcape is gone; For he may plead Nul tiel Record, becauſe without Record the Action is not maintainable; But *till ſuch Judgment, or Execution is reverſed by Error the Sheriff or Gaoler ſhall not take Benefit of it*; Becauſe he cannot in ſuch Caſe plead Nul tiel Record;

For

For till it be reverſed it remains in Force notwithſtanding there is a manifeſt Error. 8 Rep. 142. b. per Cur. cites it as ſo held 34 H. 6. 2. b. and 21 E. 4. 23. b.

7. *But* in the ſame Caſe, *if the Plaintiff brings Debt* againſt the Sheriff or Gaoler *on the Eſcape, and has Judgment and Execution, and after the Judgment is reverſed*, yet *this Judgment* upon this collateral Thing being executed, it *remains in Force* notwithſtanding the Reverſal of the firſt. Ibid. cites 7 H. 6. 42.

Br Error, pl. 56. cites S. C. —— 5. Rep. 90. b. cites S. C —— S C cited Arg. Saund 38.

8. Debt *againſt the Marſhal upon an Eſcape* of one T. who was condemned to the Plaintiff at the Aſſiſes in 40 l. and brought Writ of Error, and the Judgment was affirmed, and he committed to the Marſhalſea and ſuffered to eſcape; The *Defendant ſaid, that a great Number of the King's Enemies broke the Priſon and took them out*, abſque hoc *that he eſcaped otherwiſe, or alio modo*; And the Opinion was, that it is no Plea if he *does not ſay that they were ſtrange Enemies*, as of France &c. For if they were of England he may have his Recompence, and if they were Strangers the Plea is good without any Sans ceo; et adjournatur. Br. Dette, pl. 22. cites 36 H. 6. 1.

Br. Eſcape, pl. 10. cites S C.

9. *And* it was ſaid, that if he pleads that *ſtrange Enemies* did it he *ſhall ſhew ſome of their Names*, and not quod Ignoti fecerunt &c. Br. Dette, pl. 22. cites 33 H. 6. 1.

10. Debt againſt the Marſhal who *permitted a Priſoner condemned to go at large*; The Defendant ſaid that he did not permit him to go at large prout &c. and a good Plea. Br. Dette, pl. 228. cites 38 H. 6. 28.

11. *Writ of Execution comes to the Sheriff* and *he makes a Mandate to the Bailiff of the Franchiſe, who takes him, and after he eſcapes*, Writ of Debt lies againſt the Bailiff and not againſt the Sheriff, and in thoſe Caſes it ſeems that the Bailiff, the Warden, Sheriff &c. *ſhall be named by their Names of Offices*; For otherwiſe the Writ ſhall abate, and in this Caſe he was named Bailiff of the Franchiſe of D. Br. Eſcape, pl. 40. cites 5 E. 4. 1. 2.

12. In Debt *againſt a Gaoler for ſuffering a Man condemned to go at large*, it is a geod Plea that he did not permit him to go at large. Br. Dette, pl. 157. cites 10 E. 4. 10.

13. Action upon the Caſe by the Earl of Kent againſt Shaw and another Sheriffs of L. that where the *Plaintiff had brought Writ of Account* againſt M. and *Judgment given that he ſhall account*, and *Capias ad computand' awarded to the Sheriffs of L. by which they took him and held him in Ward till ſuch a Day when the Sheriffs ſuffered him to eſcape* &c. and note that Action upon the Caſe was brought; For he *cannot have Debt till it be certain, and it is not certain till he has accounted in Fact*. Jenney ſaid Actio non; For after the Arreſt the *Chancellor ſent Writ to him*, by which he brought him to him, *and* the ſaid Chancellor *committed him to the Fleet, and commanded this Defendant to carry him there, and in carrying him A. and B. reſcued him at K. Judgment ſi Actio*; and the *Parties demurred*; Per Pigot this is no Plea; For he is bound to keep the Priſoner and may have his Remedy over, and ſo where a Man breaks the Priſon and permits the Priſoners to eſcape. But by all the Juſtices, if the *Sheriff ſerves Capias* and *a Man makes Reſcous*, and the Sheriff *returns the Reſcous*, this is *a Diſcharge for the Sheriff*, quod Catesby conceſſit when it hangs in Proceſs; For the Plaintiff may proceed by Alias and Pluries, and ſo to Exigent. Br. Eſcape, pl. 37. cites 16 E. 4. 23.

14. But *Contra after Condemnation*, and there he ſhall be charged; For he may have his *Remedy over* againſt the Offender, as in Waſte by a Stranger the Termor ſhall anſwer the Waſte, and the other ſhall anſwer to him. Ibid.

S. C cited. D. 67 a. pl. 16. but is miſprinted there (28) inſtead of (23.)

15. In Debt againſt the Warden upon Eſcape of a Man condemned it is no *Plea that the firſt Action was diſcontinued before Judgment*; For he is a Stranger to the Record, and this is only Error of which a Stranger cannot ſpeak; Per Pigot in an Action upon the Caſe. Br. Dette, pl. 220. cites 21 E. 4 23.

16. The *Gaoler ſhall not take Advantage of Diſcontinuances or Error in the Record*, inaſmuch as he is a Stranger to it, though he is charged by Action brought upon this Record for the Eſcape, any more than a Stranger ſhall falſify by a Matter dilatory. D. 67. a. pl. 16. Mich. 3 E. 6. in Caſe of Minors v. Turke cites it as held for Law 21 E. 4. 28.

17. In Debt againſt a *Gaoler* for ſuffering his Debtor to eſcape, who *was condemned by Recovery in Debt*, there *Nul tiel Record* is a good Plea; becauſe the Action is founded upon the intire Matter, viz. the Recovery and the Eſcape; Per Frowyke. Keilw. 18. b. Hill. 12 H. 7.

18. In Debt upon Eſcape, it is a good Plea *that after he had him in his Ward by the Condemnation*, the *Plaintiff who recovered ſaid to him that he might ſuffer him to go*, by which he ſuffered him to go accordingly, this is a good Plea, and no Eſcape, though the Condemnation be by Matter of Record, and the Diſcharge *by Parol without Writing*; Quod nota per tot. Cur. Br. Eſcape, pl. 1. cites 27 H. 8. 24.

19. Debt againſt the Marſhal for an Eſcape of a Priſoner being in Execution &c. if he plead *that the Priſon was broke by Enemies*, or by *ſudden Waters*, or by ſuch Force or vehement Power *that he could not reſiſt*, this is good with a *Traverſe*, that he did not break Priſon in any other Manner; *but* if this be done *by Traitors or Rebels* within the Realm the Law varies, becauſe the Gaoler may have Remedy over againſt them. D. 66. b. pl. 15. Mich. 3 E. 6. in Caſe of Mynors v. Turke.

20. Defendants in Eſcape ſhall *not be admittted*, as it ſeems, *to take Exceptions to the Inſufficiency of the Count, for that the Record is not good and formal*, but ſhall anſwer to the Eſcape. D. 67. a. pl. 16. Mich. 3 E. 6. in Caſe of Mynors v. Turke.

21. Debt upon Eſcape againſt a Sheriff who *ſaid that before the Eſcape the Priſoner was condemned in the ſaid Condemnation and in Execution, as in the Declaration, in the Time of a former Sheriff who ſuffered him to eſcape, and after retook and impriſoned him, and was removed, and this Defendant was made Sheriff, and after ſuffered him to Eſcape*; Judgment if of this ſecond Eſcape Action ought he to have, and a good Plea; For he has confeſſed and avoided the Plea; For when the Priſoner firſt eſcaped, and the firſt Sheriff retook and impriſoned him, *this ſecond Impriſonment is no Execution for the Party*, but the Party is put to his Action for the Eſcape againſt the firſt Sheriff. Br. Eſcape, pl. 45. cites 5 E. 6.

Mo. 274. pl. 428. Ugnoll v Paſton, Hill. 31 Eliz. in the Common Pleas of the Exchequer S. C. adjudged accordingly. ——Cro. E. 164. pl. 1. Ognal v. Paſton, S. C. ſays that after his being found Guilty he was diſcharged of the Felony, and then the Defendant ſuffered

22. In Debt the Plaintiff counted that C. the Defendant was bound to him by Recognizance, and thereupon he ſued *Execution by Capias*, and the *Sheriff returned Cepi*, and that afterwards the Sheriff ſuffered the ſaid C. to eſcape, for which the Plaintiff brought this Action. The Defendant *pleaded*, *that before this Execution C. was indicted and found Guilty of Felony, and had Judgment to be hanged, and afterwards eſcaped.* It was inſiſted, that by the Judgment in Felony C was diſcharged of the Debt, he being thereby a Perſon dead in Law; But becauſe he *was reſponſible to every Action till he was executed in Fact* Judgment was given for the Plaintiff. Sav. 63. pl. 135. Paſch. 26 Eliz. Ognell v. Martin and Webb.

fered him to go at large. All the Court reſolved that the Execution was well ſerved upon him; For though his Body was at the Queen's Pleaſure, yet he ſhall not take Advantage of his own Tort (no more ſhall the Sheriff) but he ſhall anſwer the Action and Execution of a Common Perſon.——— 2 Le. 84 pl. 112. S. C adjudg'd for the Plaintiff.———S. C. cited 8 Rep. 142. a.

24. C. brought an Action of Debt upon an Eſcape againſt H. Sheriff of the County of H. who *pleaded that the Plaintiff dedit conſenſum* eidem Jacobo *that the Priſoner ſhould go at large*, whereby he did ſo. Walmſley ſaid he ought to plead it by Way of Licence, and not by Conſent. Curia, The Plea is good without Queſtion, and he may take Iſſue thereupon. Goldsb. 81. pl. 20. Hill. 30 Eliz Cunny v. Harrington.

25. In Action againſt the Defendants, late Sheriffs of York, for an Eſcape of J. S. who was committed to their Cuſtody upon a Judgment given againſt him in the Court of York upon an Obligation made by him to the Plaintiff; they plead that they *let him at large by reaſon of a Writ of Privilege awarded by the Council of York &c* Plaintiff demurred, becauſe they did not allege the Authority of the Council there; and it appeared not to the Court that he might be privileged there &c. and though they let him at large by Colour of the Writ of Privilege, yet the *Writ not being a good Warrant they are reſponſible to the Plaintiff*; For they *muſt at their Peril take Heed what Warrant they had* to let him out of their Cuſtody. Cro. E. 894. Trin. 44 Eliz. B. R. Colſton v. Roſs and Levet. Noy 45. S. C. but S P. does not appear.

26. *Nor* ſhall the Defendants *take Advantage of erroneous Proceſs in the original Cauſe*, though it appears in the Declaration againſt them, as that a Capias was awarded returnable at the next Court, which ought to have been at a Day certain. For the Plaintiff is to declare according to the Record, and not to vary from it. Cro. E. 893. Colſton v. Roſs and Levet. Noy 45. S. C. but S. P does not appear. —— S. P. Cro. E. 165. Mich. 31 & 32 Eliz.

in Scacc. Ognel v. Paſton.——— 8 Rep. 142. a. cites S. C. adjudged and ſays, that with this agrees 21 E. 4. 23. b.

27. And it was further alleg'd, *That it was not ſaid that the ſaid J. S. was arreſted, and if he were not arreſted, there cannot be any Action brought for his Eſcape* Sed non Allocatur. For when the Serjeant return'd Cepi Corpus & Paratum habeo, it is to be intended that he was arreſted. But if he were not arreſted, yet the Record is that he is committed to Priſon, which is ſufficient, the Party being preſent in Court without an Arreſt. And notwithſtanding theſe and other Exceptions it was adjudg'd for the Plaintiff. Cro. E. 894. Colſton v. Roſs and Levet. Noy 45. S. C. but S. P. does not appear. —— S. C. & S. P. cited by Northey; Arg. 1. Salk. 272. in pl. 2.

28. J. S. was outlaw'd upon a Ca. Sa. and being taken upon a Cap. Utlagatum the Sheriff ſuffer'd him to eſcape, the Plaintiff not being ſatisfied. The Plaintiff brought Action in C. B. and had Judgment; And in Error brought it was among other Things aſſign'd, *becauſe the Action is brought in Suffolk againſt the Sheriff of Suffolk* for arreſting the Defendant in the firſt Action upon the Cap. Utlagatum, and ſuffering him to eſcape; *and the Defendant in the firſt Action is nam'd of S. in the County of Norfolk, and the Arreſt is ſuppos'd at S. prædict' and ſo the Arreſt is ſuppos'd in the County of Norfolk, and then it is tortious, and there cannot be any Eſcape thereupon.* This was held to be a manifeſt and incurable Error. And therefore Judgment was revers'd. Cro. E. 877. Paſch. 44 Eliz B. R. Eden v. Loyd.

29. In Error on a Judgment againſt a Sheriff for ſuffering an Eſcape, Exception was taken, becauſe *he did not recite the whole Record, but began at the Judgment Quod cum recuperaſſet &c.* Sed non Allocatur. For it

it is but a Conveyance to the Action. Cro. Eliz. 877. Paſch. 44 Eliz. B. R. Eden v. Loyd.

Yelv. 83. S. C. Hill. 3 Jac. B. R. and per tot. Cur. the Execution was void, and the

30. An Adminiſtrator recovers in Debt againſt A. The Adminiſtration is revok'd; yet the Adminiſtrator ſued A. and took him in Execution, a *Superſedeas* was awarded becauſe the Execution *erronice emanavit*, for he cannot ſue him to Execution after the Adminiſtration is revok'd. And if in ſuch a Caſe A. had eſcaped, the Gaoler might well plead that in Diſcharge Noy 15. Barnhurſt v Yelverton.

Defendant ought to be diſcharged, quia Erronice emanavit.——Brownl. 91. S. C. and ſeems only a Tranſlation of Yelv.

So if the Body comes by Hab. Corp. and becauſe he *cannot find good Bail the Judge commits the Party to the Marſhal*, this diſcharges the Bail; But it was agreed by all, that if the *Procedendo had*

31. In Debt upon an Eſcape the Caſe upon Demurrer was, That a *Plaint of Debt was in an Inferior Court, and Bail given there, and an Hab. Corp. was awarded to bring the Body with the Cauſe before the Ch. J.* which being done *Bail was accepted and Procedendo was afterwards awarded*, whereupon they proceeded and Judgment was given againſt the Defendant. The Queſtion was, Whether the Sheriffs by this are diſcharg'd or chargeable with the Priſoner? And it was reſolv'd that they are diſcharg'd; For *when a Hab. Corp. is return'd, and Bail accepted, though not fil'd*, yet preſently the Priſoner is diſcharg'd, and his Sureties alſo in the Inferior Court; And though a Procedendo was afterwards awarded, and that the Cauſe is remanded, yet the Sureties and Sheriffs are diſcharg'd; But the Plaintiff may proceed againſt the Party as if he had not been impriſon'd, and not otherwiſe. And Judgment accordingly. Cro. J. 203. Hill. 5 Jac. B. R. Farnely v. Baſſet.

been deliver'd to the Sheriff before the Bail taken by the Ch. J. then it had been a Superſedeas to the firſt Writ, and in ſuch Caſe the Bail in the Inferior Court had ſtood. Yelv. 120, 121. S. C. by the Name of Fernely v Fawſett.

32. Upon a Ca. Sa. againſt the Defendant, and Non eſt inventus returned, and a Teſtatum that he concealed himſelf in Lancaſhire, a Writ was awarded to the Chancellor of the County-Palatine, to command the Sheriff to take him ad Satisfaciendum &c. Ita quod the Chancellor ſhould have him &c. and that the Chancellor commanded the Sheriff to take him, Ita quod the Sheriff ſhould have him Coram Juſticiariis &c. An Action on the Caſe was brought againſt the Sheriff for an Eſcape, and Judgment againſt him. *Error was aſſigned that the Plaintiff ought to have brought Debt, and not an Action on the Caſe*; but *adjudged it was at the Plaintiff's Election to bring either Action*; and though there was a *Variance in the Writ to the Chancellor, and of that by him to the Sheriff*, yet that *being only Error in Proceſs, the Sheriff ſhall not take Advantage of it*, and the Judgment was affirmed. Cro. J. 288. pl. 5. Mich. 9 Jac. B. R. Burton v. Eyre.

The Writ was directed to the Sheriff with a Quod non omittat, and the Sheriff delivered it to the Bailiff

33. An Action of Debt was brought upon an *Eſcape againſt a Bailiff of a Liberty*, and after a Trial Exception was taken to the Declaration, becauſe *it was not alleged* therein, *that the Sheriff made a Warrant to the Bailiff* upon an Execution, *but* it was *only* alleged *that at A. aforeſaid, by Virtue of the Warrant aforeſaid, he took the Priſoner*, and *ſays not within the Liberty aforeſaid*, and the Exception was held void. Brownl. 79. Trin. 10 Jac. Brownſworth v. Trench.

of the Liberty who arreſted the Defendant and let him Eſcape. The Defendant demurred, becauſe the Writ being directed to the Sheriff, he ought to have executed it and not the Bailiff, and ſo the Arreſt not lawful; By which the Party may have an Action of Debt upon an Eſcape. Noy 51. Hill. 42 Eliz. Gardiner v Harriſon.

34. In

34. In an Action of *Debt againſt a Bailiff of a Liberty for an Eſcape* &c *where the Commitment was in a Court within the Liberty*, it the Defendant *pleads Nul tiel Record*, and in the Record certified are diverſe *Differences in the Continuances and in the Proceſs*, yet becauſe the *Plaint*, *Count*, *and Judgment certified agree with the Declaration*, the Plaintiff ſhall have Judgment. Hob. 179. pl. 210. Hill. 14 Jac. Coachman v. Halley. Brownl. 68. Cowchman v. Hawtry, S. C. accordingly.

35. Debt againſt the Sheriff for ſuffering a Man to eſcape who *was in Execution upon a Capias Utlegatum on a Judgment of* 60*l.* recover'd againſt him; the *Defendant pleaded Nul tiel Record* of the Recovery; The Plaintiff demurred, ſuppoſing that he ſhould plead Nil debet; but adjudged for the Defendant; For in Debt upon an Eſcape the Defendant might plead Nul tiel Record. Hob. 209. pl. 263. Trin. 15 Jac. Maddox v. Young. Brownl 51. S. C. held accordingly.

36. The *Sheriff on a Ca. Sa. return'd Cepi Corpus*, afterwards the *Plaintiff brought Debt againſt him on the Eſcape* of the Defendant, the *Sheriff pleaded Non arreſtavit the Defendant by Virtue of that Writ*; Plaintiff replied quod arreſtavit, and ſo to iſſue; and the *Sheriff was not eſtopp'd by the Return, but the Court* upon the Return *may amerce him.* 2 Roll Rep 57. Mich. 16 Jac. Arg. cites it as adjudg'd in the Caſe of Michel v. Henning the Sheriff of Dorſet.

37. Caſe againſt the Marſhal of B. R. wherein the Plaintiff *declar'd that he had Judgment againſt J. S. in Debt, and that he was taken in Execution and committed to the Defendant, who ſuffered him to eſcape at D. in the County of H.* The *Defendant confeſſed the Judgment, and that J. S. was committed in Execution at Southwark in the County of S.* &c. *and that afterwards he eſcaped at Southwark* out of the Defendant's Cuſtody, *and contrary to his Will, and that he made freſh Purſuit after him, and that upon that freſh Purſuit, viz. Ante Diem exhibitionis Billæ præd', viz. 8 Die Maii, Anno &c. he retook him* &c. and that he was in his Cuſtody, and demanded Judgment; Reſolved upon Demurrer, that though the Plaintiff alleged the Eſcape at D. in Com' H. and the Defendant confeſſed it to be at S. in Surrey, that this was good *without a Traverſe of the Eſcape at D.* for when a Man is at large it is an Eſcape in every County. Jo. 144. pl. 2. Mich. 2 Car. B. R. Harvey v. Reynel. Nov 93. S C. but S P. does not appear. —— Godb. 433. pl. 497. S C. but S. P. does not appear.

38. Caſe &c. for an Eſcape againſt a *Serjeant of the Compter* in London; The Defendant *pleaded that the Sheriff commanded him to deliver the Priſoner to him, which he did, and traverſed that he was guilty of Eſcape aliter vel alio Modo*; And upon a Demurrer the Court held that the Serjeant is the Sheriff's Officer, and the uſual Manner of Pleading is to plead that the Priſoner was in the Cuſtody of the Sheriff, and Sheriffs in London may make their Houſes their Priſons if they will, as the Compter, and ſo the Bar is good, but the Traverſe being ill the Court directed it ſhould be referred. Sid. 318. pl. 6. Hill. 18 & 19 Car. 2. B. R. Husband v. Cole. 2 Keb 147. pl. 22. S. C. the Court held that here is no Eſcape confeſſed, and therefore Not Guilty ſhould be pleaded, and not take any Traverſe;

but it being the Caſe of an Officer, they agreed to ſtay till Remedy be taken againſt the High-Sheriff; Et adjornatur.

39. Caſe againſt the Sheriff for an *Eſcape upon meſne Proceſs*; The *Defendant pleaded the Statute* 23 *H.* 6. *cap.* 10. *and that he let the Perſon out upon Bail*, according to the ſaid Statute, and that he had taken reaſonable Securities, viz. A. and B. *having ſufficient within the County*; The Plaintiff in his *Replication traverſed that the Defendant took Bail of of Perſons having ſufficient within the County*; And upon Demurrer it was inveſted for the Defendant that he is compellable to take Bail; If he take thoſe who are inſufficient, the Courſe is for the Court to amerce 2 Mod 177. S. C. adjudged per tot. Cur. for the Defendant. —— Freem Rep. 219. pl. 226. (bis) S. C. adjudged per

tot. Cur. that the Action would not lie for the Party, but that the Sheriff is to be amerced till he brings in the Body, and he is Judge of the Bail, but the Party has no Remedy by Action.

the Sheriff, and not for the Party to bring an Action; Beſides, the Traverſe is pregnant; For it implies that the Perſons have ſufficient out of the County, and the Sheriff is not bound to take Bail only of Perſons having ſufficient within the County. Per Cur. the Sufficiency of the Bail is not material, it is only for the Sheriff's ſecurity; If he takes no Bail then an Action lies againſt him. For then he does not act by Colour of this Law. And per tot. Curiam Judgment for the Defendent. Mod. 227. pl. 17. Trin. 28 Car. 2. C. B. Ellis v. Yarborough.

Saund. 58. S. C. & S P. held accordingly. ——— Sid. 305, 306. pl. 14. S. C. & S P held accordingly as to Debt, but Action on the Caſe for Eſcape lay at Common Law, and therefore is within the Statute of Limitations.

40. The *Statute of Limitations* is not pleadable in Debt for Eſcape. Lev. 191. 191. Mich. 18 Car. 2. B. R. Jones v. Pope.

Freem. Rep. 213. pl. 220. S. P. cited by North Ch. J. in S. C.

41. One was in Execution in B. R. and *Propoſals were made to the Plaintiff* in Behalf of the Priſoner, *who ſeeing there was Likelihood of Accommodation conſented to a Meeting in London, and deſired the Priſoner might be there, who came accordingly*, and this was held to be an Eſcape with the Conſent of the Plaintiff, and he could never after be in Execution at his Suit for the ſame Matter. 2 Mod. 136. Mich. 28 Car. 2. C. B. in Caſe of Baſſet v. Salter.

42. A *Sheriff* on Action of *Eſcape* ſhall take Advantage of the Cauſes ariſing out of the Juriſdiction. 2 Show. 374. pl. 360. Trin. 36 Car. 2. B. R. Anon.

43. An Action was brought upon an Eſcape, for that he being Sheriff of Surry, *voluntarily ſuffered J. S.* whom he had in Execution *to eſcape.* He *pleads that he made freſh Purſuit and took again*, and does *not traverſe the voluntary Eſcape* to which it was demurred. Reſolved for the Defendant for it is impertinent for the Plaintiff to allege it, and no ways neceſſary to this Action; *It is out of Time to ſet it forth in the Declaration, but it ſhould have come in the Replication.* It is like leaping (as Hale Ch. J. ſaid) before one comes to a Stile. Vent. 211. 217. Paſch. and Trin. 24 Car. 2. B. R. Sir Ralph Bovey's Caſe.

In Debt for an Eſcape, the Plaintiff declared that the Priſoner was committed and eſcaped, and becauſe he did not ſay prout patet per Recordum, the Defendant demurred generally, but the Plaintiff had Judgment; for the Giſt of the Action was the Eſcape, and the Commitment only Inducement; And per G. Eyre J. the Matter here is grounded on the Fact, for Nil debet is a good Plea, and not on the Matter of Record; And the Rule in Co. Litt. 302. where the Difference is taken between Caſes, where the Record is the very Foundation, and where Inducement, is a good Diverſity. 2. Salk 565. pl. 1. Mich. 6 W. & M. in B. R. Waites v. Briggs. ——— 5 Mod. S. S. C. adjudged for the Plaintiff, Niſi &c.

44. In Debt for an Eſcape againſt the Warden of the Fleet, the Plaintiff *declared that one Lenthal was committed to him in Execution upon three ſeveral Judgments*, (but did *not ſay prout patet per Recordum of the Commitment*) and that the Defendant permitted him to eſcape; The Defendant pleads that he permitted him to eſcape by Licence of the Plaintiff, who replied, that he permitted him to eſcape de Injuria ſua propria, and not by Licence of the Plaintiff; and upon Demurrer it was inſiſted for the Defendant that the Declaration was ill, becauſe he did not allege prout patet per Recordum of the Commitment, which is a Matter triable by Record, and not per Pais; to which it was anſwered that this was *cured by the Plea over which tenders an iſſue of another Matter, and by that admits the Commitment*, ſo that it is not the Commitment, but the Licence to eſcape; and the Court was of that Opinion and gave Judgment for the Plaintiff. 3 Lev. 393 Paſch. 6 W. & M. in C. B. Norden v. Fox.

45. Debt

45. Debt upon an Eſcape in Execution brought againſt the Bailiff of the Honour of Pontefract, who *pleaded that before the aforeſaid Eſcape an Habeas Corpus was directed to him, returnable Craſtin' Pur'* (which is the third Return in Hillary Term) commanding him *to bring the Body* of the Priſoner to Weſtminſter, *that by Virtue thereof he brought him into Court and returned the Cauſe of his Commitment, and that he was ſent to the Fleet, quæ eſt eadem Eſcapia*; The Plaintiff *replied, that before the Eſcape an Habeas Corpus was directed to the Defendant returnable Octab' Hillarii* (which is the firſt Return in Hillary-Term) *and that after the Day of the Return he brought the Priſoner &c. to Weſtminſter by Colour of the ſaid Writ, and then procured another Habeas Corpus mentioned in his Plea to be Fraudulently proſecuted, and directed to himſelf, by Virtue of which laſt Writ the Priſoner was brought into Court and turned over the Fleet, abſque hoc that the Defendant by Virtue of the Habeas Corpus ſet forth in his Plea did take the Priſoner out of Gaol and bring him to Weſtminſter*, and upon a ſpecial Demurrer to this Replication the Plaintiff had Judgment, for by three Juſtices, contra Treby Ch. J. the Virtute Cujus was traverſable. Lutw. 627. Hill. 9 W. 3. Beale and Ux. v. Simpſon.

Ld. Raym. Rep. 408. S. C. Treby Ch. J. held that the Virtute Cujus was not traverſable, but the other three Juſtices e contra, though they admitted that Generally the Virtute cujus is not to be traverſed where it contains matter of Law, but when it is mixed with Fact it may be; and that in this Caſe there is matter of Fact which depends upon it and for that reaſon it is traverſeable; And that there may be ſome Caſes where nothing but the Virtute Cujus is traverſable as in the caſe of a Bail Bond; Cited Ibid. 412. by Powell J.

46. Debt upon an Eſcape againſt the Marſhal, who *pleaded Nil debet*, and at the Trial the *Evidence was, that the Priſoner being out upon Bail ſurrendered himſelf by entering Reddidit ſe in Diſcharge of the Bail in the Judge's Book, which the Plaintiff's Attorney accepted, and filed a Committitur* with the proper Officer; there was a Verdict for the Plaintiff upon this Evidence, and upon a Motion for a new Trial the Court held, that *the Reddidit ſe in the Judge's Book is an immediate Diſcharge of the Bail, but* that *he is not in Cuſtody till the Plaintiff makes his Election by entring a Committitur, nor then ſo as charge the Marſhal with an Eſcape, till there is a Notice by Rule or Entry of a Committitur in the Marſhal's Book kept in the Office for that Purpoſe*, but this ought to be inſiſted on at the Trial, and it is now too late after a Verdict, and ſo the Motion was denied. 1 Salk. 272. pl. 3. Mich. 13 W. 3. B. R. Watſon v. Sutton.

12 Mod. 583. S C held accordingly.

47. The Sheriff had the Defendant in Execution upon a *Ca. Sa.* which *iſſued after a Day and Year without a Sci. Fa.* and ſuffered him to eſcape, and in an Action of Eſcape brought againſt him the Queſtion was, whether he could *take Advantage of this Error?* And held that he could not. 1 Salk. 273. pl. 4. Trin. 1 Ann. B. R. Shirley v. Wright.

7 Mod. 29. S.C. adjudg'd for the Plaintiff, niſi.

48. In Debt for an *Eſcape of one taken upon a Ca. Sa.* which appeared to be *returnable the Term next but one after the Teſte, ſo that a Term intervened*; After a Verdict for the Plaintiff it was moved in Arreſt of Judgment, that the Writ was merely void, and conſequently there could be no Eſcape, and the Sheriff did well to let him go. Per Holt Ch. J. Eſcape lies againſt the Sheriff, and there is a *Difference between a Capias in Mean Proceſs, and a Capias in Execution.* In Mean Proceſs if a Term be omitted the Writ is void in all Actions Perſonal, and the Sheriff ſhall not be charged; for the Cauſe is diſcontinued and out of Court by the Intermiſſion, and by not having a Day in Court by the Return of the Writ as he ought the Party may be at great Prejudice by Reaſon of the Impriſonment in the mean Time; But *in Execution* a Ca. Sa. omitting a Term, is not void; for *the Party is not to have a Day in Court*, his Cauſe is at an End, and he muſt be in Priſon, whether the Writ be returned or not; nor is it neceſſary it ſhould be returned.

7 Mod 29. Shirley v. Right S. C. & S. P. accordingly by Holt Ch. J. and Judgment per Cur. for the Plaintiff Niſi.

returned. Per Curiam the Plaintiff had Judgment Niſi &c. 2 Salk. 700. pl. 4. Trin. 1 Ann. B. R. Shirley v. Wright.

49. And in the ſame Caſe Holt Ch. J. ſaid, if *a Writ of Execution bear Teſte out of Term*, the Sheriff is juſtifiable, and yet ſhall not be liable to an Action of Eſcape, for it is a void Writ. Ibid.

50 If a *Defendant in Execution pays the Plaintiff, but no Satisfaction is entered on Record*, and the Sheriff ſuffers him to eſcape, and Debt is brought againſt him for it, he cannot take Advantage of that Payment; Per Holt Ch. J. 6 Mod. 27. Hill. 2 Ann. B. R. in Caſe of Barwick v. Andrews.

51. In Eſcape againſt the Sheriffs of London the Plaintiff *declared, that he levied a Plaint againſt J. S. being then in the Counter in Cuſtody upon a former Plaint levied againſt him by J. N. and that he being ſo in Cuſtody was ſuffered to eſcape.* The *Defendant* demurred, and *inſiſted that there ought to be a Precept iſſued out on the laſt Plaint*, on which the Sheriff might have returned Cepi. But Holt Ch. J. having looked on Mackally's Caſe ſaid, that upon entering a Plaint in the Counter there never is any Precept awarded, but the Serjeant at Mace arreſts the Party by this general Authority, and therefore all is ſet forth that ſhould be; For *by entering the Plaint, and charging him in the Counter, he is in actual Cuſtody of the Sheriff.* 1 Salk. 273. pl. 6. Trin. 5 Ann. B. R. Jackſon v. Humfries.

52. Debt for the Eſcape of one L. Defendant *pleads that L. without Knowledge of the Defendant*, the Warden of the Fleet, *eſcaped, and before Action brought, without Knowledge of the Defendant returned, and was in Execution for the Damages on the ſaid Judgment*, to which it was demurred. Judgment for the Defendant Niſi &c. for this *tantamounts to a Retaking on a Freſh Purſuit*; and the ſame Plea was held good. Hill. 8 Geo. 2. Grey v. Gambier. Comyns's Rep. 554. Trin. 9 & 10 Geo. 2. C. B. Chambers v. Gambier.

53. Action for *Eſcape for the Debt of the King* againſt Defendant late Warden of the Fleet, Mr. Ward *moved, that the Defendant might be allowed Liberty of pleading double*, viz. *Non debet, & recent' inſecutus eſt*, for by the Statute 4 Annœ 16. it ſhall be lawful for any Defendant &c. with Leave of Court, to plead as many ſeveral Matters as he ſhall think neceſſary for his Defence, and this Statute extends to the King's Suit as well as to that of the Subject, for Sect. 24. it is ſaid, this Act and all Statutes of Jeofails ſhall extend to all Suits for Recovery of Debt immediately owing, or any Revenue belonging to her Majeſty her Heirs or Succeſſors, and to all Courts of Record in County Palatine of Lancaſter, Cheſter, Durham, and Principality of Wales, and all other Courts of Record in this Kingdom; And ſo it was agreed in this Court; And afterwards, upon *Affidavit that the Eſcape was not voluntary*, (for otherwiſe by Statute 8 & 9 W. 3. 26 Plea of Freſh Purſuit is not allowable) the *Defendant was allowed to plead both Pleas.* Comyns's Rep. 422. pl. 199. Paſch. 2 Geo. 2. in Scacc. The King v. Huggins.

(O) Pleadings

(O) Pleadings againſt Sheriff.

1. IN an Action of Eſcape againſt a Sheriff the Plaintiff may *declare briefly upon the Judgment in the Sci. Fa. without ſhewing the gradual Proceedings at length*, as is uſually done in an Action of Debt on a Judgment; Per Cur. held clearly. Carth. 149. Trin. 2 W. & M. in B. R. in Caſe of Gold & al' v. Strode

2. In Action of Eſcape Exception was, that it was *not ſhewn* that the Party was *in Cuſtody at the Suit of the Plaintiff at the Time of the Eſcape*; and Holt ſaid, they ought to have ſhewn that he was arreſted and taken at the Suit of the Plaintiff, and then eſcaped; The like where a Man is in Cuſtody before any Suit, a *Charge* of him *in Cuſtody* is in Law an Arreſt. Dee ſaid it was pleaded, that at the Time of the Eſcape a *Plaint was levied in the Counter, whereby he was charged in Cuſtody* at the Suit of the Plaintiff; Holt ſaid *Charged* was a vulgar Expreſſion, but not a legal one. 11 Mod. 69. pl. 4. Hill. 4 Ann. B. R. Jackſon v Humphrys.

3. A Plaint is in the Nature of an Original, but not of a Capias, and the declaring againſt a Man in Cuſtodia Mar' is the ſpecial Cuſtom of the Court of B. R. But a *Plaint* will *not* be *ſufficient to found an Eſcape upon till* Proceſs goes out to bring him in Cuſtody, (viz.) to bring him into Court, for by the Plaint he is ſuppoſed to be at large. Powell differed. Adjorn.' 11 Mod. 69. Jackſon v. Humphrys.———cites 1 Salk. 273.

(P) Gaoler.

Forfeiture or Penalty for Eſcapes.

1. 8 & 9 *W.* 3. 26. IF *any Marſhal or Warden, or their Reſpective Deputies, or the Keeper of any other Priſon, ſhall take any Money, Gratuity, Reward or Security, to procure, connive at, or permit any Eſcape, ſhall forfeit* 500 *l. and his Office, and be diſabled to hold any ſuch Office.*

(Q) Eſcape of Felons.

What ſhall be ſaid ſuch.

The Offence thereof; and how inquired and puniſhed.

1. A *Felon eſcaped*, and the *Warden purſued freſhly*, and the *Felon run out of Sight*, and the *Warden purſued and retook him*, and yet it was adjudged an Eſcape. Br. Eſcape, pl. 49. cites 6 E. 2. Itin. Canc.

2. If a Man *abjures for Felony*, and *no Record is made of it*, this is an Eſcape. Br. Eſcape, pl. 50. cites 6 E. 2. Itin. Canc.

3. *So where a Felon coming to the Gaol flies to the Church.* Ibid.

4. A Man was *taken for Suſpicion of a Thief*, and *bailed to the Conſtable of C.* and *eſcaped for want of good Keeping*, and the Conſtable was taken and arraigned for it, and ſaid, that becauſe he who eſcaped was not taken with the Manner, nor at the Suit of the Party, nor indicted of Felony, therefore it is no Eſcape; Judgment &c. and ſo was the Opinion there. Br. Eſcape, pl. 29. cites 42 Aſſ. 5.

5. R. *ſtole* certain *Chattels* felonioufly, and fled, and *Hue and Cry was made*, and G. *arreſted him, and* when he had him in Arreſt he *took the Chattels from him, and ſuffered him to go at Large* felonioufly &c. and was indicted thereof, and arraigned, and found Not Guilty, and went quit; and ſo ſee that a *voluntary Sufferance of a Felon to eſcape* is Felony. Br. Corone, pl. 112. cites 27 Aſſ. 62.

Br. Corone, pl. 112. cites S. C.

6. Sufferance of a *voluntary Eſcape* of a Felon *is Felony.* Br. Eſcape, pl. 25. cites 27 Aſſ. 62.

7. A *Man* was *adjudged to be hanged*, and *was delivered to the Sheriff to make Execution and eſcaped out of his Ward*, and the *Vill was arraigned* of the Eſcape; for *he took to the Church*, and becauſe *he cannot abjure* in this Caſe they were diſcharged of the Eſcape. Br. Eſcape, pl. 24. cites 27 Aſſ. 54.

8. *Capias for Felony*, the *Sheriff returned Cepi Corpus*, and *had not the Body at the Day*, by which he was amerced to 100 s. for the Eſcape; quod nota; and the Party was indicted of the Felony. Br. Retorn de Briefs, pl. 79. cites 40 Aſſ. 43

9. A Man was *indicted of Felony*, *Capias iſſued*, the *Sheriff returned* Quod *Cepi Corpus*, and *had him not in Court at the Day*, and therefore he was amerced to 100 s. for the Eſcape. Br. Eſcape, pl. 27. cites 40 Aſſ. 42.

10. In B. R. it was *preſented that J. N. had ſtole two Sheep*, and *M. took him for Suſpicion, and delivered him to P. who let him go becauſe there was no Indictment againſt him*, and after the Thief was indicted for the Eſcape, and notwithſtanding that there was *nothing againſt him but Suſpicion*, P. was charged of Eſcape. Br. Eſcape, pl. 31. cites 44 Aſſ. 12.

Br Traverſe de Office, pl. 3. cites S. C

11. *Two were indicted of the Death of a Man*, and they *both had to the Value of* 100 *Marks* et fugam fecerunt, and therefore the *Vill was charged and Scire Facias* againſt them *to anſwer the Sum to the King*; quod nota; and therefore it ſeems that *that this Eſcape was by the Day.* Br. Eſcape, pl. 6. cites 47 E 3. 26.

2 Hawk. Pl. C. 129. cap. 19. S. 1. cites S. C.

12. If a *Man has a Felon in his Houſe*, and *ſuffers him to go*, this is no Eſcape of Felony, becauſe he had not arraigned him of Felony before. Br. Corone, pl. 26. cites 9 H. 4. 1.

13. If a Man *receives a Felon knowing of the Felony*, and *takes* 40 *s. of him to ſuffer him to go*, this is no Eſcape, becauſe he did not arreſt him, but *he is acceſſary to the Felony.* Br. Eſcape, pl. 43. cites 9 H. 4. 1.

14. If a Man *ſtrikes another*, and the *Conſtable takes him*, and after ſuffers him to eſcape, and after the *Party dies* of the Wound, this Eſcape is no Felony in the Conſtable; Per Thirn. Br. Corone, pl. 28. cites 11 H. 4. 12.

15. If *a Man ſtrikes another*, and the *Conſtable takes him, and after ſuffers him to go at Large*, and after the *Party dies of the Stroke*, this is no Eſcape of Felon in the Conſtable; Per Thirn; for he was no Felon at the Time &c. Br. Eſcape, pl. 8. cites 11 H. 4. 11.

16. A *Priſoner was adjudged to be hanged*, and the Sheriff was commanded to make Execution, *and as the Sheriff was going to do Execution R. K. and others* ſuch a Day, Year and Place, *reſcued him* out of the Poſſeſſion of the Sheriff, and the Sheriff freſhly purſued him and retook the Priſoner; Per Hobart, this is an Eſcape; for he was once out of the

Poſſeſſion

Poſſeſſion of the Sheriff; But Keble contra; for if the Priſoner in going to Execution runs from the Sheriff, ſo that ſometimes he is out of the View of the Sheriff, yet this is no Eſcape if he be taken in the Purſuit, and yet he was out of Poſſeſſion of the Sheriff, and though the Taking out of Poſſeſſion of the Sheriff ſhall be an Eſcape, yet not in this Caſe, becauſe he was *taken from him by Violence, and thoſe who took him ſhall be Felons*, againſt whom a Man can have no Remedy. Br. Eſcape, pl. 32. cites 6 H. 7. 11. 12.

17. If *a Sheriff goes to the Gallows to hang a Felon*, and *J. N. reſcues him* from him, and *he freſhly purſues and takes him, and hangs him*, there per Keble, Tremail and Huſſey, this is no eſcape, inaſmuch as he was freſhly re-taken and hanged, and was not out of Sight, and ſo in Poſſeſſion in Law. Br. Eſcape, pl. 52. cites 10 H. 7. 25.

18. If a Felon *creeps under a Bench, and is freſhly retaken*, this is no Eſcape; Per Huſſey; But Fineux, Fiſher and Fairfax contra. Ibid.

19. *Indictment* of Eſcape is not good unleſs it be *Quod exivit ad largum*; Per Huſſey. Br. Eſcape, pl. 52. cites 10 H. 7. 25.

20. Where a Sheriff or Gaoler has a Man in his Ward for Felony, who is after *acquitted by Judgment before the Juſtices*, and after goes his Way, this is no Eſcape, nor the Gaoler ſhall not make Fine; for by the Judgment he is no Priſoner, and yet the *Judgment is, That he ſhall be diſcharged paying his Fee*, and if he *goes his Way before he has paid his Fees*, yet the Gaoler ſhall not make Fine. Br. Eſcape, pl. 16. cites 21 H. 7. 17.

21. One was *killed in the Evening*, the *Murderer eſcaped*; by the Common Law the Town ſhall be amerced; for the Evening is Parcel of the Day and not of the Night. 7 Rep. 6. b. Trin. 28 Eliz. C. B. in Aſhpole's Caſe.

22. The Sheriff was indicted for ſuffering a Perſon convicted of Felony to eſcape; it was objected againſt this Indictment, for that he is indicted as Sheriff, and it did not appear that he had the Cuſtody of the Priſoners delivered over to him by Indenture, as he ought to have, for otherwiſe he ſhall not be charged for the Eſcape, as it was adjudg'd in **Weſtby's Caſe** 3 Rep. 72. Sed per Cur. *if the Sheriff takes upon him the Cuſtody of the Priſoners, though without Delivery by Indenture to him, if he ſuffers the Priſoners to eſcape he may be indicted of it*; for an Indictment is the Suit of the King. 2 Roll Rep. 146. Hill. 17 Jac. B. R. Sir Thomas Read's Caſe.

23. If a Man be *in Cuſtody of F. for a Treſpaſs*, and *another* Perſon goes before a Juſtice of Peace, and *ſwears High Treaſon againſt him*, he will be in Cuſtody of F. and alſo charged with High Treaſon; but yet ſince he was not committed to F. for High Treaſon, *F. ſhall not anſwer for his Eſcape, as* the Eſcape of a Man *committed for High Treaſon.* The Precedents are, Cujus ex Cauſa commiſſus fuit. Ld. Raym. Rep. 424. Hill. 10 W. 3. in Caſe of the King v. Fell.

1 Salk. 272. pl. 2. S. C. & S. P. accordingly by Holt Ch. J. —— 12 Mod. 226. S. C. & S. P. per Holt Ch. J.

and for this Reaſon Judgment was arreſted. —— 5 Mod. 416. S. C. & S. P. and by Holt Ch. J. in Indictments for ſuffering Perſons to eſcape it muſt appear that the Party was lawfully committed. —— The Cauſe muſt be contained in the Warrant, as for Treaſon, Felony &c. or for Suſpicion of Treaſon or Felony &c. Otherwiſe if the Mittimus contains no Cauſe at all, if the Priſoner eſcapes it is no Offence at all, whereas if the Mittimus contained the Cauſe, the Eſcape were Treaſon or Felony, though he were not Guilty of the Offence; and therefore for the King's Benefit, and that the Priſoner may be more ſafely kept, the Mittimus ought to contain the Cauſe. 2 Inſt. 52.

24. Though

The Warrant or Mittimus containing a lawful Cauſe ought to have a lawful Concluſion, viz. and him ſafely to keep until he be delivered by Law &c. and not until the Party committing doth further order. 2 Inſt. 52.

24 Though *Error in the Commitment will not excuſe the Gaoler* (as if a Man be committed for High Treaſon, there to continue till farther Order) if he permits the Man committed to eſcape, yet the Gaoler ſhall never be charged for the Eſcape of a Man, as committed for an Offence, for which he never was committed to him. Ld. Raym. Rep. 424. Hill. 10 W. 3. in Caſe of the King v. Fell.

1 Salk. 172. pl. 2. S. C. & S. P. accordingly.

25. If a Man committed for High Treaſon was *pardoned*, yet the *Sheriff ought not to take Notice of it until* his Pardon was *allowed in B. R. or ſome other Court*; for the Sheriff cannot allow the King's Pardon; and it is criminal in him to permit a Priſoner to eſcape before ſuch Allowance had. Ld. Raym. Rep. 425. Hill. 10 W. 3. in Caſe of the King v. Fell.

26. The Priſoner is in the Cuſtody both of the Gaoler and the Sheriff, and if he be committed to the Sheriff, and the Gaoler ſuffer him to *eſcape*, the Gaoler is puniſhable; For the Sheriff ſhall anſwer *civilly* for the Faults of the Gaoler, but not *criminally*; Per Holt. 1 Salk. 272. pl. 2 Hill 10 W. 3. B. R. The King v Fell.

See 2 Hawk. Pl. C. 128. to 139. cap. 19, 20. and Hales's Hiſt. of Pl. C. 591. to 606. cap. 51, 52. and ſee tit. Gaoler and tit. Marſhal.

(R) Equity.

A *Bill* preferred to be relieved upon Point of Eſcape, but *diſmiſſed*.

1. A Sheriff preferred his *Bill* to have *Relief upon an Eſcape* of one that was in Execution. Toth. 82. cites Mich. 20 Jac. Carnſew v. Coad.

Toth. 84.

2. In an *Eſcape* againſt the Marſhal the *Gaoler ſhall have the Priſoner's Equity*, and may give in Evidence the Poverty of the Priſoner &c. Per Jeffries C. 2 Vern. 89. pl. 84. Mich. 1688. in Caſe of Searle v. Lane.

For more as to Eſcape in General, See **Bail, Gaoler, Marſhal, Reſcous, Sheriff,** and other Proper Titles.

Eſchange, [or Exchange.]

Fol 811.

(A) Permutation.

Of what Things it may be.

1. A **Permutation cannot be of** a Lay Hoſpital for a Prebend, **becauſe the one is** Lay **and the other is Spiritual,** 21 E. 3. 6. b. 7. Br. Exchange, pl. 11. cites S C. but ſays Quære; for non adjudicatur, but Iſſue was taken upon another Point.

2. But **otherwiſe it is if the** Hoſpital be Spiritual; **as where it is founded for Alms and Things Spiritual.** 21 E. 3. 7. Br. Exchange, pl. 11. cites S.C.

3. Nota dictum fuit pro Lege, that if a *Parſon or Vicar* leaſes his Land for Term of Years, and exchanges, the *Succeſſor may enter*, for the Eſtate is ceaſed as well by Permutation as by Death, contrary of a Leaſe of *Maſter and College* who have College and Common Seal, the Succeſſor cannot enter, Nota. Br. Leaſes, pl. 8. cites 2 H. 4. 5.

4. *Eccleſiaſtical Perſons*, their Patrons and Ordinaries, though they all agree, yet they cannot exchange the Inheritance of Spiritual Livings, and the Reaſon is, becauſe the Statute ſtrictly provideth that no Alienation be made in *Mortmain.* Fulb. 34.

(A. 2) Notes.

1. EXCHANGE *is a mutual Grant of equal Intereſts*, each in exchange of other, As of Land in Fee ſimple, for other of the ſame Eſtate. But to exchange an *Eſtate pur auter vie, for an Eſtate for Life* is not good. For though both have a Freehold, yet an Eſtate during another's Life, is not ſo high a Freehold, as an Eſtate during his own Life. Finch's Law, 8vo. 103.

2. *Equality* in Lands are of three Sorts, viz. 1ſt, Equality in Value. 2dly, In *Quantity* of Lands given and taken. 3dly, In *Quality* or Manner of the Eſtate given and taken. Equality in Value of Lands in an Exchange is not requiſite, nor Equality in the Quality or Manner of the Eſtate, but Equality of the Quantity of the Eſtate is *requiſite.* Co. Litt. 50. a. b.

3. Five Things are *neceſſary to the Perfection* of an Exchange, viz. 1ſt, That the *Eſtates* given be *equal.* 2dly, That this *Word* (Excambium, *Exchange*) *be uſed*, which is ſo individually requiſite as it cannot be ſupplied by any other Word, or deſcribed by any Circumlocution. In the Book of Doomſday I find, Hanc Terra cambiavit Hugo Briccuino, quod Modo tenet Comes Meriton, & ipſum Scambium valet duplum. Hugo de Belcamp pro Eſcambio de Warres. 3dly, That there be an *Execution by Entry or Claim* in the Life of the Parties. 4thly,

That if it be of Things that lie in Grant it muſt be *by Deed.* 5thly, If the Lands be in ſeveral Counties there ought to be a Deed *indented*, or if the Thing lies in Grant albeit they be in one County. Co. Litt. 51. b.

4. In every Exchange rightly made, the Word *Excambium imports in itſelf tacitly Condition and alſo a Warranty*, the one to give an Entry, and the other a Voucher and Recompence in regard of the reciprocal Conſideration, the one Land being given in Conſideration of the other; Reſolved. 4 Rep. 121. a. Paſch. 1 Jac. B. R. Buſtard's Caſe.

5. Exchange *importeth* in the Law a Condition of *Re-entry* and a *Warranty*, *Voucher* and *Recompence* of the other Land that was given in Exchange. Noy's Max. 61.

(B) What Perſon may make Exchange.

At what Time.

[Baron and Feme or Infant.]

Br. Exchange, pl. 2. cites S. C.

1. IF two Barons and Femes exchange between them this is good during the Coverture. 45 E. 3. 20. b.

per Hould, that this ſhall ſerve only for the Lives of the Barons, and if it be by Livery the Wives may have a Cui in Vita after the Deaths of their Husband. ——— Fithz. Exchange, pl. 1 cites Mich. 45 E. 3. S. P. and ſeems to intend S. C.

2. If an Infant makes an Exchange for Land of leſs Value than his Land which he gives in Exchange, this ſhall not bind him. 12 H. 4. 12.

Br. Exchange pl. 3. S P. cites 12 H. 4 11.

3. But at his full Age he may make it good by Agreement. 12 H. 4. 12. 4 E. 3. Exchange. 3.

——— If he Occupies after his full Age he is bound; Contra if at his full Age he waives the Poſſeſſion. Br. Ibid. pl. 4. cites 21 H. 6. 24, 25.

4. An Exchange by an Infant is good till it be defeated. 15 E. 4. 3.

5. But he may avoid it at his full Age. 4. E. 2 Exchange admitted by Iſſue. 16 E. 3. F. Exchange 2. per Skarde admitted.

If ſhe occupies the Land after

6. If Baron and Feme exchange with another this is good during Coverture. 29 E. 3. 30.

the Death of the Baron ſhe ſhall be bound; Contra if ſhe waives the Poſſeſſion. Br. Exchange, pl. 4. cites 21 H. 6. 24, 25.

Br. Exchange, pl. 9. cites S C. but ſays it ſeems,

7. If the Baron exchanges the Land of the Wife for Land of leſs Value, if the Feme after his Death agrees once to the Exchange ſhe never ſhall avoid this after. 9 H. 6. 52. Curia.

that if the *Baron makes Exchange without the Feme*, ſhe ſhall not be bound by Entry or Agreement any more than by Acceptance of the Rent upon Leaſe by the Baron only, for thoſe are void as to her where ſhe is not Party, and voidable where ſhe is.

8. If

8. If the Baron exchange the Land of the Wife for other Land given to him his Feme and Son jointly, this ſhall be good by Agreement of the Feme after the Death of the Baron. 9 E. 2. Cui in Vita. 28.

9. If Baron and Feme exchange the Land of the Feme for other Land, this ſhall be a good Exchange not voidable by the Feme if ſhe agrees after Death of the Baron. 10 E. 2. F. Exchange 13. Br. Exchange, pl. 9. S. P. cites 9 H. 6. 52.

10. If an Infant exchange Land with another, if he continues in the Land given to him in Exchange at full Age he has affirmed the Exchange, ſhall never avoid it after. 4 E. 2. Exchange 3. admitted by Iſſue 16 E. 3. Exchange 2. per Sharde. Dal. 64. in pl. 26 Anno 6 Eliz. S. P. by Bendlowes.—— Co. Litt. 51. b. S. P.

11. J. S. and J. his Feme, and T. and M. his Feme were agreed upon Exchange of Land for Land, by which T. and M. entered, and after *infeoffed J. S. and his Father in Fee where he ought to have given to J. S. and J. his Feme in Tail*, the *Remainder to the right Heirs of the Feme*, and alſo that T. and M. Feme ſhould pay annually 40 s 8 d. to the ſaid J. S. and J. his Feme. This was arrear by four Years, by which J. S. and his Feme entered, and T. and his Feme ouſted them, and they brought Aſſiſe and recovered per Judicium; For *by the Miſfeaſance of the Eſtate* J. S. and his Feme *were only Tenants at Will*, and therefore the Entry of J. S. lawfull. Br. Entry Cong. pl. 10. cites 45 E. 3. 20. It was agreed that Exchange is *Warranty in itſelf*, but in this Caſe is no Warranty, nor the Party cannot vouch by it; For it is no Exchange. Br. Exchange, pl. 2. cites S. C.

12. Husband and Wife ſeiſed of *Lands in the Right of the Wife* make Exchange with a Stranger for other Lands, and after *Execution aliened the Lands taken in Exchange by Fine*. After Death of the Huſband the *Wife may enter into her own Lands* notwithſtanding the Fine; Per two Juſtices. Le. 285. pl. 386. Hill. 28 Eliz. Anon.

13. *Parſon exchanges* his Glebe-Land and dies; The *Succeſſor enters into the exchanged Land* and takes the Profits, yet the Succeſſor is bound for his Time; Et adjornatur. It is clear that the Exchange ſhould not have been good, if it had been *made after* 13 *Eliz.* but the Exchange in our Caſe was made before. Noy 5. Trin. 40 Eliz. Turther's Caſe.

14. An Exchange *with the King* is good, and yet the King is ſeiſed in his politick Capacity, and the Subject in his natural Capacity; But Equality of the Quantity of the Eſtate is requiſite. Co. Litt. 51. a. But if the King exchange Lands with another, by this Warranty in Law, the King is bound to Warranty, and to yield in Value, and ſo it was adjudged Hill. 6 E. 1. in C. B. Rot. 2. William Brewie's Caſe. 2 Inſt. 269.

(C) What Perſons may in reſpect of Eſtates.

[Tenant in Tail]

1. IF Tenant in Tail exchange for Land of equal Value the Iſſue may avoid it. 14 H. 6. 2, 3. Br. Exchange, pl. 13. cites S. C. —— Br. Confeſs and avoid. pl. 23 cites S. C.

2. If

Br. Exchange, pl. 13. cites S. C.—— S P though the Exchange is Warranty and Aſſets in itſelf. Br. Agreement, pl. 11. cites S. C.—— Br. Aſſets per Deſcent, pl. 20 cites S. C. —— See pl. 4. in the Notes.

2. If Tenant in Tail exchange for Land of equal Value and dies, though the Land taken in Exchange deſcends to the Iſſue, yet if the Iſſue does not occupy but diſagrees to it he may avoid the Exchange. 14 H. 6. 2, 3.

* Br. Taile, pl. 34 cites S. C. & S. P. in the Caſe of the King

3. If Tenant in Tail exchange with another and lets other Lands deſcend to his Iſſue in Fee, this ſhall bind the Iſſue. 8 H. 6. 2, 3. 14 H. 6. 23. admitted, for then it is a lineal Warranty with Aſſets. * 45 Aſſ. 6. adjudged.

S. P. As if he enters into the Land or the like Br. Exchange, pl. 9. cites S. C.—— But where the Iſſue did not enter or agree but brought his Action, yet he was not barred though the Exchange was *with Warranty*; for the Land taken in Exchange is not Aſſets unleſs he enters into it, and his bringing the Action is a Diſagreement by Matter of Record. Br. Exchange, pl. 13. cites 14 H. 6. 3.

4. If Tenant in Tail exchange for Land of leſs Value, if the Iſſue once agrees to it after his Death, he ſhall never avoid it. 9 H. 6. 52. b. Curia. So it is (a Fortiori) where the Land which he has in Exchange is of equal Value. 14 H. 6. 2, 3.

(D) Of what Things it may be.

[*What for What.*]

Fitzh. Exchange, pl. 4. cites S. C. —— S P. And it is not neceſſary that the Things exchanged be of the ſame Nature. Br. Eſchange, pl. 5. cites 9 E. 4. 19, 20. —— Fitzh. Exchange, pl. 5 cites S. C. ——Mo. 665. pl. 909. in Caſe of Bolton v. Buſtard, S P. accordingly.

1. A Rent may be exchanged with another for certain Land 16 E. 3. Eſchange 2. 3 E. 4. 10. b. 9 E. 4. 21. 15 E. 4. 8. b. 30 E. 1. Itinere Cornubiæ 15. Co. Lit. 50. b.

So of Rent for Common. Br Exchange, pl. 5. cites 9 E. 4 19, 20. —— Ibid. pl 6. S. P. cites 9 E. 4. 38. per Littleton.——Mo. 665. in Caſe of Bolton v. Buſtard, S. P. accordingly.

2. A Man may exchange Common for Land. Perkins S. 263. Co. Lit. 50. b. Contra 15 E. 4. 3.

3. A Tenure by Divine Service may be exchanged for a Temporal Seigniory. Co. Lit. 50. b.

Exchange may be of Things Spiritual and Temporal, As to give Land to a Parſon and his Succeſſors to be quit of Tithes and Mortuaries. Br. Eſchange, pl. 5. cites 9 E. 4 19, 20. per Choke.

4. A Common may be exchang'd for Tithes. Contra 15 E. 4 3.

5. Land may be exchang'd for Tithes. Co. Lit. 50. b.

6. An Annuity cannot be exchanged for Land, becauſe this charges the Perſon only and is not real. Co. Lit. 50. b.

7. A Villein in groſs may be exchang'd for an Acre of Land, for the Villein is real as well as the Land; For a Feme ſhall be endow'd of it, and an Eſtate Tail may be of it within the Statute.

8. A

8. A Reverſion expectant upon an Eſtate for Life may be exchang'd for an Acre in Poſſeſſion. 9 E. 4. 39. per Littleton. 4 Rep. 122. b. Buſtard's Caſe.

Land may be exchang'd for a Reverſion if the Tenant for

Life attorns. Br. Eſchange, pl. 6. cites 9 E. 4. 38. per Littleton. —— Mo. 665. S. C. & S. P accordingly — Cro. E. 902. pl. 2. Buſtard v. Coulter, S. C. & S P per Popham. —— Yelv. 8. S. C & S. P. without Doubt; for this is apparent at the Time of the Exchange.

See (H) pl. 12.

(D. 2) *How. By Releaſe on one Side.*

9. If I have a Rent out of certain Land I may exchange this Rent with the Tenant of the Land by way of Releaſe of the Rent for other Land, though there be not any Tranſmutation of the Poſſeſſion of the Rent, but this enures by way of Extinguiſhment. 16 E. 3. Eſchange 2. per Skipwith. Perkins S. 267. Co. Lit. 50. b.

10. So if a Man releaſe a Common of Eſtovers to the Tenant of the Land in Exchange for other Land, though this enures by Way of Extinguiſhment, and it ſhall be good Exchange. 30 E. 1. Itinere Cornubiæ, Eſchange 16. adjudged. Co. Lit. 50. b.

11. So Common of Paſture may be releaſed to the Tenant of the Land in Exchange for other Land though it enures by Way of Extinguiſhment.

12. If J. S. be ſeiſed of certain Land to which I have Right of Entry, I may releaſe this Right to J. S. in exchange for other Land, and this ſhall be good Exchange though there is not any Tranſmutation of Poſſeſſion. Perkins S. 271. Co. Lit. 50. b. Contra 7 H. 4. 43. Dubitatur * 3 E. 4. 10. b.

* Fitzh. Exchange, pl. 4. cites S. C. but S.P. does not appear.

13. So a Right of Action may be releaſed to the Tenant of the Land in Exchange for other Land, and this ſhall be good Exchange, for he to whom the Releaſe is made has as good Advantage by it as if the Land itſelf had been given to him. Dubitatur 16 E. 3. Eſchange 2. Perkins S. 268.

14. In Scire Facias the *Tenant ſaid that ſhe had had Land aſſigned to her in Dower*, and *after he in Reverſion exchanged the Land in Demand with her for the other Land which ſhe had in Dower*, and prayed aid of him in Reverſion, and it was doubted if it be a good Exchange or not; Quære; For he in *Reverſion took the other Land by way of Surrender*, and alſo it is not expreſſed what Eſtate he had in this Land, therefore Quære. Br. Eſchange, pl. 14 cites 39 E. 3. 1.

15. Exchange is good of *Land for a Chamber*. Br. Præcipe, pl. 23. cites 5 H. 7. 9. per Huſſey and Fairfax.

16. Exchange may be of *Chattels Perſonal for Chattels Perſonal*; and ſo of *Chattels Real for Chattels Real*; and of Freehold for Freehold; and of Inheritance for Inheritance; So that if J. S. makes an Exchange with T. R. and T R. gives his *Gown* to J. S. in Exchange *for the Horſe* of J. S. and J. S. gives his Horſe in Exchange to T. R. for his Gown &c. it is a good Exchange; And ſo of other Chattels Perſonal mutatis mutandis; *And* in the ſame Manner *of Chattels Real*, and Freehold, and Inheritance &c. Perk. S. 257.

17. An Exchange betwixt a *Rent and a Common* which are in Eſſe at the Time of Exchange is good. Fulb. 32. b.

(E) Of what Things it may be for a Collateral Reſpect.

Fitzh. Exchange, pl. 5. cites S. C. 9 E. 4. 4. 21. b. per Choke. Perkins S. 262. Contra Co. Litt. 50. b.

1. BOTH the Things **which are exchanged** ought to be in Eſſe at the Time **of the Exchange, otherwiſe it ſhall not be good.**

Fitzh. Exchange, pl. 5. cites S. C. 9 E. 4. 21. b. per Coke. Contra Co. Litt. 50 b.

1. **As if a Man grants a** Rent De Novo out of his Land **to another in Exchange** for certain Land, **this is not good, becauſe the Rent was** not in Eſſe before.

Perk. S 264. S. C

3. Three Acres of *Land with Advowſon appendant in Fee* were exchanged by a Prior with the Maſter of G. *for one Chamber of two to be aſſigned* by the Maſter, at his Election, to the ſaid Prior and his Succeſſors in D. and the Maſter ſhewed two Chambers to the Prior, viz. a high Chamber and a low Chamber, and the Prior elected the high Chamber and enter'd into it, and the Maſter entered into the Land, and this was held a good Exchange though the *Succeſſor might diſagree* to it, but if he does not diſagree it is good notwithſtanding it was *uncertain at the firſt*, viz. that the Prior ſhould have one Chamber of two which ſhould be aſſigned to him by the Maſter, and ſo the *Chambers not known till the Maſter aſſigned them, and the Prior made his Election*; But when the one aſſigned, and the other elected, and both entred then was the Exchange made good and perfect; Quod Nota. Br. Exchange, pl. 6. cites 9 E. 4. 38.

Fol. 813.

(F) What Eſtates the Parties to the Exchange ought to have.

[And of granting a Rent for Owelty.]

Fitzh. Exchange, pl. 1. cites Mich. 45 E 3 and ſeems to be S. C.

1. **TWO may exchange, and for Equality the** one may reſerve by Deed, out of the Land which he paſſes, a Rent for Owelty, and **for Surety of Payment** a Re-entry **for Non-payment**; Dubitatur, 45 E. 3. 20. **b. for it ſeems that this is but a Collateral Incumbrance to the Eſtate.**

2. It is *not neceſſary* that the Parties to the Exchange be ſeiſed of an *equal* Eſtate *at the Time of the Exchange* made, for if *Tenant in Tail*, or a *Husband*, ſeiſed in Right of his Wife exchange Lands, and both by the Exchange *give a Fee-Simple*, this is good till it be avoided by the Iſſue in Tail, or by the Wife after the Death of the Husband; ſo as Littleton ſays, that in Exchanges the Eſtates which both Parties have in the Land ſo exchanged ought to be equal, is as much as to ſay, as that the Eſtate reciprocally given in Exchange ought to be equal. Co. Lit. 51. a.

(G)

(G) Of what Eſtates it may be.

[*And what Eſtates are equal.*]

1. THE Eſtates ought to be equal **which are given in Exchange the one for the other.** 9 E. 4. 21. b. 38. b. Fitzh. Exchange, pl. 6. cites S. C. —— Br. Exchange, pl. 6. cites S. C. —— Br. Exchange, pl. 2. cites 45 E. 3. 20. per Hould. —— Unequal Value or Quantity in the one more than in the other ſhall not impeach the Exchange, but unequal Eſtates ſhall, as Copyhold for Freehold, or Ancient Demeſne for Frankfee, or Eſtate for Years for an Eſtate for Life, unleſs tolerated by the ſpecial Agreement of the Parties. Mo. 665. pl. 909. Mich. 44 & 45 Eliz. B. R. Bolton v. Buſtard. —— But this ſeems to be underſtood if the particular Agreement of the Parties do not tolerate it. Ibid. Bolton v. Buſtard. —— Though the Values or Quantities differ it is not material if the Eſtates in the Exchange are equal, otherwiſe no Acceptance can make it perfect in Law; Per Dyer. D 356 b. pl. 40. —— 7 Mod. 25. S. P. by Holt Ch. J.

2. **An Exchange of Land** for Life **for Land** in Fee **is not good, becauſe the Eſtates are not equal.** * 38 E. 3. 15. b. 30 E. 1. Itinere Cornubiæ 15. **adjudged.** 22 E. 3. 15. * Fitzh. Exchange, pl 8. cites S. C. —— S. P Br. Exchange, pl. 5. cites 9 E 4. 19, 20. per Pigot. —— S.P. by Holt Ch. J. in delivering the Opinion of the Court. 7 Mod. 25. Trin. 1 Ann. B. R.

3. **A Man may give an Eſtate** for Life of the Donee **in Exchange for an Eſtate** for another's Life, **for the Eſtates are equal, both being Eſtates of Frankfenement.**

4. **It ſeems an Eſtate** for three Lives **may be given in Exchange for an Eſtate** for one Life, **for both are Eſtates of Frankfenement, and ſo equal.**

5. **An Eſtate may be given** to one and his Heirs for the Life of J. S. **in Exchange for an Eſtate** for Life, **for both are Eſtates of Frankfenement.**

6. **It ſeems an Eſtate cannot be given** to another and his Heirs for the Life of J. S. **in Exchange for** a baſe Fee, **as ſo long as that J. D. ſhall have Iſſue of his Body, or that ſuch Oak ſhall grow, becauſe the Eſtates are not equal.**

7. **An Eſtate** to one and his Heirs ſo long as J. S. ſhall have Iſſue of his Body **may be given in Exchange for** an abſolute Fee, **for both are Eſtates of Fee Simple, though the one be but a baſe Fee.**

8. **So an** abſolute Fee **may be given in Exchange for an Eſtate** to the other and his Heirs ſo long as ſuch Oak ſhall grow, **for both are Fees.**

9. A Villein **may be given** in Fee for an Acre in Fee, **though he has but a baſe Fee in the Villein, ſcilicet, ſo long as that he ſhall have Iſſue of his Body. Note that this has been held for a Point in a Boot in the Hall.**

10. Tenant in Tail may give **the Land** to another and his Heirs **in Exchange** for another Acre to him ſo long as J. S. ſhall have Iſſue of his Body, **for both are Eſtates in Fee.**

11. **So it ſeems that** Tenant in Tail may give **the Land in Exchange** for other Land to him in Fee, **for both are Fees.** Mo. 665. pl. 909. Trin. 43 Eliz. B. R. the S. P. held e contra if the ſpecial Agrerment of the Parties does not tolerate it. —— It is not neceſſary that the Parties to the Exchange be ſeiſed of an equal Eſtate at the Time of the Exchange made; for if Tenant in Tail, or a Husband ſeiſed in the Right of his Wife, exchange Lands, and

and both by the Exchange give a Fee Simple, this is good until it be avoided by the Iſſue in Tail, or by the Wife after the Death of the Husband Co. Litt 51. a. —— If one gives an Eſtate Tail, and takes a Fee, it is bad; If Tenant in Tail and Tenant in Fee make an Exchange, they both have Fee Simple (1 Inſt. 51. a.) without more ado; for in Caſe of Change there needs no Livery, but only a reciprocal Execution by both Parties, and this is notwithſtanding a good Exchange, and a Fee Simple paſſes from the Tenant in Tail, and ſhall continue till avoided by the Iſſue; and here he is not put to his Action to avoid it, becauſe here being no Livery there was no Diſcontinuance, cites 1 Inſt 332. Then the Exchange muſt have this Effect, that it paſſes a baſe Fee till avoided by his Iſſue; and if the Iſſue will not agree to it, he may waive the Land in Fee conveyed to him, and enter into the other. But if he does not do ſo, but continues in the Land given, the Exchange ſtands good during his Life; and after his Death his Iſſue may avoid it by entering, and ſo on toties quoties. It does therefore follow that a baſe Fee does paſs, otherwiſe it could not be a good Exchange; Per Holt Ch. J. in delivering the Opinion of the Court. 7 Mod 25. Trin 1 Ann. B. R. in Caſe of Machil v Clerk.

Fitzh. Exchange, pl. 6. cites Mich. 9 E. 4. 38. S. C. —— See (D) pl. S. S. P. and the Notes there.

12. A Reverſion in Fee **expectant upon an Eſtate for Life may be given in Exchange** for Land in Poſſeſſion in Fee, **for the Eſtates are equal, for every one has a Fee.** 9 E. 4. 39. **per Littleton.** 4 Rep. 122. b. *Buſtard's Caſe.*

13. If two Jointenants give Land to two others jointly for Land given to them in common, **this is good, for the Eſtates are equal, though they differ in the Quality. Co. Litt. 51.**

14. **So if** two give Land to one **in Exchange** for Land given to them two, **this is good. Co. Litt. 51.**

15. If a Man *exchanges his Manor in Poſſeſſion* with J. S. *for the Manor of M. which he ſhall have after the Deceaſe of his Father*, this is no good Exchange. Br. Eſchange, pl. 6. cites 9 E. 4. 38.

S. P. per Cur. 11 Rep. 80. b. —— S. P. per Coke Ch. J. Roll Rep. 179. Paſch. 13 Jac. B. R.

16. An Exchange *between a bare Tenant for Life and Tenant in Tail after Poſſibility of Iſſue extinct* is good, for their Eſtates in reſpect of their Quantity are equal, ſo as the Difference ſtands in the Quality and not in the Quantity of the Eſtate. Co. Litt. 28. a.

17. If the *one Land* be of a *defeaſible Title*, and *the other of an indefeaſible* Title, yet the Exchange is good *till* it is avoided. Co. Litt. 51. a.

18. Exchange between *Tenant for Life* and Tenant in *Tail after Poſſibility* is good, for the Eſtates are equal. 11 Rep. 80. b. Paſch. 13 Jac. in Bowles's Caſe.

Fol 814.

(H) By what Words.

Fitzh. Exchange, pl. 5. cites S. C. 1. **AN Exchange is not good if it be not by the Word** Excambium. 9 E. 4. 21. b. **Perkins S. 253.**

—— Br. Exchange, pl. 5. cites 9 E. 4. 19, 20. S. C. —— Ibid. pl. 12. cites 15 E. 4. 3. for without the Word (Excambium) it is no more than one Thing granted in Conſideration of another Thing —— The Word (Excambium) is ſo appropriated by Law as it cannot be expreſſed by any Periphraſis or Circumlocution. Co. Litt. 50. b. —— Ibid. 51. b. S. P. —— Perk. S. 252. S. P.

Perk. S 253. S P. though the Indenture expreſſes To have and to hold to him and his Heirs. But if either of them enters into the other's Land by Force of the Deed delivered to them they are Tenants at Will.

2. Without the Word *Excambium* no Exchange paſſes; for if *I give to one an Acre of Land by Deed indented, and he by the ſame Deed giveth to me another Acre*, nothing paſſeth except *Livery* be made, and then the Livery only transferreth the Land; but it had been otherwiſe if the Word (Exchange) had been uſed in the Deed. Fulb. 32. a.

3. Where

3. Where the Word (Exchange) is though the Conveyance be but an *Indenture of Covenants* it is good; and an Exchange is good, *though one Part of it enures by way of Extinguiſhment.* Fulb. 32. b.

(I) How an Exchange may be made.

Where without Deed in reſpect of the Thing.

[And of the Place.]

1. IF the Land lies in one County it may be made without Deed, (for the Exchange is Livery in Law.) 45 E. 3. 21. Br. Exchange, pl. 2. cites 45 E. 3. 20. S. C.——Fitzh. Exchange, pl. 1. cites 45 E. 3.——Br. Exchange, pl. 6. cites S. C. but not exactly S. P.

2. But if it be in two Counties it ought to be by Deed. * 45 E. 3. 21. b. 15 H. 7. 11. 9. Rep. 14. *Dowman's Caſe.* † 9 E. 4. 38. b. Co. Litt. 51. b. by Deed indented. * Br. Exchange, pl. 2. cites S. C. & S P. admitted.——So of Land in one County exchanged for a Chamber in another County. Br. Exchange, pl. 6 cites 9 E. 4. 38.——Exchange of Land *in divers Counties* is good if it be by Deed, *though there be no Livery of Seiſin*, and this is to be underſtood *where each enters into his Part allotted in Exchange.* Br. Exchange, pl. 2. cites 28 H. 6. 2.

† Br. Exchange, pl. 6. cites S. C.——Fitzh. Exchange, pl. 6. cites S. C.

3. If Land in Ireland be exchanged for Land in England this ought to be by Deed. Temps E. 2. 71. b.

4. If the Thing exchanged lies in Grant, though it be in one County, yet it ought to be made by Deed indented. Co. Litt. 51. b.

(I. 2) *How.*

5. Two may exchange Land, and for Equality one may reſerve a Rent for Equality. 45 E. 3. 20 b. admitted. Fitzh Exchange, pl. 1. cites S. C.

6. Two may exchange Land reſerving a Rent for Equality, upon Condition that if the Rent be arrear he may enter into his Acre given in Exchange. 45 E. 3. 20. b. Fitzh Exchange, pl. 1. cites S. C.

7. If Parlance be of an Exchange for certain Land between two, and after the one enters into the Land which he ought to have, and levies a Fine to the other of the Land which he ought to have, without Parlance of any Exchange in the Fine, this is not a good Exchange, becauſe the Land paſſes by the Fine. 45 E. 3. b. Fitzh. Exchange, pl. 1. cites S. C.

8. Two may exchange Land by two ſeveral Fines, for the one may upon Writ of Covenant brought againſt him by the other acknowledge all his Right, and render his Acre to the other in Exchange for another Acre, and the other may ſo do in the other Writ of Covenant brought againſt him by him. 16 E. 2. Exchange 14. If a Man will exchange Land or other Things by Fine &c. they ought to have two Writs of Covenant, viz. one Writ of the one Land, and another Writ of the other Land &c. Perk. S. 257.

9. Note, per Moyle Arguendo that Exchange *of a Reverſion is not good unleſs it be by Deed*, and *the ſame* ſeems to be *of a Seigniory, Rent, Advowſon, Villein* &c. which lies in Grant, quod non negatur, but it was ſaid that *otherwiſe* it is *of Partition*; For there the Heir is in by Deſcent of the Anceſtor, and as Heir, and not by the Partition as Purchaſor; Note the Diverſity. Br. Eſchange, pl. 1. cites 28 H. 6. 2.

(K) At what Time it ought to be executed.

S. C cited 2 Rep. 74. b.—Hob. 152 S. C. cited by Hobart Ch J.

1. IF two Perſons permute their Churches **the one with the other, this ought to be executed of both Parts during their Lives, otherwiſe the Permutation ſhall be void.** 4 & 5 E. 3. Fitzh. Exchange 10. **adjudged.**

——Permutation *between two Parſons* is void if the *one reſign after* as well as it ſhall be by the *Death of one.* Br. Exchange, pl. 10. cites 2 H. 4 5.——*Contra* between *Wardens* [as Maſter of a College or Abbot] *who have a Common Seal* &c. *and make Permutation by Deed under the Common Seal.* Br. Ibid.

S. C. cited 2 Rep. 74. b.——Hob. 152. S C. cited by Hobart Ch. J.

2. **For if** the one be inducted **into the Church which is given to him,** and the other dies before Induction, **the Permutation is void.** 45 E. 3. **Exchange** 10. **adjudged.**

——Ow. 12 Arg. S. P. cites it adjudged 46 E. 3. [but it ſeems miſprinted for 45] that the Parſon whoſe Part was not executed may have his Benefice again.

If the Exchangers do not enter in their Lives the Exchange is void, for it *muſt be executed in the ſame Parties that made the Exchange.* Br. Exchange, pl. 6. cites 9 E. 4. 38. Quod nota bene. 1 Rep. 105. a. S. P.——Co. Litt. 51. b. S. P.——But he who entred ſhall not be the firſt Perſon who ſhall defeat the Exchange; But if the Heir of the Exchanger who entred not, enter into the Land into which the other has entred by Force of the Exchange, and ouſts him as he may, then he, viz. he who is put out may enter into the Land which he gave in Exchange. Perk S. 285.——Jenk. 424. in pl. 50. S. P.——If the Heir of him who did not enter, enters after his Father's Death, he has it by Deſcent though his Father had nothing in it. Jenk. 249 in pl. 45.——An Exchange ought to be executed by either Party in their Lifetime or elſe it is void. 3 Mod. 135. Trin. 3 Jac. 2. B. R. in a Nota there.

3. **If two exchange** Land and one dies before Entry, **the Exchange is void; The Heir cannot take as a Purchaſor becauſe he was named only to take by way of Limitation of Eſtate in Courſe of Deſcent. Co. Litt. 50. b.**

4. In Exchange of a *Horſe for a Horſe*, or ſuch like, the Bargain is good without giving of Day or Delivery. Noy's Max. 90.

5. Exchange is good *that after Chriſtmas you ſhall have my Manor for your Houſe*, there if *both enter after Chriſtmas* it is a good Exchange; Per Littleton. Br. Eſchange, pl. 6. cites 9 E. 4. 38.

(L)

(L) How it ſhall be executed; and what ſhall be ſaid an Execution.

1. IF an Exchange be made of Land the Exchange is not perfect till Entry made by the Parties. Co. Litt. 51. a. b. Exchange is *good without Livery*, and each Party may enter into the other Lands; Per Needham, Quod non negatur. Br. Exchange, pl. 5 cites 19 E. 4. 19, 20. ——No Exchange is perfect till *the one and the other have entered* into their Parts, and then it is Perfect if the Eſtates are equal, and if the *Manor of D.* be put in Exchange *for the Manor of S.* or N. there when he has entered into the one, and the other has entered into the Manor of D. this is a perfect Exchange. Br. Exchange, pl. 6. cites 9 E. 4. 38.

2. If two Parſons permute their Churches the one with the other, this ſhall be executed by Preſentation of their Patrons, and their Admiſſion, Inſtitution and Induction. 45 E. 3. Exchange 10. adjudged. See (K) pl. 1. 2. ſupra and the Notes there.

3. But this is not executed till they are inducted into the Churches according to the Permutation. 45 E. 3. Fitzh. Exchange 10. adjudged. If one of the Parſons is admitted, inſtituted and inducted, and the other Parſon is admitted and inſtituted, but dies before induction, the other Parſon ſhall not keep the Benefice in which he is inducted; for the Exchange is not perfected becauſe it is not executed &c. Perk. S. 288. cites S. C. —— But Perk. S. 257. is, That if two Parſons of a Church exchange their Benefices by the Word Permutatio, and *either of them reſigns his Benefice into the Hands of the Biſhop to the Purpoſe, and the Patrons preſent* them accordingly, and the Preſentments make mention Per Viam Permutationis, this is a good Exchange *if either of them be inducted living the other* &c.

It ſhall *depend on the Execution and enjoying* of the Exchange; Per Hobart Ch. J. Hob. 152.—— 2 Rep. 74. cites S. C.

4. If an *Infant* exchange Lands and *at full Age occupies the Land taken* in Exchange, the Exchange is become perfect by this; For the Exchange at firſt was not void becauſe it amounts to a Livery, and alſo in reſpect of the Recompence, but only voidable. Co. Litt. 51. b. S. P. 2 Vern. 225. Caſe of Cecil v. Earl of Saliſbury —— See (B) pl. 10. ſupra and the Notes there.

5. Albeit the Land be in *one County*, the Parties by the Exchange have *no Freehold* in Deed or Law in them *before* they execute the ſame by *Entry*, and therefore if one of them dies before the Exchange be executed by Entry the Exchange is void; for the Heir cannot enter and take it as a Purchaſor, becauſe he was named only to take by way of Limitation of Eſtate in Courſe of Diſcent. Co. Litt. 50. b.

(M) How this ſhall enure. What Eſtate.

1. IF two exchange Land together without limiting any Eſtate, they ſhall have Eſtate for their Lives. 19 H. 6. 27.

(N)

(N) What Act or Thing will defeat an Exchange.

One Moiety was Fee-ſimple, and the other Moiety Eſtate Tail, and the Tenant in Tail of that Manor died, and the Iſſue diſagreed and entered into the Whole. Br Exchange. pl. 8. cites S. C. —— Fitzh. Exchange, pl. 7. cites S. C. —— Co. Litt. 173. b. 174 a. S. P.

1. IF A. exchange a Manor with B. for another Manor, and after Part of the Manor which he gives is evicted from B. by elder Title B. may enter into all the Manor which he gives, and this defeats the whole Exchange, becauſe the Condition is entire. 13 E. 4. 3. b. per all the Juſtices.

4 Rep 121. Paſch. 1 Jac. B R. the S C. —— Cro. E 902. pl. 6. S. C. Ibid. 917. pl 9. S C adjudged. —— Mo. 665. pl. 909. Boulton v. Buſtard, S. C. adjudged. —— Yelv 8. S. C. adjudged. —— Co. Litt 173. b. 174. a. cites S. C.

2. So if A. exchange two Acres with B. for two Acres, and after one of the Acres was evicted from B. B. may re-enter into all the Land which he gives in Exchange, becauſe the Condition is intire. 4 Rep. *Buſtard's Caſe.*

* 2 Rep. 69. Hill. 43 Eliz. C. B. the S. C.

3. If two *Parſons permute* they ought to reſign, and the Patrons ſhall preſent, and they ſhall be *admitted and inducted*, and if the one be *evicted* he ſhall defeat the Exchange; Arg. Roll Rep. 471. cites * 3 Rep. Cromwell's Caſe.

4. When the *Agreement is to have Poſſeſſion for Poſſeſſion*, there if one *Part proves to be in Reverſion*, or any Part of it, all the Exchange is defeated, becauſe there is Fraud in the valuable Conſideration. Mo. 665. pl. 909. Mich. 44 & 45 Eliz. Boulton v. Buſtard.

Cro. E. 902. pl. 6. S. C. & S. P. per Cur.

5. If J. S. *makes a Leaſe for* 1000 *Years* of Land, *to commence at a future Day, and* then *conceals this Leaſe, and exchanges the Land as in Poſſeſſion for other Land in Poſſeſſion*, and afterwards the Leſſee enters, this defeats the whole Exchange; for in Exchange *Warranties are implied* which warrant Poſſeſſion for Poſſeſſion; Per Popham. Yelv. 8. Mich. 44 & 45 Eliz. B. R. in Caſe of Buſtard v. Bolter.

6. If he in *Reverſion in Fee diſſeiſes his Leſſee for Life, and gives this Land in Exchange* to another for other Land, and after the *Leſſee for Life enters*, now may the other enter into his Land, and thereby all the Exchange is defeated; Reſolved. 4 Rep. 122. b. Paſch. 1 Jac. B. R. in Buſtard's Caſe.

7. *But if A. has a Reverſion in Fee of an Acre* of Land *expectant on an Eſtate for Life*, and makes Exchange with B. by Deed indented, and *gives this Acre by Name of an Acre of Land, and not by the Name of the Reverſion, in Exchange for another Acre*; In this Caſe though B. expected to have this Acre, ſo given to him in Poſſeſſion, yet ſince Nothing paſſed by the Gift of the Acre of Land but the Reverſion, *the Warranty or the Condition cannot by Law extend to more than paſſed by the Exchange*, For they are incident and annexed to the Eſtate given, and cannot extend to the Franktenement, which was in the Leſſee, and if the Law ſhould be otherwiſe great Miſchief would enſue; For if Exchange be made of divers Manors, and perchance divers Parcels of 'em are in Leaſe for Life, in this Caſe if the Leaſe ſhould be void becauſe made as of a Manor in Poſſeſſion, this would avoid all ſuch Exchanges; but the Leſſees being in Poſſeſſion it ſhall be accounted the Folly of the Purchaſor if he does not know it. 4 Rep. 122. b. 123. a. Paſch. 1 Jac. B. R. reſolved in Buſtard's Caſe.

8. So

8 *So* when an *Eſtate of Freehold* in the Whole, or in Part of the Lands given in Exchange, *is evicted*, the whole Exchange may be defeated by Force of the Condition in Law, for the whole Eſtate given was the Conſideration of the other's parting with his Land. 4 Rep. 122. b. Reſolved Paſch. 1 Jac. B. R. in Buſtard's Caſe.

9. A. and B. exchange Lands in Fee, A.'s Wife had a *Jointure* in his Land, of which B. had *Notice*, yet her entering on B. after A.'s Death deſeats the Exchange. 4 Rep. 123. a. Paſch. 1 Jac. Buſtard's Caſe. Cro. E. 902, S. C. —Ibid. 917. —— The Exchange is

defeated as well where Parcel of the Eſtate is defeated, eſpecially being a Freehold, as where Parcel of the Land given is defeated. Cro. E. 902. Buſtard v. Coulter, cites 13 E. 4.

10. If *two Women exchange* Lands, and *one marries before Entry*, this ſhall not deſeat the Exchange; Per Cur. Vent. 186. Hill. 23 & 24 Car. 2. B. R. in Caſe of Parſons v. Perus. Mod. 91. pl. 59 S. P. by Twiſden, and admitted by Hale Ch. J. in S. C.

(O) Defeating Exchanges.

1. IF one enter by Wrong upon the other **with whom he exchanged, this ſhall not deſeat the Exchange, for the other cannot enter upon him in his Acre, but is put to his Aſſiſe.** 15 E. 4. 3. * 9 E. 4. 20. b. **per Cur.** * Br. Exchange, pl. 12. cites S. C. becauſe it is a Thing executed,

and not executory, and the Eſtate perfected. —— And where it was ſaid by Keeble 4 H. 7. 6. that if two exchange 20 Acres for 2 Acres, the Entry of one into an Acre of his Companion diſſolves the entire Exchange. Brooke ſays, that it ſeems this is intended where the Party was within Age, or the like, for otherwiſe the one cannot enter upon the other. Br. Exchange, pl. 7. —— S. P. Arg. Roll Rep. 122. Hill. 12 Jac. —— S. P. by Hobart Ch. J. Hob. 41. obiter.

2. **The ſame Law if** a Stranger enters by Tort. 9 E. 4. 21. 15 E. 4. 3. Br. Exchange, pl. 12. cites S. C.

3. But **if the** one enters upon good Title upon the other, **and deſeats his Acre, as becauſe he was Infant at the Exchange, or Feme Covert, or ſuch like, this deſeats the Exchange, and the other may enter into his Acre.** 15 E. 4. 3. Br. Exchange, pl. 12. cites S. C. —— Br. Exchange, pl. 5. S. P. cites 9 E. 4. 19. 20. per Pigot.

4. **The ſame Law if** a Stranger enters upon the elder Title. 15 E. 4. 3. Br. Exchange, pl. 12. cites

S. C. —— S. P. of a Recovery by a Stranger. Br. Exchange, pl. 5. cites 9 E. 4. 19, 20. per Pigot.

5 **If a Man exchange** a Villein for an Acre of Land, and after the Villein dies without Iſſue, **yet the Exchange is not deſeated, for when the Exchange was good at the Exchange made, this Matter ſubſequent** which does not come by Relation before **the Exchange, but is ſubſequent to the Exchange, cannot deſeat the Exchange as an Eviction.** S. P. Br. Exchange, pl. 12. cites 15 E. 4 3.

6. So **if a Man gives a** baſe Fee ſo long as J. S. ſhall have Iſſue of his Body, **in Exchange for an abſolute Fee, and after J. S. dies** without Iſſue, **the Exchange is not deſeated by it.**

7 So if Eſtate for Life be exchanged, and after one dies, yet the Exchange is not defeated by it, for this is determined according to the firſt Limitation.

8. So if two exchange, and after the Land which the one has is ſurrounded by the Salt Sea, yet the Exchange is not defeated by it, for this comes by Accident after the Exchange made.

9. If two makes an Exchange of Land, and after the one releaſes to the other the Warranty created by the Law, yet this does not defeat the Exchange. 16 E. 3. Exchange 2. per Hill.

10. Exchange between two, *the one being within Age*, he may re-enter into his own Land if he does not occupy the other Land at his full Age. Br. Waiver de Choſes, pl. 20. cites 43 Aſſ. 23.

Br. Formedon, pl 40. cites 14 H. 6. 3. S. C.

11. The *Iſſue in Tail may waive* the Land taken by his Father Tenant in Tail in Exchange for the Land tailed, though the Exchange was by Deed, and then this ſhall not bind him as an Aſſets, and then the Warranty ſhall not bind without the Aſſets. Br. Waiver de Choſes, pl. 14. cites 14 H. 6. 2.

12. An *Aſſignee* cannot *re-enter* nor *vouch*, but *rebut*; Exchanger may re-enter upon an Aſſignee; The ſame Condition *defeated in Part* is defeated in the Whole; The ſame Law is in Partition. Noy's Max. 61.

(P) What ſhall be recovered on the Exchange being defeated.

1. THE *Warranty* imported in the Word Excambium *is ſpecial*; For upon the Voucher by Force thereof he *ſhall not recover* in Value *any other Land but that only which was given in Exchange*; becauſe the mutual Conſideration being the Cauſe of the Warranty it ſhall extend only to the Land reciprocally given, and not to other Land; Reſolved per tot. Cur. 4 Rep. 121. b. 122. a. Paſch. 1 Jac. B. R. Buſtard's Caſe.

2. *And* this Warranty *runs only in Privity*; For none ſhall vouch by Force thereof but the Parties to the Exchange, or their Heirs, and no Aſſignee ſhall, but the *Aſſignee ſhall rebut* by Force thereof though the Exchange was without Deed. Ibid. 121. b. cites 3 E. 4. Formedon 44 and 2 E. 2 Cui in Vita 17.

3. If *A. exchanges* Land *with B.* and *B. aliens to C. who is evicted* by Title paramount, C. ſhall not enter upon the other; For as *the Warranty* runs in Privity to the Parties to the Exchange and their Heirs, ſo alſo the Condition in Law, which the Law implies upon the Exchange, was alſo in Privity, and *extends not to the Aſſignee*, and ſo no one ſhall have Contra Formam Feoffamenti but the Feoffee or his Heirs, but the Aſſignee may rebut; Reſolved per Curiam. 4 Rep. 121. b. Paſch. 1 Jac. B. R. in Buſtard's Caſe, and cites F. N. B. 163. (C). 22 H. 6. 50. b. 30 H. 6. 7. a. 10 H. 7. 11. a.

4. *But* in the ſame Caſe *if A. who does not alien, be evicted, he ſhall re-enter* into the Land which he gave in Exchange, *though B. has alien'd* it over. 4 Rep. 121. b. reſolved. Paſch. 1 Jac. B. R. in Buſtard's Caſe.

5. If *A. exchanges Land with B. to which C. has a Prior Title, of which B. had Notice at the Time* of the Exchange, yet this is not material,

terial, but that *after C's Entry the Exchange ſhall be defeated*, and upon his Eviction B. ſhall have his Land again; Reſolved. 4 Rep. 123. a. Paſch. 1 Jac. B. R. the 4th Reſolution in Buſtard's Caſe.

For more of Eſchange, [or Exchange] in General, See other Proper Titles.

Eſcheat.

Fol 816.

(A) In what Caſes it ſhall be.

[And What.] [*And to whom.*]

1. IF 200 Faggots are granted to a Maſter and his Confreres and their Succeſſors, to perceive of all the Lands of the Grantor, and after the Maſter and Confreres grant them over, and after the Corporation is diſſolved, yet the Thing granted to them ſhall not eſcheat to the Grantor, though it ought to have eſcheated if they had not granted it over. M. 37 El. B. R. adjudged between *Southwell and Wade*, which is entered M. 34 El. Rot. 229. Poph. 91. pl. 4 Southwell v. Ward, S. C. adjudged.

2. The ſame is where Land, Rents or other Things is granted to a Corporation and their Succeſſors, and after the Corporation grants it over, and after is diſſolved; for this is all one as if it is granted to a Man and his Heirs, and he grants it over and after dies without Heir, there this ſhall not Eſcheat. M. 37 El. B. R. between *Southwell and Wade*.

3. But if Land, Rent or other Things be granted to a Corporation aggregate in Fee, and after the Corporation is diſſolved, the Thing granted to them ſhall eſcheat to the Donor. Co. Litt. 13. b. S. P. — Godb. 211. pl. 301. Mich. 11 Jac. C B The Dean &c. of Windſor's Caſe, S. P. the Court held that the Donor ſhall have the Land again, for the ſame is a Condition in Law annexed to the Gift, and in ſuch Caſe no Writ of Eſcheat lies.

Note per Cur and in a Manner agreed per omnes, that if a Man grants a Rent-Charge, Common, certain or uncertain to one in Fee, and to a Corporation in Fee, and the Grantee dies without Heir, or if the Corporation be diſſolved, the Rent, Common &c. are extinct; For theſe are not held, and do not lie in Tenure, and therefore they cannot eſcheat. Br. Extinguiſhment, pl. 2. cites 27 H. 8. 10. —— And Fitzh. agreed, that the Rent and Things which lie in Render are extinct; For the King has no Means to cauſe the Tenant to pay him; but contra of Things which lie in Prender if the Common was certain; For where none can take the Thing, the King ſhall have it, which others denied; For the Grant is to a Man and his Heirs, or to a Corporation and to their Succeſſors, therefore when the Man dies without Heir, or the Corporation is diſſolved, the Grant is determined. Ibid.

4. The ſame Law is of a Corporation Sole. Co. Litt. 13. b. S. P.

5. If a Man grants a Rent to another and his Heirs, and he dies without Heir, this ſhall eſcheat to the Grantor, and ſhall be extinct in the Land.

6. If

6. If a Man grants an Advowſon in Groſs to another in Fee, and the Grantee dies without Heir, it ſeems that this ſhall revert to the Grantor, not being held of any Man, for this is a groſs Thing which cannot vaniſh but muſt be in ſome Perſon, and it ſeems if the Grantor ſhall not have it, the King ſhall have it as ſupreme Patron. Contra Sta. Eſcheate it ſhall be extinct.

7. *Father and two Sons were*, and the *Eldeſt did Felony and* was impriſoned, and *became Approver*, and *prayed his Clergy, and was ſent to Priſon for his Penance*, and *had Iſſue a Daughter*, and *dyed in Priſon*; The *Father died*; the *Daughter entered*; The youngeſt Son, Uncle to the Daughter, ouſted her, and ſhe brought Aſſiſe and recovered by Award. And ſo ſee that the Land is not loſt by the Act of the eldeſt Son in this Caſe; For it ſeems that *it is no Attainder without Judgment*. Br Eſcheat, pl. 23. cites 8 E 1. and Fitzh. Aſſiſe 421.

8. Where there are *Baſtard Eigne and Mulier puiſne*, and the *Baſtard enters and dies ſeiſed*, the *Mulier ſhall be barred*, and *yet if the Baſtard dies ſeiſed without Iſſue the Land ſhall not eſcheat*, and yet *if the Iſſue of the Baſtard dies without Iſſue the Land ſhall eſcheat*, and therefore it ſeems that the Deſcent to the Iſſue of the Baſtard makes the Mulier to be barred, and not the dying ſeiſed without a Deſcent. Br. Eſcheat, pl. 34. cites Abridgment of Aſſiſe, fol. 36.

9. In Appeal the *Defendant Waged Battel and was vanquiſhed in the Field, but not by Death*, by which *Judgment was given that he be Hanged*, For *without Judgment the Lord cannot have the Eſcheat*. Br. Eſcheat, pl. 24. cites 8 E. 3. and Fitzh. Judgment 225.

10. *Land entailed* ſhall not eſcheat for the Felony or *Attainder of his Father*. Br. Eſcheat, pl. 21 cites 29 Aſſ. 61.

11. If a *Leaſe* be made *for Life*, Remainder *to the Feme in Fee*, and *Tenant for Life levies a Fine* ſur Conuſance de Droit *to the Baron and Feme to the Heir of the Baron*, in this Caſe if the *Feme dies without Heir* the Lord ſhall have the Land by Eſcheat, for this amounts to a *Surrender* in Law. Co. Read. on Fines 5. cites 39 E. 3. 30. Aſſ. Osborn's Caſe.

12. If he in Remainder be *attainted* of Felony it ſhall eſcheat, per Litt. Br. Prerog. pl. 25. cites 15 H. 4 11.

13. Where *a Man goes beyond Sea* to D. *out of the Allegiance of the King without the King's Licence and there eſpouſes a Feme, and has Iſſue a Son*, and *there dwells all his Life time without other Iſſue, and dies without other Iſſue*, the Land ſhall eſcheat, and no other of the Blood ſhall inherit to him, where the *Alien born ſurvives his Father*, no more than where the Son is attainted of Felony in the Life of the Father, and gets Charter of Pardon and the Father dies, the Son ſurvives, the Land ſhall eſcheat, and the *Lord ſhall ſuppoſe that the Tenant died without Heir*; Per Newton; quod Arden conceſſit and demurred upon the Plea, and Priſot durſt not demur to the contrary but pleaded another Plea; Quod nota. Br. Eſcheat, pl. 8. cites 22 H. 6. 38.

14. Where the *Tenant who dies without Heir has his Entry tolled before by Deſcent, Diſcontinuance*, or the like, there the Lord cannot enter for the Eſcheat. Br. Ent. Cong. pl. 129. cites 32 H. 6. 27.

15. *A Man may have Writ* of Eſcheat *though his Tenant did not die ſeiſed, For* the dying ſeiſed *is not traverſable*; Per Forteſcue J. but Pole contra; therefore *quære*. Br. Eſcheat, pl. 11. cites 37 H. 6. 1.

16. If *Lord and Tenant* are, and the *Tenant infeoffs J. S. and declares no Will* [Uſe] and *Ceſty que Uſe* does Felony and is *attainted*, the Lord ſhall not have Subpœna to have the Land, and it ſeems that the Heir ſhall not have it; For there is Corruption of Blood, and therefore it ſeems that the *Feoffee ſhall retain to his own Uſe*. Br. Feoffments al Uſes, pl. 34. cites 5 E. 4. 7.

17. If

17. If *all the Monks and the Abbot of the Monaſtry die* the Lord may enter, viz. the Donor or Founder; For none is alive who can do Services, and he ſhall have it as Eſcheat; Per Fairfax and Littleton J. Br. Eſcheat, pl. 19. cites 7 E. 4. 11, 12.

18. If an *Alien born has Iſſue a Son and* after *is made a Denizen* and then *has Iſſue another Son*, and *purchaſes Land and dies*, the *youngeſt Son ſhall have the Land*, and not the Eldeſt or the Lord by Eſcheat. Br. Eſcheat, pl. 28.

19. Where a Man is *attainted of Hereſy* and *lay Hands to be burnt*, yet he ſhall not Forfeit his Land, unleſs he were put to Execution, and there *by the Execution the Lord ſhall have the Eſcheat*, unleſs the the Land were held of the Ordinary, and then the King ſhall have it by the Stat. of 2 H. 5. Br. Eſcheat, pl. 29.

20. If the King *grants Common ſans numbre to an Abbot in his Manor*, and after *grants the Manor in Fee*, and after the *Abbey is diſſolved*, the King ſhall not have the Common; Per Cur. becauſe it is Common uncertain, and alſo a Thing which cannot eſcheat; For it is not held. Br. Prerogative, 1. cites 27 H. 8. 10.

21. *And* if a Man has *Common in certain Eſtovers*, or the like and *dies without Heir*, as here &c. the King ſhall have it *becauſe it lies in Prender and not in Render.* Ibid. per Fitzherbert Juſtice.

22. *Contra* of *Rent* which lies in Render; Per Fitzherbert J. But by all others all is one, and the Rent-charge and Common is *Extinct*, For there is none that can take it, but at this Day all is *given to the King by Act of Parliament* in ſuch Form as the Abbot had it, which makes a Difference of the Common Law. Ibid.

23. If the *Baron* be *attainted of Felony* and *gets Charter of Pardon and* after *dies*, yet the Feme ſhall not have Dower *of the Land which he had before the Pardon.* Br. Eſcheat, pl. 27. cites F. N. B. tit. Dower.

24. *Contra of Land which he gets after the Pardon*; For the firſt Land ſhall eſcheat. Ibid.

25. *The ſame* ſeems to be *of Land which he purchaſes, or which deſcends to him meſne between the Atiainder and the Pardon.* Ibid.

26. *And* it ſeems that the *Heir ſhall inherit the one and not the other*; For ſo it was ſaid in Writ of Eſcheat, and ſo it is ſaid in the Natura Brevium, but the contrary is Law. Ibid.

27. *Husband and Wife Tenants in ſpecial Tail*; the *Husband is attainted of Treaſon and executed, leaving Iſſue*; The *Wife died*; The Lands ſhall eſcheat, becauſe the Iſſue in Tail ought to make his Conveyance by Father and Mother, and from the Father he could not, by Reaſon of the Attainder. Dyer. 332. pl. 27. Paſch. 16 Eliz. Sir Nich. Carew's Caſe. And. 32. pl. 102. Ld. Effingham v. Sir F. Carew, S. C. reſolved by the three Ch. Judges.

28. The *Defendant in an Appeal of Death* did *wage Battle and was ſlain* in the Field, yet *Judgment* was given *that he ſhould be hanged*; and the Juſtices ſaid, that it *is* altogether *neceſſary* that ſuch Judgment be given, for otherwiſe the Lord could not have a Writ of Eſcheat. Co. Litt. 390. b.

29. An Eſcheat *happens two manner of Ways*, Aut per Defectum Sanguinis, i. e. *for Default of Heir*, Aut *per Delictum Tenentis*, *i. e.* for Felony and that is *by Judgment* three manner of Ways, Aut *quia Suſpenſus per Collum*, *Aut* quia *abjuravit Regnum*, *Aut* quia *Utlagatus*; And therefore they which are hanged by Martial Law, in furore Belli forfeit no Lands; and ſo in like Caſes Eſcheats by the Civilians are called Caduca. Co. Litt. 13. a.

30. W. R. a Norman *held Lands in Fee of the King*, *as of the Honour of P. and R. forfeited his ſaid Land for Treaſon*, and the *King ſeiſed it as his Eſcheat of Normandy.* In this Caſe the Land ſo forfeited was no Part of the Honour, as it would have been if it had come to the

King, as a common Eſcheat, for it came to the King by reaſon of his Perſon and Crown, and therefore *if he grant it over* &c. the *Patentee ſhall hold of the King in Chief, and not of the Honour.* 2 Inſt. 64, 65.

Keilw 14. a. pl. 50. Caſus incerti Temporis Keble held, that after the Death of Tenant for Life the Lord might have a Writ of Eſcheat, for the Grantee and the Lord are but one Lord in Law, and Words of the Writ are true, viz. that the Tenant who died held the Lands of the Lord, and alſo he died ſeiſed, and ſo to his Intent, though he cannot enter he ſhall have Remedy by Writ of Eſcheat.

31. If there had been a *Farmer for Life or Years of a Manor*, and a *Tenancy* had *eſcheated*, this Tenancy ſo eſcheated *aid belong to the Tenements that he held in Farm*, and therefore this Act extended to it, and the Leſſee ſhall have generally a Writ, and ſuppoſe a Leaſe made of the Lands eſcheated by the Leſſor, and maintain it by the ſpecial Matter. 2 Inſt. 146. in the Expoſition on the Statute of Marlbridge. 24.

32. If a *Man ſeiſed in Fee of a Fair, Market, Common, Rent-Charge, Rent-Seck, Warren, Corody, or any other Inheritance that is not holden*, and *is attainted of Felony*, the King ſhall have the Profits of them during his Life, but after his Deceaſe, ſeeing the Blood is corrupted, *they cannot deſcend to the Heir, nor can they eſcheat*, becauſe they be not holden, [*but*] they periſh and *are extinct by act in Law*; For in Eſcheats for Petit Treaſon or Felony, a Tenure is requiſite as well in the Caſe of the King as of the Subject. 3 Inſt. 21. Cap. 2.

33. It was holden by Cook and Warburton J. that if a *Rent* be granted *to one and his Succeſſors*, and *the Corporation be diſſolved*, that *the Rent ſhall revert* to the Donor, and there is *no Difference* as to the Matter *betwixt Things* which lie *in Prender and* Things which lie *in Render*. Nichols J. contrary, that the Rent extinguiſhes in the Land itſelf. Godb. 211. pl. 301. Mich. 11. Jac. C. B. The Dean and Canons of Windſor v. Webb.

34. An *Abbot* &c. was *ſeiſed of an Acre of Land in Fee held of the Manor of D.* and *he and all the Monks died*, by Reaſon whereof *the ſaid Acre of Land eſcheated to R.* and *after R's Death the Manor deſcended to his Heir* at Law, *who conveyed the Manor* (of which the Acre was Parcel) after the Eſcheat by mean Conveyance, *to H. in Fee*, and after H. *enfeoffed J. S. of the ſaid Acre.* The Queſtion was, whether by the Death of the Abbot and Monks, the Acre ſhould eſcheat to the Lord of whom it was holden? Or whether it ſhall go to the Donors and Founders? and Hobart thought it ſhould eſcheat; to which Winch ſeemed to agree, but the Caſe was not adjudged. Win. 37. Mich. 26 Jac. C. B. Johnſon v. Norway.

34. *Grantee of a Rent in Fee-ſimple* dies without Heirs; The Tenant of the Land ſhall hold it diſcharged of the Rent becauſe there is no other that has any Title to it; Per Hale Ch. B. Hard. 496. Mich. 20 Car. 2. in Scacc. in Caſe of Attorney General v. Sir G. Sands.

35. One ſeiſed in Fee of Lands limits a Term of Truſtees for 100 Years upon ſuch Truſts as he by Deed or Will ſhould appoint, and for want of ſuch Appointment to attend the Inheritance, and afterwards by a *Nuncupative Will* gives all to J. S. and being *a Baſtard* dies without Iſſue; this will not paſs the Truſt of the Term. Vern. 340. pl. 333. Mich. 1683. Thruxton v. the Attorney General.

36. If there be Father and Son, and the *Son ſeiſed in Fee makes a Leaſe for Life* and dies, and the *Reverſion deſcends on the Uncle who dies*, the Reverſion ſhall not deſcend to the Father, but ſhall eſcheat; for he muſt make himſelf Heir to the Son, and not to the Uncle who had the Reverſion caſt upon him; Arg. Show. 246. Mich. W. & M.

(A. 2) In what Caſes by other Means than Grants. By Forfeiture.

1. THERE are only three manner of Eſcheats, 1ſt. *Abjurat Regnum.* 2d. Quia *Suſpenſus per Collum.* 3d Quia *Utlagatus.* Per Coke Ch. J. Godb. 211. pl. 301. Mich. 11 Jac. C. B.

2. Eldeſt Son in the Life of his Father is *attaint of Felony* and *dies, living the Father*; The youngeſt ſhall have the Land as Heir to his Father; But if any *Iſſue* of the Eldeſt is *living* the Land ſhall eſcheat to the Lord. D. 48. a. pl. 16. Trin. 32 H. 8. Anon.

3. *Attainders* that give Eſcheat to the Lord muſt be by Judgment of Death given in ſome Court of Record againſt the Felon found Guilty by Verdict or Confeſſion of the Felony, or it muſt be by Outlawry of him. Bacon's Uſe of the Law. 38.

4. If a *Baſtard* dies ſeiſed without Iſſue, and the Lord by Eſcheat enters, this dying ſeiſed ſhall not bar the Mulier, becauſe there is no Deſcent. Co. Litt. 244. a. S. P. 8 Rep. 101 in Sir Richard Lechford's Caſe.

5. There can be no Eſcheat but *Pro defectu Tenentis.* Per Hale. Hardr. 494. Mich. 20 Car. 2. in Scaccario. Sir G. Sand's Caſe.

6. If a Man be *ſeiſed in Jure Ux'* and the *Wife is attainted of Felony*, the Lord ſhall enter and ouſt the Husband; he gains nothing but a bare Preception of Profits till Iſſue had; after Iſſue he has Eſtate for Life. Arg. Mod. 91. pl. 59. Mich. 22 Car. 2. B. R. in Caſe of Parſons v. Perns.

(B) In what Caſes there ſhall be an Eſcheat.

Fol. 816.

Where the Lord has a Tenant who is in by Title, and where not.

1. IF the Tenant be diſſeiſed, and Diſſeiſee dies without Heir during the Continuance of the Diſſeiſor, this Right ſhall eſcheat to the Lord. 3 R. 2. Entry Congeable 38. Br. Ent. Cong. pl. 63. cites 27 Aſſ. 32 contra by Shard, who ſaid, that it is ignotum per ignotius.

2. If the Tenant be diſſeiſed, and the Diſſeiſor by Fine grants and renders the Land to one in Tail, the Remainder to another in Fee, and after the Tenant in Tail dies without Iſſue, and he in Remainder enters, and after Diſſeiſee dies without Heir; this Right ſhall not eſcheat to the Lord, becauſe he had another Tenant by Title in the Life of the Diſſeiſee. 3 R. 2. Entry Congeable 38. adjudged. If Diſſeiſor makes a *Feoffment in Fee*, or dies ſeiſed, and after the Diſſeiſee dies without Heir, in ſuch Caſe there is no Eſcheat at all, becauſe the *Lord has a Tenant in by Title.* Co. Litt. 268. b.

3. It

4. If *Tenant for Life*, the *Reverſion to a Feme Covert in Fee, aliens to the Baron and his ſaid Feme* who has the Fee, and the *Feme dies without Heir*, the Lord cannot enter by the Eſcheat nor for Forfeiture; for this is given to the Heir only, and here is no Heir, which was in a Manner agreed. Br. Forfeiture de Terres, pl. 97. cites 39 E. 3. 29.

5. If *Baſtard purchaſes in Fee and is diſſeiſed*, and the *Diſſeiſor gives in Tail by Fine*, the *Remainder over in Fee*, and the *Tenant in Tail dies without Iſſue*, and he in *Remainder enters*, there the Entry of the Diſſeiſee is lawful; But when the *Baſtard dies without Iſſue after the Entry of him in Remainder* the Entry of the Lord by Eſcheat is not lawful; for he has it by Title in Life of the Baſtard by reaſon of the Fine. Br. Ent. Cong. pl. 17. cites 50 E. 3. 21.

6. Aſſiſe; A *Baſtard purchaſed, and was diſſeiſed by H. who gave in Tail by Fine the Remainder over*, the *Tenant in Tail died without Iſſue*, he in *Remainder entered*, and the *Baſtard died without Iſſue*, the Lord cannot enter by Eſcheat, becauſe he had Tenant by Title in the Life of the Baſtard, by reaſon of the Fine. Br. Avowry, pl. 34. cites 3 R. 2.

Br. Avowry, pl. 39. cites S. C —— Br. Eſcheat, pl. 5. cites S. C. And Fitzh. tit. Ent. Cong. 38. accordingly in 3 R. 2.

7. If Lord and Tenant are, and the *the Tenant is diſſeiſed, and dies without Heir*, the Lord may enter for the Eſcheat. *Contra upon the Heir of the Diſſeiſor or his Feoffee*; for they are *in by Title*, and the Lord has a Tenant by Title. *Contra of the Diſſeiſor*, who is a Tort Feaſor; for thoſe who are in by Title, by Tender of the Services, may compel the Lord to change his Avowry. Br. Ent. Cong. pl. 20. cites 7 H. 4. 17. Per Markham J. for Law.

8. If a *Deſcent* be *from the Diſſeiſor to his Heir*, by which the Entry of the Diſſeiſee is taken away, and after the *Iſſue dies without Heir*, ſo that the Lord enters by Eſcheat, yet the Entry of the Diſſeiſee is not revived, for he affirms the firſt Eſtate. Br. Ent. Cong. pl. 92. cites 9 H. 7. 24. Per all the Juſtices and Serjeants.

9. *But* if the *Diſſeiſor himſelf dies without Heir*, and the Lord enters by Eſcheat, the Diſſeiſee may enter, for there was no Deſcent. Br. Ent. Cong. pl. 92. ut ſup.

10. Though a Lord has been ſeiſed of the Services within the Time of Limitation, yet if the *Tenant dies without Heir* the Land ſhall Eſcheat; for at the Time of the Eſcheat the Seignory remained, though Seiſin of the Services was wanting. 4 Rep. 11. a. in a Nota of the Reporter Mich. 17 & 18 Eliz. in Bevil's Caſe.

Lord by Eſcheat ſhall not avoid voidable Eſtates made by his Tenant who was an Infant.

11. If an *Infant or Non Compos in Perſon makes a Feoffment*, and after *dies without Heir*, the Land ſhall not eſcheat, 4 Rep. 125. a. Paſch. 1 Jac. B. R. in Beverley's Caſe.

7 Rep. 7. b. Mich. 28 & 29 Eliz. in the E. of Bedford's Caſe.

12. *Otherwiſe* if made *by Letter of Attorney*, for then the Feoffment is void. 4 Rep. 125. a. Paſch. 1 Jac. B. R. in Beverley's Caſe.

13. If a *Diſſeiſor makes a Feoffment and dies ſeiſed*, and after the *Diſſeiſee dies without Heir*, there ſhall be no Eſcheat, becauſe the Lord has a Tenant by Title. Co. Litt. 268. b. in Principio.

14. A. ſeiſed in Fee of Land died without Iſſue, Brother or Siſter, but *left two Couſins his Heirs at Law, one of whom was his own Mother*. The Maſter of the Rolls held, that his Mother might inherit immediately as Heir in the Capacity or Relation of Couſin; and further obſerved, that the other Couſin being but *Half an Heir could not take the Whole, nor could any Thing go to the Lord by Eſcheat*; for *as long as there*

is any Heir he cannot take; ſo that though the other Couſin could take but a Moiety, yet her being a Moiety of an Heir would prevent the Lord's Title by Eſcheat, and that though this was a very uncommon Caſe he took it to be a clear one. 2 Wms's Rep. (613) (614.) Trin. Eaſtwood v. Vinke alias Styles.

(C) What may eſcheat.

1. *Founderſhip* cannot eſcheat nor be forfeited; For it is a Thing which *is annexed to the Blood*; Quod nota bene. Br. Eſcheat, pl. 9. cites 24 E. 3. 72. *he adds L. Hale's notes to F. N. B. on Writ of Eſcheat fol. 143. b.* Br. Corodies and Penſions, pl. 5. cites 24 E. 3. 33. 72. S. C.

2. And yet *Rent-Charge may be forfeited* by Attainder &c. which does not lie in Tenure *but cannot eſcheat for want of Heirs*; *For it is not held*, and ſo ſee a Diverſity what may eſcheat, and what may be forfeited, and e contra. Ibid. S. P. And ſo of Common certain &c. Br. Corodies and Penſions, pl. 5. cites 24 E. 3. 33. 72. S. C.

3. Where a *Man does Felony and after purchaſes Land, or Land deſcends to him after*, this is forfeited, and ſhall eſcheat as well as the Land which he had at the Time of the Felony committed. Per Belk. quod nemo dedixit, quod nota. Br. Eſcheat, pl. 3. cites 48 E. 3. 2.

4. A *Reverſion* is held as well as the particular Tenancy, and it ſhall eſcheat to the Lerd. Arg. D. 137. pl. 26. cites 3 H. 6.

5. Where the *Diſſeiſor makes Feoffment*, and the *Diſſeiſee dies without Heir*, the Lord has Tenant by Title, and therefore cannot enter. Quære inde. Br. Avowry, pl. 34. cites 3 R. 2.

6. *Founderſhip* may come to the King by Eſcheat. Br. Petition, pl. 26. cites 5 E. 4. 118.

7. If *Tenant is attainted of Felony*, and the Lord has the Land by Eſcheat, he ſhall have the Charters which concern the ſame Land, and yet a Man ſhall not forfeit his Charters by ſuch Attainder. Per Moyle J. Br. Charters de terre, pl. 59. cites 10 E. 4. 14. Br. Forfeiture de terre, pl. 60. cites S C. and 21 H. 6. 1.—

Where Lord by Eſcheat ſhall have the *Charters*, and what. See 1 Rep. 1. Ld. Buckhurſt's Caſe.

8. *If an Abbot or Pariſh Church be diſſolv'd*, the *Land of the Abbey or of the Church where it ſtands may eſcheat, and the Glebe*; for the Land where the Church is built was given by the Lord of the Manor to make the Church there, which is the Reaſon and Cauſe that he is the Patron of the Benefice, and ſhall have the Preſentment. Br. Eſcheat, pl. 15. cites 5 H. 7. 37.

9. *Right of Entry* may eſcheat *as where the Diſſeiſee dies without Heir or is attainted of Felony*, the Lord may enter, per Keble, but Hubbert contra. Br. Eſcheat, pl. 16. cites 6 H. 7. 9.

10. *Common ſans Numbre* is a Thing uncertain and cannot eſcheat; For it is not held. Br. Prerog. pl. 1. cites 27 H. 8. 10. per Cur.

11. If there be *Lord and Tenant*, and the *Tenant doth leaſe the Tenancy for Life unto a Stranger upon Condition*, and afterwards the *Tenant dies without Heir*, and the *Reverſion doth eſcheat* unto the Lord, the Lord ſhall not take Advantage of the Condition by way of Entry; And the

Lord in this Caſe is ſaid privy in Law, becauſe he hath his Eſtate in the Reverſion by the Law only, viz. by Eſcheat. Perk. S. 832.

12. *Rent-Corn* may eſcheat. Ow. 32. Paſch. 7 Eliz. in an Anonymous Caſe.

The Lord by Eſcheat ſhall have the Rent reſerv'd by the Tenant;

13. If I make a *Leaſe for Years rendering Rent to me during the Term*, if I die without Heir during the Term, the Lord by Eſcheat ſhall not have the Rent. Owen. 9. Hill. 33 Eliz. C. B. in Richmond's Caſe.

But he cannot enter into the Land by Force of the Condition &c. becauſe he is not Heir to the Leſſor. Litt. S. 348.

Becauſe Lord by Eſcheat is in by Title and not by way of Eſtate,

14. The Lord by Eſcheat ſhall not have *Benefit of Warranty* made to the Tenant, nor take Benefit of *Condition*, *Voucher* &c. 2 And. 148. Obiter in pl. 82. Paſch. 42 Eliz.

and the Warranty runs with the Eſtate. Per Williams J. Bulſt. 164.

15. *Land purchaſed* or deſcended *after the Attainder* ſhall be forfeited to the Lord. Finch. 71. b.

16. Whese the Perſon attainted is ſeis'd in *Right of his Wife*, the King ſhall have the Iſſues during the Life of the Baron. Finch. 71. b.

* Br Ent' Cong pl. 17. cites 3 R. 2. and Fitzh. Ent' Cong. 38.

17. A * *Right of Entry* may eſcheat. Arg. Godb. 309. in pl. 417. Paſch. 21 Jac. In the Exchequer Chamber, in Caſe of Sheffield v. Radcliff.

——Br. Eſcheat, pl. 5. S. P. cites S. C. and 7 H. 4. 17.——Br. Avowry, pl. 34. cites 3 R. 2. S. P. —— As in Caſe of Fine by *Lunatick &c.* 4 Rep. 125. b. Paſch. 1 Jac. B R Beverley's Caſe. —— Lord by Eſcheat cannot enter into the Land by Force of a Condition &c. becauſe he is not Heir to the Leſſor. Co. Litt. S. 348. 216.

Such Right for which the Party has no Remedy,

18. *Right of Action* ſhall not eſcheat either by the Common Law or by Statute. Arg. Godb. 310. in Caſe of Sheffield v. Radcliff.

but an Action only, to recover the Land is a Thing which *conſiſts only in Privity*, and which cannot eſcheat nor be forfeited to the Common Law. 3 Rep. 2. b. Trin. 25 Eliz. Marquis of Wincheſter's Caſe. —— 10 Rep. 48. a S P. per Cur. obiter Mich. 10 Jac.

Ibid. 245. pl. 30. but if Ceſty que Truſt is attaint, the Feoffee ſhall hold the Land diſcharged. —See Sid. 403. pl. 10.

19. At *Common Law Ceſty que Uſe* for *Felony or Treaſon* ſhould not forfeit the Uſe, for it is only a Confidence; ſo *now* for *Truſt* of Frankteneement or Inheritance, otherwiſe of a *Chattle*. *Feoffee upon Truſt* at this Day commits Treaſon or Felony the Land is loſt and eſcheated, and the *Truſt extinct*; For the King or Lord by Eſcheat cannot be ſeiſed to any Uſe or Truſt, for they are in le Poſt and paramount the Confidence. Jenk. 190. pl. 2.

Hill. 20 & 21 Car. 2. in the Exchequer. Sir G. Sands's Caſe. —— N. Ch. R. 133. S. C.

(D) To whom.

1. IT was agreed that *of High Treaſon the King* ſhall have the Eſcheat of whomſoever it be held, *but of Petit Treaſon the Lord* ſhall have it; which appears alſo in the Statute 25 E. 3. of Treaſon. Br. Eſcheat, pl. 14. cites 22 Aſſ. 49.

2. If

2. If a Man *gives a Seigniory in Tail*, and the *Donee aliens*, and the *Tertenant does Felony, and is attainted*, and the *Donee dies without Iſſue*, the *Donor ſhall have Writ of Eſcheat*. Br. Eſcheat, pl. 2. cites 46 E. 3. 4.

3. *But if the Donee had not aliened, but had entered for the Eſcheat and aliened the Land*, and died without Iſſue, there *the Donor ſhall have Formedon in Reverter*, and not Writ of Eſcheat; *for the Land is come in Lieu of the Seigniory*, and ſo Formedon in Reverter of a Thing not given in Tail; Note the Diverſity. Ibid.

4. The *Father is ſeiſed of Land in Fee holden of J. S.* The *Son is attainted of High Treaſon*. The *Father dieth*. The Land ſhall eſcheat to J. S. propter Defectum Sanguinis; becauſe the Father died without Heir; and the King cannot have the Land, becauſe the Son never had any Thing to forfeit. But the King ſhall have the Eſcheat of all the Lands whereof the Perſon attainted of High Treaſon was ſeiſed, of whomſoever they were holden. Co. Litt. 13. a. and in Marg. cites Pl. Com. in Nicholl's Caſe.

5. *Eſtates Tail* in Caſe of Treaſon ſhall not eſcheat to the Lord who has *Jura Regalia*, for the King himſelf could not have them but by the Statute 26 *H.* 8. and alſo the Tenant in Tail holds of his Donor and not of the Lord. And alſo for *new Treaſons* made ſince ſuch Grants of Jura Regalia the Patentee ſhall not have the Forfeiture. D. 289. pl. 57. Paſch. 12 Eliz.

6. If a Man having an Eſtate *for his own or another's Life*, commit *Treaſon or Felony*, the whole Eſtate is forfeited to the Crown, but no Eſcheat to the Lord. Bacon's Uſe of the Law 40.

7. But a *Copyhold* for Fee Simple or for Life is forfeited to the Lord and not to the Crown; and if it be *entailed* the Lord is to have it during the Life of the Offender only, and then his Heir is to have it. Bacon's Uſe of the Law 40.

8. Eſcheat of all Lands for *High Treaſon* belongs to the King only, and to no other; but *entailed Lands* did not veſt in the King at Common Law *before Office*, but did deſcend to the Iſſue in Tail till Office; but this is altered by 33 H. 8. which gives and *veſts all in the King by the Attainder*. 3 Rep. 10. b. Trin. 26 Eliz. in Scaccario. Dowtie's Caſe.

9. A. ſeiſed of a Houſe in Southwark held of the Archbiſhop of C. as of his Borough of S. ſurrendered it 30 H. 8. to the King, who granted the *Houſe and divers other Lands in London, Middleſex, and Eſſex*, to J. S. and his Heirs, to hold *in Libero Burgagio* by Fealty for all Services and Demands, and not in Capite. Q. Mary granted the Manor and Borough of S. to the Mayor &c. of London, and the Tenant of the ſaid Houſe died without Heir; Adjudged that the Queen ſhould have the Eſcheat; for the firſt Patentee of the Houſe held it of the Queen *in Capite as of a Seigniory in Groſs*, and the Words in Libero Burgagio are merely void; for the Land out of the Borough cannot be held in Libero Burgagio, and there ſhall *not be ſeveral Tenures*, for one Tenure was reſerved by the King for all, and therefore muſt neceſſarily be a *Tenure in Socage of the King*. Cro. E. 120. pl. 9. Mich. 30 & 31 Eliz. B. R. May and Baniſter v. Street.

10. If an *Alien purchaſes Land and dies* the Law caſts the Inheritance on the *King*. Co. Litt. 2. b.

11. If an *Alien made Denizen* purchaſes Land and dies without Iſſue, the Lord, and not the King, ſhall have the Eſcheat. Co. Litt. 2. b.

(E) Entry.

In what Caſes the Lord may enter or muſt have a Writ to the Eſcheator.

1. THE *Lord after Year, Day, and Waſt* taken, cannot enter, but *ſhall have a Writ to the Eſcheator* to deliver the Land to him, and if he enters otherwiſe the Land ſhall be re-ſeiſed into the Hands of the King, and he ſhall anſwer of the Profits to the King; Quod nota. Br. Corone, pl. 208 cites 8 E. 2.

2. If the *Tenant of the Lord who dyed without Heir was toll'd of his Entry in his Life by Deſcent or Diſcontinuance* &c. there the *Lord cannot enter* for Eſcheat Br. Eſcheat, pl. 26 cites 32 H. 6. 27.

3. *But where the Tenant in his Life might have entered*, there the Lord may enter. Ibid.

4. *But* he *ſhall not have Writ of Eſcheat but where his Tenant dies ſeiſed.* Ibid.

5. *Right of Entry* may eſcheat, *As where the Diſſeiſee dies without Heir, or is attainted of Felony*, the Lord may enter; Per Keble, but Hubart contra. Br. Eſcheat, pl. 16. cites 6 H. 7. 9.

6. A Man *ſhall not have Writ* of Eſcheat *but where his Tenant dies ſeiſed*, therefore he *cannot enter* for Eſcheat; Per Brian. Ibid.

7. But Fineux *contra*, As if he in *Reverſion dies without Heir*, and after the *Tenant for Life dies*, the Lord may enter, and yet cannot have Writ of Eſcheat. Ibid.

(F) Barred, prevented, or reſtored.

By what.

3 Inſt. 231. cap. 104. S. P.

1. THE *principal Felon* fled, and *was outlawed*, the *Acceſſary was convicted and executed*; the Lord entered on his Land as eſcheated; afterwards the *Principal reverſed the Outlawry*, and *pleaded to the Felony, and was found Not Guilty*, and ſo was acquitted; Adjudg'd, that the *Heir of the Acceſſary ſhall recover* the Lands, for by the Acquittal of the Principal he alſo would have been acquitted had he been living. 9 Rep. 119. b. Trin. 10 Jac. in Lord Sancher's Caſe cites a Caſe in Time of E. 1. tit. Mortdanceſter 46.

2. It was found by Inqueſt of Office before the Mayor of L. that R. Jurden was ſeiſed of certain Land in London, and deviſed it by his Teſtament *to A. for Life, ſo that he finds a Chaplain to ſing for his Life in the Church of S. in London for the Souls* &c. *ſo that after his Deceaſe the Tenements ſhall remain to two of the beſt of the Fraternity of the Whitawers of London for ever, to find a Chaplain to chant in the Form aforeſaid*, and *died without Heir*; and that *A. had the Tenements during his Life accordingly, and found the Chaplain* accordingly, and that *after the Death of A. Thom. and W. as Wardens of the ſaid Guild, as the beſt of the ſame Fraternity, entered by Force of the Remainder*, and took the Profits to their Uſe, *and did not find any Chaplain according to the Teſtament aforeſaid*; and

and that the Tenements ſhould revert to the King by Eſcheat, becauſe the Deviſor died without Heir, and the Office was returned in the Chancery, and Sci. Fa. iſſued againſt T. and W. to ſay why the Tenements ſhould not be ſeiſed into the King's Hands; who came and maintained the Deviſe, and that A. found the Chaplain for Term of his Life, and after his Death T. and W. entered and found the Chaplain, and yet finds, and that by the Cuſtom and Uſage of the City of London People of every Art may make a Commonalty, Guilds and Fraternities, and make a Deviſe to them, and that our Lord the King and his Progenitors by their Charters have confirmed all their ancient Uſages and Cuſtoms; Judgment if the King can impeach them. Per Perſey, a Man *cannot preſcribe to make* Guilds or Fraternity *without Charter of the King*; for Commonalty cannot make a Commonalty; and the Remainder is void to two of the Whitawers for incertain, which Candiſh agreed, and that none may make a Commonalty but the King only; and Belknap and Knivet concordat; and awarded that the King ſhall have Execution; quod nota. Br. Deviſe, pl. 21. cites 49 Aſſ. 8. and 49 E. 3. 3.

3. A Feme *deviſed Land in Tail, and for Default of Iſſue to be ſold by her Executors, and made three Executors and died*; And the Queſtion was, if by the *Death of the Tenant in Tail* the Land ſhall eſcheat; becauſe it was found before the Eſcheat that the *Deviſor died without Heir*; or if the Executors might ſell. But it ſeems that the Executors may ſell, for the Land *is bound with this Deviſe*, and ſo cannot eſcheat. Br. Deviſe, pl. 10. cites 49 E. 3. 16.

A *Deviſe* of Land by one that dies without Heir ſhall prevent the Eſcheat; Per Doderidge J. 3 Bulſt. 43.

cites 48 E. 3. —— Godb. 411. S. P. Arg cites 49 E. 3. 16.

4. Brook ſays, it ſeems that one *deaf and Dumb cannot make Alienation*, but if he does, Quære if the Lord may enter for Eſcheat? it ſeems that he may; for if it be void the Feoffee is a Diſſeiſor; for it appears 3 R. 2. Fitzh. tit. Entry Congeable 38. that Right of Entry may eſcheat. Br. Eſcheat, pl. 4.

5. If there are *Lord and Tenant by Fealty and Rent*, and the *Tenant is diſſeiſed*, and the *Diſſeiſee dies without Heir*, and the *Lord accepts the Rent by Hands of the Diſſeiſor*, yet *he may enter* for Eſcheat, *or have Writ* of Eſcheat, and the Receipt of the Rent no Bar; Per Brown, Hales and Choke J. Br. Eſcheat, pl. 18. cites 7 E. 6.

6. *Contra if he had avowed for it in Court of Record, or had taken corporal Service as Homage* &c. for the Diſſeiſor is in by Tort. Ibid.

7. *Contra of Acceptance of Rent by the Hands of the Heir of the Diſſeiſor, or of his Feoffee* who are in by Title, and ſo no Bar ſupra. Ibid.

8. If my *Tenant dies without Heir*, and *J. S. enters*, and the *Lord accepts the Homage of the Tenant*, he ſhall not have Writ of Eſcheat after; for he has accepted him as his Tenant. Br. Acceptance, pl. 25. cites F. N. B. 164.

Co. Litt. 268. a. S. P.

9. *So* per Fitzh. if he accepts *Fealty*; *Contra* if he accepts *Rent* only of him. Ibid.

Accepting Rent of Tenant is no Bar; for that may be received by the Hands of the Bailiff. Co. Litt. 268. a.

10. If a *Felon* is *pardoned before Conviction* the Lord ſhall loſe his Eſcheat; for he cannot have it before an Attainder; Arg. Ow. 87. Hill. 41 Eliz. C. B. in Caſe of Eliz. Smith.

11. If an *Infant* makes a *Feoffment*, and executes the *Livery with his own Hands*, and dies within Age without Heir, the Lord is prevented of his Eſcheat; but if the Livery be executed by Letter of Attorney it does not *prevent* the Eſcheat. 8 Rep. 45. b. Hill. 45 Eliz. Whittingham's Caſe.

Jo. 9. Mitton v. Lutwich S. P.

12. A *Baſtard* purchaſed a Manor, and *deviſed it* by his Will, and after makes a *Feoffment* thereof *to the Uſe of ſuch Perſons*, and for ſuch Eſtates as he had declared *by his Will* bearing Date &c. It was adjudg'd that the Feoffment was a Countermand of the Will, and yet that the countermanded Will was ſufficient to declare the Uſe of the Feoffment, and ſo no Eſcheat to the Lord. Mo. 789. pl. 1090. 2 Jac. in the Exchequer. Huſſey's Caſe.

13. Some do hold that if there be Lord and Tenant, and the *Tenant is diſſeiſed, and the Diſſeiſee dies without Heir, and* Lord accepts *Rent by the Hands of the Diſſeiſor*, this is no Bar to him. Co. Litt. 268. a.

14. *But* if the Tenant be *diſſeiſed, and dies without Heir*, if he *avows for the Rent* in a Court of Record *upon the Diſſeiſor, or takes* a corporal Service of him as *Homage or Fealty*, it is a Bar; for the Diſſeiſor is in by Wrong. Co. Litt. 268. a.

15. *But* if the *Lord accepts the Rent by the Hands of the Heir of the Diſſeiſor or* of *his Feoffee*, this ſhall bar him of his Eſcheat, becauſe *they are in by Title.* This is to be underſtood of a *Deſcent or Feoffment after the Title of Eſcheat accrued*; For if the Lord makes a Feoffment in Fee, or dies ſeiſed, and afterwards the Diſſeiſee dies without Heir, in ſuch Caſe there is no Eſcheat at all, becauſe the Lord has a Tenant in by Title. Co. Litt. 268. a. b.

16. In Caſe of an *Indictment of Felony*, if the Felon makes a *Conveyance* of his Land, and after is outlawed, the Lord is not prevented of his Eſcheat; But if pending an *Appeal* a Felon conveys, and after is outlawed, the Land ſhall not eſcheat. Co. Litt. 13. a.

17. If *one*, being *attainted of Felony, commits Treaſon afterwards*, he ſhall anſwer thereunto, becauſe it is of a higher Nature than the Felony, but *it ſhall not diveſt the Right of Eſcheat*, which lawfully was by the Felony veſted in the Lords, contrary to the Opinion of Juſtice Stanford in that Caſe; for the Act and Offence of the Party ſhall not diveſt the lawful Eſcheat of the Lords. 2 Inſt. 213. cap. 101.

18. If Tenant dies without Heir, and *an Abator intrudes, and makes a Feoffment in Fee*, and the *Lord accepts the Rent* of the Feoffee; this Acceptance is a Bar to his Eſcheat; Per Coke Ch. J. 2 Bulſt. 153. Mich. 11 Jac.

19. A. makes *a Leaſe for Life to B. Remainder to the right Heirs of J. S. who is attaint in the Life of B.* A. ſhall have this Land after B.'s Death where there is no right Heir to J. S. The Lord has B. for his Tenant, and therefore the Lord ſhall not have it, for B. is living. Jenk. 203. pl. 27.

But an *immediate* Deviſe will; becauſe of the Inception in his Life. Roll Rep. 214. cites 38 E. 3. 3. —— Le. 260. Per Wray Ch. J. in Caſe of **Manning v. Andrews**, that a Deviſe that his Executors ſhall ſell his Lands, though he dies without Heir, ſo as the Land eſcheats to the King, yet the Authority given to the Executors ſhall bind the Land into whoſoever Hands it comes; Cites 49 Aſſ. 8. and 49 E. 3. 16. Iſabel Goodcheap's Caſe. —— S. C. cited Arg. 10 Mod. 361, 362.

20. A *future Deviſe* will not *prevent* an Eſcheat for Default of an Heir, as where an Eſtate in Fee is deviſed to T. and if he dies without Heir, the Remainder to a Stranger or Siſter of the Half Blood; not only the Remainder is void as a Remainder, but no future Deviſe could have been made of the Land by the Deviſor; For if T. had died without Heir the Land eſcheated, and the Lord's Title would precede any future Deviſe. Vaugh. 270. Hill. 20 & 21 Car. 2. in Caſe of Gardner v. Sheldon.

21. The *Heir of a Cottager* without Licence or Order, being in Poſſeſſion by Deſcent, is a good *Title againſt* any Eſcheat the Lord might have at Common Law. 8 Mod. 288. Trin. 10 Geo. The King v. Wilby Pariſh.

(G) Charged or not in the Lord's Hands.

1. A *Rent-Charge* was granted *out of a Manor*; if a *Tenancy eſcheats* it ſhall not be charged with the Rent; Arg. Ow. 74. cites 12 Aſſ. 40.

2. The *Tenant of the King* may *charge the Land without Licence* of the King, and if the Land comes to the King by Ward or by Eſcheat the King ſhall hold diſcharged; Per Marten quod *quære*; for the contrary is Law. Br. Prerog. pl. 120. cites 11 H. 6 9. Br. Extinguiſhment, pl. 23. cites 3 Aſſ. 1. Contra per Herle Ch. J. that the King ſhall hold charged, and agreed by Judgment It. South, and from hence ſee that the King ſhall not ouſt the Leſſee for Years.

3. If *Tenancy* eſcheat *to a Jointreſs* this is out of the Statute 11 H. 7. Pl. C. 44. b. Mich. 4 E. 6. in Wimbiſh's Caſe. 4 Rep. 59. in Caſe of the Commonalty of Sadlers.

4. If there be Lord and Tenant, and the *Tenant be diſſeiſed*, and the *Diſſeiſor aliens* to another in Fee, and the *Alienee dies without Iſſue*, and the Lord enters as in his Eſcheat; In this Caſe the Diſſeiſee may enter upon the Lord, becauſe the Lord comes not to the Land by Deſcent, by Way of Eſcheat. Litt. S. 390.

5. *But* though the Alienee of the Diſſeiſor dies ſeiſed, and the Lord by Eſcheat comes to the Land by Act in Law, yet becauſe the Land deſcends not to him, the Entry of the Diſſeiſee in reſpect of the Eſcheat ſhall not be taken away; For a dying ſeiſed, and a Deſcent, and *not a dying ſeiſed and an Eſcheat* does take away the Entry; for the Deſcent is the worthier Title; But if the *Lord by Eſcheat dies ſeiſed*, and the Land deſcends to his Heirs, that Deſcent ſhall take away the Entry of the Diſſeiſee; So it is if the *Diſſeiſor dies ſeiſed, and the Heir of the Diſſeiſor dies without Heir*, the Diſſeiſee cannot enter upon the Lord by Eſcheat. Co. Litt. 240. a.

6. If *Truſtee dies without Heir* the Lord by Eſcheat will have the Land at Law, but ſubject to the Truſt in Equity; Per the Maſter of the Rolls. Chan. Prec. 202. pl. 192. Trin. 1702. Eales v. England.

(H)

(H) What ſhall be avoided by the Lord.

1. IN Writ of Waſte it is admitted that Releaſe *by* him in *Remainder in Fee to the Tenant for Life, and his Heirs* is good, and ſhall be a Bar to the Lord in Action of Waſte againſt the Tenant for Life after the Death of him in Remainder without Heir, where the Remainder is ſuppoſed to be eſcheated. Br. Releaſes, pl. 1. cites 3 H. 6. 2.

2. If one takes a Leaſe by Indenture of his own Lands, the ſame ſhall bind him; but if he dies without Heir it ſhall be no *Eſtoppel* to the Lord, nor ſhall bind him in Point of Eſcheat; for a Stranger ſhall not take Advantage of an Eſtoppel, and therefore ſhall not be bound by it. Le. 158. in an Anon's Caſe cites 18 H. 6. 22.

3. If an *Infant makes a Leaſe* the Lord by Eſcheat ſhall not avoid it. Arg. Roll Rep. 403. cites D. 28 H. 8.

8 Rep. 42. b. and the ſame Law of *Coverture or Non ſanæ Memoriæ.*

4. Lord by Eſcheat ſhall not *avoid* voidable Eſtates made by his Tenant who was an *Infant*; Per Cur. 7 Rep. 7. b. Mich. 28 & 29 Eliz. in the E. of Bedford's Caſe.

Ibid. 44. a. Hill. 45 Eliz. in Whittingham's Caſe.

D. 115. b. 66. Marg.

5. If Tenant makes Leaſe for Years, and after is *attaint* of Felony, or dies without Heir, the Lord by *Eſcheat*, though he recovers by Writ of Eſcheat, ſhall not avoid the Term; Per Coke. 8 Rep. 45. b. Hill. 45 Eliz. in Whittingham's Caſe.

So if he aliens by *Fine*, and ſhe dies without Heir, the Lord is not within the Remedy of 32 *H.* 8. Per Hobert Ch. J. Hob. 261.

6. If Baron *is ſeiſed in Jure Ux' and makes a Leaſe for Years without the Wife joining*, and then the Wife dies, the Lord by Eſcheat ſhall not avoid ſuch Leaſe for the Coverture of the Wife; Per Coke Ch. J. Roll Rep. 402. Trin. 14 Jac. B. R.

7. A. ſeiſed in Fee *contracts to ſell*, and dies before Aſſurance, and without Heir, ſo that his Lands eſcheat to the Lord, Chancery will not *compel the Lord to convey* to the Vendee; Admitted by Counſel. Nelſ. Chan. Rep. 107. 17 Car. 2. Stephens v. Baily.

(I) How to be held by the Lord.

1. IF Lands which have been *departible and departed* come into the Lord's Hands by Eſcheat, they ſhall not be departible in his Hands, vel *in Manibus alicujus alius Perquiſitoris non poſſunt partiri.* Arg. Goldsb. 106. cites 4 E. 2.

(I. 2) Writ of Eſcheat, or Intruſion &c. Lies. In what Caſes.

1. IF *Reverſion eſcheats* to the Lord, and the *Tenant for Life dies*, and *a Stranger abates*, Writ of *Intruſion lies*. Br. Eſcheat, pl. 6. cites 11 H. 4. 10. 11.

2. Writ of Eſcheat *does not lie of Rent*, per Perning and Trewe; For the Land is held and not the Rent. Br. Eſcheat, pl. 22. cites 13 E 3.

3. If the *Tenant leaſes for Life and dies without Heir*, and the *Tenant for Life dies* the Lord ſhall have the Writ of Eſcheat per Fineux; For the Tenant did not die ſeiſed, and alſo the Reverſion was veſted in the Lord before, and therefore he may have Writ of *Intruſion*, or enter and have *Aſſiſe*. Br. Eſcheat, pl. 22. cites 13 E. 3.

4. In Eſcheat by the *Writ* it was *ſuppoſed that the Tenant who did the Felony held of the Father of the Demandant, and not de eo tenet*, yet the Writ was adjudg'd good, notwithſtanding that he was *Tenant to the Heir after the Death of the Anceſtor*. Thel. Dig. 103. Lib. 10. cap. 11. S. 13. cites Hill. 46 E. 3. 4.

(K) Avoided. In what Caſes.

1. IF Lands eſcheat for want of an Heir, an *after-born Son ſhall defeat all meſne Incumbrances*. Arg. D. 94. b. pl. 34. Mich. 1 Mariæ.

2. Upon a Writ of *Error to reverſe an Attainder* of Felony a *Sci. Fa.* ought to be *to warn the Lords* mediate and immediate. Arg. Cro. E. 225. pl. 10. Paſch. 33 Eliz. B. R.

3. *Mortgagor may redeem* after an Eſcheat by forfeiture of one claiming under the Mortgagee; And though by the Eſcheat the Tenure is extinguiſh'd that will be nothing to the Purpoſe, becauſe the Party may be recompenc'd for that by the Court, by a Decree for Rent or Part of the Land itſelf, or ſome other Satisfaction. Per Hale Ch. B. Hardr. 469. Trin. 19 Car. 2. in Scacc. in Caſe of Pawlett v. the Attorney General.

4. If *Truſtee* of Lands be attainted of Felony, and ſo the Eſtate in Law eſcheat, Quære, If Ceſty que Truſt has any Remedy againſt the King? It ſeems he has none. Quære as to other Lands. Sid. 403. pl. 10. Hill. 20 & 21 Car. 2. in the Exchequer. Sir G. Sands's Caſe.

5. If *Diſſeiſor dies without Heir* by which the Land eſcheats, yet the *Diſſeiſee may bring his Action* for the Land againſt the Lord. Arg. 10 Mod. 362. Hill. 1 Geo. 1. B. R. cites 49 E. 3. 16.

(L) Proceedings and Pleadings.

1. THAT he does *not hold of him* is a good Plea in Writ of Eſcheat. Br. Eſcheat, pl. 22. cites 3 E. 3. Itin. Nott.

2. If *T. reverſes Outlawry by Impriſonment at the Time of the Outlawry*, the *Lord, to have Eſcheat, cannot aver that he was at large at the Time of the Outlawry* &c. For *the Outlawry was reverſed before*, which is the Cauſe of Eſcheat. Br. Eſtoppel, pl. 213. cites 16 E. 3. and Fitzh. Utlawry 48.

3. The *Writ* of Eſcheat *was Feloniam fecit pro qua abiuravit Regnum* &c. And adjudged good *without ſaying what Regnum*; For it ſhall be intended the Realm of England. Thel. Dig. 99. lib. 10. cap. 9. S. 5. cites Paſch. 20 E. 3. Brief 251.

4. *Waſte* was brought *by Lord againſt Tenant for Life by reaſon that he in Reverſion was a Baſtard, and died without Iſſue of his Body*, and good, per Cur. For by this the Reverſion is eſcheated and veſted in him. Br. Waſte, pl. 40. cites 45. E. 3. 3.

5. *So* where he in *Reverſion* is *attainted of Felony*. Ibid.

S. P. by Belk and agreed by Finchden, quod non negatur. Br. Ingreſſu ad &c. pl. 1. cites S. C.

6. *And* if the *Tenant for Term of Life aliens* the *Lord ſhall have Writ of Entry in conſimili Caſu*. Ibid.

The Lord may have Writ of Intruſion, for the Reverſion was veſted in the Lord before; Per Thorp and Belk. Quod nota. Br. Intruſion, pl. 4. cites 45 E. 3. 3.

7. *And if he dies and one enters* the Lord ſhall have *Writ of Intruſion*, and *not* Writ of *Eſcheat*, by the beſt Opinion there, by which the Tenant pleaded no Waſte done after the Death of the Baſtard, and the others e contra; Quod nota. Ibid.

The Lord ſhall have Writ of Intruſion, and not of Eſcheat, for the Seigniory is extinct by the Death of him in Reverſion without Heir who is Tenant to the Lord; Per Hank. But per Culpepper, he may have Writ of Eſcheat if he will ſuppoſe that the Leſſor died without Heir. Br. Intruſion, pl. 7. cites 11 H. 4. 10.

8. In Waſte, the Plaintiff *declared that his very Tenant leaſed the Land to the Defendant for Term of Life, and the Reverſion eſcheated to him*, in aſmuch as he in Reverſion died without Heir, *and aſſigned the Waſte in the Moiety of a Hall*; The *Tenant ſaid that it was uncovered in the Life of him in Reverſion*, and the *Plaintiff ſaid, that after the Death of him in Reverſion the Tenant pulled down the ſaid Hall*, and the others e contra; And ſo ſee here, that it is admitted that the pulling down of a Frame not covered, and which has been covered before, is Waſte. Br. Waſte, pl. 117. cites 45 E. 3. 3.

9. *Writ of Eſcheat* was [brought,] *ſuppoſing that the Tenant who did Felony held the Land of the Father of the Demandant whoſe Heir he is*, and therefore the *Tenant demanded Judgment of the Writ, becauſe it ſhould be Quod de eo tenet*; For after the Death of the Father he held of the Son and Heir, and yet it was awarded good; in a Nota. Br. Eſcheat, pl. 1. cites 46 E. 3. 4.

10. Where the *Tenant is outlawed of Felony* it is *at the Election of the Lord to have Writ of Eſcheat ſuppoſing that the Tenant was outlawed of Felony, or that he died without Heir*; For by the Attainder the Blood is corrupted; Per Perſey. Br. Eſcheat, pl. 3. cites 48 E. 3. 2.

11 Eſcheat *ſuppoſing that his Tenant died without Heir*, the *Tenant ſaid that he of whoſe Poſſeſſion the Demandant demands did not die ſeiſed*; Et non allocatur; For *though he leaſed for Life and died without Heir* the *Writ of Eſcheat lies*, and this ſeems to be after the Death of the Tenant for Life; Quære if intruſion does not lie there. Br. Eſcheat, pl. 4. cites 2 H. 4. 8.

12. *But* it is a good Plea *that he did not die his Tenant* &c. Ibid.

13. By which the Tenant *ſaid, that he, who is ſuppoſed to die his Tenant, aliened in Fee to the Tenant and ſo he did not die his Tenant*; to which the Demandant ſaid he who is ſuppoſed to make the Alienation was Deaf and Dumb all his Life; Thirn ſaid, what is that to you; For if you will ſhew in Law that ſuch was no Alienation you may, or otherwiſe ſay what you will; by which he ſaid that he died his Tenant, and this ſeems to be by Reaſon of the Bar of the Tenant, which was concluded And ſo he did not die his Tenant, and therefore the Replication of the Plaintiff ſhall be a Departure, as it ſeems, if Deaf and Dumb ſhall be alleged. Ibid.

14. If *Reverſion eſcheats to the Lord*, the Lord *ſhall have Writ of Waſte*, per Hank. which proves the Seigniory extinct, and therefore he cannot have *Writ of Eſcheat of the Seiſin of the Tenant who died without Heir*, viz. *of the Seiſin of him who leaſed for Life*. Br. Waſte, pl. 65. cites 11 H. 4. 10.

15. Eſcheat by the Lord Barkley becauſe Adam L. his *Tenant held* of him &c. *and died without Heir*. The *Tenant ſaid, that Adam had Iſſue Alice and died, and Alice entered and endowed her Mother Feme of Adam of the third Part in Demand, who leaſed her Eſtate to C. B. and Alice had Iſſue K. and died*, which *K. releaſed all his Right to the ſaid C. B. Que Eſtate the Tenant has, Judgment.* Horton ſaid the Plea is double, one that Adam did not die without Heir, the other that Alice had Iſſue K. who releaſed. Per Hank. the Matter is that Adam did not die without Heir, and the other Matter is not to the Purpoſe; for *Writ of Eſcheat ſhall be of the Poſſeſſion of him who laſt died ſeiſed of the Demeſne*, and it had been a ſufficient Anſwer to have ſaid that Adam had Iſſue Alice who ſurvived him and was ſeiſed, and to have demanded Judgment if of ſuch Poſſeſſion &c. But per Culpeper the Action is well brought; For *by the Endowment the Seiſin of Alice the Heir was defeated, and the Feme is in by her Baron*, and Writ of Eſcheat lies of the Seiſin of him who was laſt ſeiſed in Fee and is dead without Heir, As if the Heir endows her Mother and dies without Iſſue, the Heir of the Heir ſhall have Aſſiſe of Mortdanceſtor of the Seiſin of the Father, and not of the Seiſin of the Heir who endowed the Feme; by which Norton *pleaded, that Adam had Iſſue Alice and died*, and *Alice entered, and died, and K. Heir of Alice releaſed to B. then Tenant, Que Eſtate the Tenant has.* Horton ſaid, *Adam died without Heir as the Writ ſuppoſes, Priſt.* Thirning ſaid, you ſhall ſay that Alice is not Heir, or that Adam had no ſuch Daughter, by which he *ſaid that Adam had no ſuch Daughter who ſurvived him, Priſt*, and the others e contra. Br. Eſcheat, pl. 6. cites 11 H. 4. 10. 11.

16. If the *Son* be *attainted in the Life of his Father*, and the *Father dies, Writ* of Eſcheat *lies ſuppoſing that he died without Heir.* Br. Eſcheat, pl. 6. cites 11 H. 4. 10. 11.

17. In Writ of Eſcheat *of Rent* the *Count ſhall make mention that the Land is held by the Rent*; For Rent does not lie in Tenure; Per Hill. Br. Eſcheat, pl. 7. cites 11 H. 4. 82. Br. Intruſion, pl. 8. cites S. C.

18. Eſcheat ſuppoſing that A. his Tenant died without Heir; the *Tenant ſaid that he had Iſſue Alice, who ſurvived him, nnd releaſed to the Tenant*, and the *Iſſue taken that no ſuch Daughter Alice who ſurvived him*;

him; Quære if Negative Pregnant. Br. Negativa, pl. 11. cites 11 H. 4. 10.

19. If a *Remainder eſcheats* and the Lord brings Action of *Waſte*, the Writ ſhall be which he *holds of him*. 2 Roll Waſt (U) pl. 17. cites 3 H. 6. 1.

Where a Leaſe is made for Life, the Remainder in Fee, and he in Remainder dies without Heir, and the Lord by Eſcheat is to bring Writ of Waſte againſt the Leſſee for Life, he need not ſuppoſe by the Writ that the Leſſee held of the Plaintiff. Thel. Dig. 105. lib. 10 cap. 13. S. 6. cites Mich. 3 H. 6. 1.

20. In Waſte, the Caſe was that *Lord and Tenant* were, and the *Tenant made a Gift in Tail to Baron and Feme, and to the Heirs of the Body of the Feme*, the *Remainder to G. in Fee*, and the *Feme died without Iſſue*, and *G. in Remainder was a Baſtard and died without Iſſue*, and the *Baron and Feme, Lords in Jure Uxoris, brought Writ of Waſte*, which was idem J. viz. the Defendant de Terris Domibus &c. in N. *quæ tenet ad Vitam ſuam of the Demiſe*, [*which*] *W. (who held thoſe Tenements of the Baron and Feme Plaintiffs) thereof made to the aforeſaid J. and Margaret his late Wife, and to the Heirs of the Body of the ſaid Margaret iſſuing, ſo that if it happen that the ſaid Margaret die without Heir of her Body iſſuing, the aforeſaid Tenements ſhould remain to G. and his Heirs, and becauſe Margaret and is dead without Heir of her Body, and the ſaid G. is ſince alſo dead without Heir de ſe &c. the ſaid Tenements ought to revert to the Demandants as their Eſcheat, in as much as the ſaid G. was a Baſtard and fecit Vaſtum &c. ad exhæredationem ipſius the Feme of the Demandant* &c. by which the *Defendant pleaded to the Writ, becauſe* the Writ *was not de eo tenet and ſo to make Privity*; et non allocatur; For *by the Eſcheat of the Remainder the Seigniory is extinct, and* therefore the *Law makes Privity*. Br. Waſte, pl. 6. cites 3 H. 6. 1.

21. By which the *Defendant pleaded to the Writ becauſe it was, and that after the Death of M. and G. it ought to revert, and did not make mention of the Eſtate of the Tenant for Life which continued*; For he ought to have ſaid, that after the Death of the aforeſaid M. and G. and after the Death of the aforeſaid Tenant &c. et non allocatur; For this Action affirms the Eſtate of the Tenant and does not demand any Land, but is to puniſh the Treſpaſs, viz. the Waſte. Ibid.

22. By which the Defendant pleaded to the Writ, becauſe it was *Ad Virum et Uxorem jam querenti reverti debent tanquam Eſcaeta ſua*, where it ſhould be Ad Uxorem tantum reverti debent, tanquam Eſcaeta of the Feme, becauſe it is her Inheritance; For the Baron Plaintiff had nothing but in Jure Uxoris, and yet non allocatur. Ibid.

23. By which the Defendant *pleaded Releaſe by G. in the Remainder to him and his Heirs*, and the Plaintiff ſaid, that Ne Releſſa pas by the Deed, and the others e contra. Ibid.

24. *In Writ of Eſcheat that the Tenant died without Heir, it is a good Plea that the Tenant infeoffed J N. Que Eſtate he has*, per Paſton; but Mombrey. J. contra if he does not *traverſe the dying ſeiſed*, and concordat tota Curia. Br. Eſcheat, pl. 10. cites 4. H. 6. 29.

Ibid. pl. 11. S. P cites old Nat. Brev. —— 4 Rep. 11. a. S. P. per Cur. cites 21 H. 6. 22 a.

25. In Writ of Eſcheat the Demandant ſhall *not allege Explees*, the reaſon ſeems to be, becauſe *they claim by his Seigniory*, and *not by any Seiſin in their Anceſtor in the Land*; and where no Seiſin is in him, nor in his Anceſtor in the Land; there he cannot allege Explees of the Profits of the Land; For he had nothing of the Seigniory. Br. Explees, pl. 5. cites 21 H. 6. 22.

26. A *Man may have Writ* of Eſcheat *though his Tenant did not die ſeiſed*; *For* the dying ſeiſed *is not traverſable*; Per Forteſcue Juſtice, but Poole contra; therefore *quære*. Br. Eſcheat, pl. 11. cites 37 H. 6. 1.

27. Lord

27. Lord may have Writ of Eſcheat, or Writ of Ward, though his Tenant did not die ſeiſed; For the *Dying ſeiſed is not traverſable*; Per Forteſcue Juſtice; But Pole contra. Br. Traverſe per &c. pl. 133. cites 37 H. 6. 1.

28. In Writ of Eſcheat of the dying ſeiſed of ſuch a one without Heir, the Tenant may ſay that he had *Iſſue who ſurvived* him, and *infeoffed the Tenant* &c. Thel. Dig. 215. lib. 15. cap. 3. S. 21. cites Mich. 2 E. 4. 23.

29. *In Writ of Eſcheat*, he ſhall ſhew the Death of his Tenant. Br. Repleder, pl. 32. cites 7 H. 7. 7.

30. If one *holds two Acres of A. by ſeveral Services* and dies without Heir, the Lord cannot have one Writ of Eſcheat for both Acres, but muſt *have two Writs*; Arg. Bulſt. 15. cites 21 H. 7. 39.

31. If *A Man holds two Acres* of Land of a Lord *by ſeveral Services and dies without Heir*, the Lord cannot have one Writ of Eſcheat of both, but ſhall have ſeveral Writs. Br. Eſcheat, pl. 13. cites 21 H. 7. 39.

32. And per Conſt. Serjeant, if a Man *held* of me 20 *Acres before the Statute*, *Quia emplores* Terrarem, *and before the ſaid Statute he made Feoffment of one Acre to hold by 6 d. and died without Heir*, I ſhall have *Writ of Eſcheat ſuppoſing that he held of me* 19 *Acres*, *and* 6 *d. of Rent*; For a Man ſhall not have other Writ in the Chancery, and yet he held the Land and not the Rent; quod nemo negavit. Br. Eſcheat, pl. 13. cites 21 H. 7. 39. Br. Eſcheat, pl. 22. cites S. C.

33. Lord may have *Writ* of Eſcheat *before Execution*. Finch. 17. b.

34. The Lord by Eſcheat ſhall not plead a *Releaſe made to the Diſſeiſor* by the Diſſeiſee *without ſhewing* it. 10 Rep. 93. 6 Hill. 8 Jac. in Dr. Leyfield's Caſe.

(M) Re-entry by the Tenant; And How.

1. IN Diſceit it was ſaid that if there be Lord and Tenant and the Tenant is *outlaw'd of Felony*, and the Lord enters by Eſcheat, and the Tenant *reverſes the Outlawry by Writ of Error*, he *cannot enter without Scire Facias againſt the Lord*; for he is in by Title, quod nota. Br. Scire Facias, pl. 109. cites 8 H. 6. 2.

For more of Eſcheat in General, See **Blood corrupted, Forfeiture,** and other Proper Titles.

Eſcheator.

(A) Who. His Antiquity, and Actions againſt him.

1. IF the Eſcheator ſeiſes without Cauſe, *Aſſiſe* lies againſt him, and in the Aſſiſe againſt him it ſhall be tried whether he had Cauſe or not, and if the Cauſe be true or not. Br. Aſſiſe, pl. 257. (256.) cites 24 Aſſ. 7.

2. If Eſcheator *enters* to the Uſe of the King, *where the King has no Title*, he is Diſſeiſor, and a Man may enter upon him where he ſo enters without Office. Br. Entre Congeable, pl. 5. cites 35 H. 6. 60.

3. In Aſſiſe the *Tenant ſaid that the Land is ſeiſed into the Hands of the King*, and prayed that the Eſcheator be examined, who teſtified it, yet the Aſſiſe ſhall not remain, per Huſe, contra if he *ſhews Cauſe*, and ſays that he ſeiſed according to the Cauſe, which others agreed, and ſo ſee a Diverſity, where Cauſe is ſhewn by the Eſcheator and no Cauſe. Br. Aſſiſe, pl. 381. cites 9 H. 7. 8.

4. If Eſcheator *takes my Goods for the Goods of J. S. who is outlaw'd*, he is puniſhable by Treſpaſs, but if he does ſo by *Colour of an Office*, finding my Goods to be J. S's. he is excuſable, becauſe he did it by Colour of Juſtice &c. Kelw. 66. b. 20 H. 7.

Eſcheator cometh of the Word Eſchaeta, and is ſo called becauſe

5. Eſcheator was an *ancient Officer*, ſo called becauſe his Office is properly *to look to Eſcheats, Wardſhips* and other Caſualties belonging to the Crown. Co. Litt. 13. b.

his Office is to inquire of all Caſual Profits, and them to ſeize into the King's Hands, that the ſame may be anſwered to the King. Co. Litt. 92. b.

6. In ancient Time *there were but two Eſcheators* in England, the one *on this Side Trent, and the other beyond* Trent, at which Time they *had Sub-Eſcheators*. But in the Reign of E. 2. the Offices were divided, and ſeveral Eſcheators made in every County for Life, and ſo continued till the Reign of E. 3. And afterwards by the Stat. 14 E. 3. it is enacted by Authority of Parliament that there ſhould be as many Eſcheators aſſigned as when King E. 3. came to the Crown, and that was one in every County, and that no Eſcheator ſhould tarry in his Office above one Year, and by another Statute to be in Office but once in three Years. Co. Litt. 13. b.

7. The *Ld. Treaſurer nameth* the Eſcheator. Co. Litt. 13. b.

(B)

(B) Statutes relating to Eſcheators.

1. 14 *E.* 3. *Stat.* 1. *cap.* 8. DIRECTS *how many Eſcheators there may be, by whom to be choſen, and how long to continue in the Office.*

34 *Ed.* 3. 13. Directs *how Eſcheators ſhall take Inqueſts, and that it ſhall be in a good Town openly, and by Indentures between them and the Jurors.*

42 *Ed.* 3. 5. Enacts that *Eſcheators muſt have at leaſt* 20 *l. of Land in Fee, and to do his Office in proper Perſon.*

8 *H.* 6. 16. Enacts that *Eſcheators ſhall take Inqueſts only by Perſons returned by the Sheriff, on forfeiture of* 40 *l.*

6 *H.* 4. 3. Directs *how his Accounts ſhall be inquired into by Commiſſioners.*

23 *H.* 6. 17. Directs *what Fee Eſcheator ſhall take, and that every Eſcheator ſhall take his Inqueſt of Office within one Month after the Delivery of the Writs to him.*

12 *E.* 4. 9. Enacts that *Eſcheators ſhall have* 20 *l. Land in Fee in the ſame County, and reſtrains them from making a Deputy or Farmer, who is not a ſufficient Man, under the Pain of* 40 *l. But this Statute does not reſtrain Corporations which have Power by their Charter to appoint Eſcheators.*

1 *H.* 8. 8. Enacts that *no Office concerning Hereditaments ſhall be returned which is not found by a Jury.*

S. 4. And that *Jurors returned to find an Office ſhall have* 40 *s. per Ann.*

S. 6. *Except in Cities.*

S. 4. *Eſcheator refuſing or delaying to receive a Verdict to forfeit* 100 *l. and ſhall deliver the Counterpain of the Indenture to the Jury upon the like Penalty.*

For more of Eſcheator in General, See **Coroner** (A), **Inquest of Office** (H), **Office** (G. 2) and (H), **Prerogative** (H. b) and (Q. 8), **Trial** (L), and other Proper Titles.

Eſſoign.

Fol. 817.

(A) Diſallowed.

For what Cauſes it may be diſallowed.

1. IF **Eſſoign be** adjudged for the Attorney, **if he be** ſeen in Court after and before Adjournment, **yet it ſhall be allowed.** 7 H. 4. 39.

Br. Eſſoign, pl. 36. cites S. C. — Fitzh Eſſoign, pl. 134. cites S. C.

2. If

Br. Default and Appearance, pl. 84. cites S. C. —— Fitzh Eſſoign, pl. 136. cites S. C.

2. If an Eſſoign be caſt by the Party for Part of the Land in Demand, if he appears afterwards the ſame Day upon the ſame Original, the Eſſoign ſhall be diſallowed, for he cannot be eſſoigned and appear the ſame Day on the ſame Writ; for the Original is entire. 11 H. 4 82.

—— The recording the Appearance of the Parties in Court at the Day, when the Eſſoign waa caſt, confounds the Eſſoign without any Challenge or Exception to it. D. 223. b. 224 a. pl. 27. Paſch, 5 Eliz.

Br. Eſſoign, pl. 45. cites S. C. —— By Stat. 12 E. 2. Eſſoign lies not where the Party appears in Court.

3. If an Eſſoign de Malo veniendi be caſt, and the Party for whom it is caſt appears in Court before it is adjudged and adjourned, it ſhall be diſallowed. 12 H. 4. 24. b.

It was ouſted as to the Baron, and ſtood for the Feme. But it ſeemed by the Entry that the Eſſoign was caſt at the ſecond Time. Br. Eſſoign, pl. 122. cites S. C. —— Fitzh. Eſſoign, pl. 99. cites S. C.

4. If an Eſſoign be caſt for Baron and Feme, and the Baron is ſeen in Court before it is adjudged, it ſhall be quaſhed. 11 H. 6. 53.

Fitzh. Eſſoign, pl. 91. cites S. C. — Br. Eſſoign, pl. 73. cites S. C. that in Præcipe quod reddat againſt the Baron and Feme returnable 15 Sanctî Johannis, the Roll was entered that the Baron and Feme were eſſoigned to Craſtino Animarum, and another Roll at the ſame 15th was, that the Feme was eſſoigned, and that the Baron appeared in Perſon, and yet at this Day now the Baron only caſt Eſſoign, and nothing was ſaid for the Feme, and the Eſſoign was adjudged and adjourned, and ſo it appears that the firſt Eſſoign ſtood for the Feme only, and the Appearance of the Baron was admitted, and now this Eſſoign ſhall ſerve for the Baron, and the other, as it ſeems, ſhall have Idem Dies. And per Marten, it is the Default of the Court that thoſe Rolls are ſo entered, and it may be that firſt he caſt Eſſoign for both, and after the ſame Day came in Perſon, and * then the Appearance † defeats the Eſſoign, and ſo the Eſſoign was adjudged and adjourned; And ſo ſee that the Appearance is higher than the Eſſoign. Br. Eſſoign, pl 73. cites 4 H. 6. 6.

5. If an Eſſoign be caſt for Baron and Feme, and adjudged and adjourned, yet if afterwards it appears that the Baron comparuit ad Diem of the Eſſoign caſt, it ſhall be diſallowed, for he cannot be eſſoigned the ſame Day, that he appears in proper Perſon, and the allowing it was the Fault of the Court. 4 H. 6. 6. b.

* Orig. is (done) and ſo are all the Editions; but it ſeems it ſhould be (donc) viz. (then.)

† All the Editions of Brooke are (Default) but the Year-Book is (defaats.)

Fitzh. Eſſoign, pl. 32. cites S. C.

6. If the Attorney of the Plaintiff be eſſoigned the firſt Day of the Return, and three Days afterwards, before the Eſſoign is adjourned, the Attorney is removed, the Eſſoign ſhall be quaſhed. 22 E. 3. 4 b.

This Act extends only to Eſſoign De ultra Mare, and not to the Eſſoign De Servitio Regis. 2 Inſt. 252.

7. 3 *E.* 1. *cap.* 44. *The Eſſoign of being Over the Sea ſhall not be wholly allowed, if the Demandant will challenge it, and will be ready to aver, that he was in England the Day of the * Summons and three Weeks after; but it ſhall be adjourned in this Form, that if the Demandant be ready at a certain Day, by Averment of the Country or otherwiſe, as the Court ſhall award, to prove that the Tenant was † within the four Seas the Day that he was ſummoned, and three Weeks after, ſo that he might be reaſonably warned, the Eſſoign ſhall be turned into a Default; and that is to be underſtood only before Juſtices.*

If the Tenan be eſſoigned in any Action De Servitio Regis, where in Truth he is not in the King's Service, the Demandant or Plaintiff may ſue a ſpecial Writ out of the Chancery directed to the Juſtices, rehearſing that he is not in the King's Service, and commanding them to proceed; then the Eſſoign ſhall not be adjourned, but ſhall be quaſhed preſently. 2 Inſt. 253.

And ſo before this Statute in the Eſſoign De ultra Mare, if the Party were in England the Demand might have purchaſed the like Writ, but for that many Times that could not be obtained without great Difficulty, the Averment was given for avoiding of Falſhood. 2 Inſt. 253.

* The Summons always is made upon the Land by two Summoners, whether the Tenant or any for

for him be there or not. The Day of the Summons is not counted Parcel of the three Weeks, but it muſt be three Weeks after the Day, otherwiſe it had been, if the Words had been three Weeks after the Summons made. 2 Inſt. 253.

† Within the four Seas is as much as to ſay within the Juriſdiction of the King of England 2 Inſt. 253

8. 13 *E.* 1. *cap.* 17. *In the Circuit* * [the Iter] *of the Juſtices an Eſſoign de Malo lecti ſhall not be allowed for Lands in the ſame Shire, unleſs he that cauſed himſelf to be eſſoigned be ſick indeed; for if the Demandant alleges, that the Tenant is not ſick, nor in ſuch Plight but that he may come before the Juſtices, the Exception ſhall be admitted. And if he can be ſo proved by Inqueſt, the Eſſoign ſhall be turned to a Default, and ſuch Eſſoign ſhall not lie in a Writ of Right between two claiming by one Deſcent.* The Miſchief before this Act was, that the adverſe Party could not take Iſſue, that he that offered to be eſſoigned De Malo lecti was in Health, and not ſick, and try it by a Jury, but it was inquired by four Knights returned for that Purpoſe by the Sheriff, Si fuerit languidus vel non, and if they found that he was not languidus, then he ſhould have 15 Days after to appear; for Remedy whereof this Act provides, that the Party ſhall take Iſſue that he is not languidus, which if ſo found ſhall be turned to a Default. 2 Inſt, 393.

* [The Words in Ld Coke, 2 Inſt. 393. are, In Itinere Juſticiariorum, and obſerves, that] tho' Juſtices in Eyre are here particularly mentioned, yet this Act being a beneficial Law to ouſt Delays is taken by Equity, and extends to the Court of C B. 2 Inſt. 293.

2. 12 *E.* 2. *Stat.* 2. *S.* 1. *Here is declared how many Ways Eſſoigns may be challenged, and in what Caſes Eſſoigns do lie, and in what not; that is to ſay, an Eſſoign lieth* not where the Land is taken into the King's Hands.

S. 2. *Eſſoign lieth* not where the Party is diſtrained by his Lands.

S. 3. *Eſſoign lieth not where any* Judgment *is* given thereupon, if the Jurors do come.

S. 4. *Eſſoign lieth not where the* Party was ſeen in the Court.

S. 5. *Eſſoign of ultra Mare lieth not where* another Time the Party hath been eſſoigned de Malo veniendi.

S. 6. *It lieth not where the Party hath* eſſoigned himſelf another Day.

S. 7. *It lieth* not where the Sheriff was commanded to make the Party to appear.

S. 8. *Eſſoign* de Servitio Regis *lieth* not where the Party is a Woman, unleſs *becauſe ſhe be* Nurſe, *a* Midwife, or commanded by Writ Ad ventrem inſpiciendum.

S 9. *It lieth* not in a Writ of Dower, *becauſe it ſeemeth to be but a Deceit and a Delay of Right.*

S. 10. *It lieth not for that the Plaintiff hath* not found Pledges to proſecute *the Suit.*

S. 11. *It lieth* not where the Attorney was eſſoigned.

S. 12. *It lieth* not where the Party hath an Attorney in his Suit. An Eſſoign was caſt for the Defendant at Niſi Prius, which the Plaintiff challenged, becauſe an Attorney was entered upon Record, and the Challenge was allowed, and Judgment peremptory was given, and upon Error brought it was affirmed in B. R. becauſe it was in Nature of a Departure in Deſpight of the Court; Cited by Powell (junior) J. as Slay's Caſe, which Caſe, as well all the Court, as the Serjeants at the Bar, remembered. Ld. Raym. Rep. So. Paſch. 8 W. 3.

S. 13. *It lieth* not where the Eſſoignor confeſſeth that he is not in our Lord the King's Service,

S. 14. *It lieth not where the* Summons is not returned, or the Party not attached, *for that the Sheriff hath* returned Non eſt inventus.

S. 15. *It lieth not where the Party* another Time *was* eſſoigned de Servitio Regis, *that is, to wit, ſuch a Day,* and *now he* hath not put in his Warrant.

S. 16. *It lieth not where he was* reſummoned in *Aſſiſe of* Mortdanceſtor, or Darrein Preſentment.

S. 17. *It lieth not becauſe* ſuch a one is not named in the Writ.

S. 18. *It lieth not where the* Sheriff hath a Precept to diſtrain the Party to come by his Lands and Goods.

S. 19. *It lieth not where ſuch a* Biſhop was commanded to cauſe the Party to appear.

S. 20. *It lieth not for that the* Term is paſſed.

S. 21. *And it is to be noted, that an Eſſoign* de Servitio *Domini Regis is allowed* after the Grand Cape, Petit Cape, and *after* Diſtreſſes taken upon the Lands and Goods.

9. If *Writ* be brought *againſt J. N.* and Eſſoign is caſt for him by Name of *J. N. of D.* the Eſſoign ſhall be diſallow'd; quod nota. Br. Variance, pl. 101. cites 18 E. 4. 4.

10. In *Dower, at Iſſue the Tenant offered to be eſſoigned upon the Venire Facias*, and *for Want of the Adjournment* thereof *by the Demandant, the Tenant* had *procured a Nonſuit*, and yet the *Demandant proceeds with the Iſſue*; And at the Niſi Prius, Tenant relying upon the Nonſuit, it appeared not by whom the Petit Cape is awarded. It was ruled, and the Prothonotaries all ſaid, that it had been the conſtant Uſe, that *no Eſſoigns are allowed in Dower*, which is Feſtinum Remedium, ſee Stat. 12 E. 2. cap. 1. has tolled the Eſſoign of the Service of the King in many Caſes, and given to the Demandant in many Caſes Power ad callumpniand' Eſſoniam; and the Words of the Statute are, Non jacet in Breve de Dote, quia videtur Deceptio & Prorogatio Juris. Hutt. 69. Hill. 25 Jac. Hickſon v. Hickſon.

11. The *Plaintiff caſt an Eſſoign, and had a Day* till ſuch a Day, but *did not ſay Idem Dies Datus eſt to the Defendant*, which is Error. Carth. 172. Hill. 2 & 3 W. & M. in B. R. Clobery v. Biſhop of Exon.

[A. 2] At what Time.

1. WHERE **there are** two Attornies **in a Plea, and** one only is eſſoigned **where both may be eſſoigned**, and it is adjudged and **adjourned, and there** be no Challenge to it at that Time, **he ſhall** not **have** Challenge afterwards **to it.** 11 H. 4. 54. * 12 H. 4. 25. b. † 18 H. 6. 20.

* Br. Eſſoign, pl. 38. cites S. C. but that is only upon the Point whether it be a Diſcontinuance or not—Br. Ibid. pl. 43. cites S. C. but S. P. does not appear.—Fitzh. Eſſoign, pl. 174. cites S. C. that if the *other Attorney had appeared at the Day* before *when the Attorney was eſſoigned, and his Appearance had been recorded*, the Demandant ought to have had Seiſin of the Land notwithſtanding the Eſſoign of the one Attorney if he will not plead in Salvation of his Tenancy; But becauſe the Preſence of the other Attorney is not recorded the Eſſoign is good &c.

† Fitzh. Eſſoign, pl. 101. cites S. C.

2. In *Waſte*, the *Tenant took Day by Prece Partium without Eſſoign*, and *at the Day was eſſoigned*, and becauſe *it was not challenged at this Time*, but was admitted without Challenge, therefore it was awarded to be good, and no Error. Br. Eſſoign, pl. 19. cites 40 E. 3. 15.

(B) In what Caſes a Diſallowance againſt one, ſhall be againſt the other.

1. IF an Eſſoign be caſt for Baron and Feme, and the Eſſoign be caſt ſeverally for each of them, and it be diſallowed for the Baron, yet it ſhall remain for the Feme. 11 H. 6. 53. Fitzh. Eſſoign, pl. 99. cites S. C.

2. But otherwiſe it is, if the Eſſoign be caſt jointly. 11 H. 6. 53. Fitzh. Eſſoign, pl. 99. cites S. C.

(C) What Perſons may be eſſoigned.

* What it is.

* An Eſſoign is the Surmiſe of the Party. Br. Eſſoign, pl. 2. cites 3 H. 6. 55.

1. A Common Eſſoign is de Malo veniendi. 21 E. 4. 79. Br. Eſſoign, pl. 114. cites S C.

This is the common Eſſoign intended by the Stat. of Marlb. 2 Inſt. 125.

2. An Eſſoign *in legal Underſtanding is* an Excuſe of a Default by reaſon of ſome Impediment or Diſturbance, and is as well for the Plaintiff as the Defendant, and is *all one with that which the Civilians call Excuſatio.* 2 Inſt. 125.

[C. 2] How many Sorts.

2. [1.] THERE are four manner of Eſſoigns, viz. De Malo veniendi, * De Malo lecti, De ſervitio Domini Regis † ultra Mare, et ‡ Protectio. 21 E. 4. 79. b. 2 Inſt. 125. ſays, that there was another Eſſoign, viz. In Terram Sanctam.

In Terram Sanctam. —— * See Stat. Weſtm. 2. 13 E. 1. cap. 17. and the Expoſitions thereupon, 2 Inſt. 393, 394. And ſee (A) ſupra.

† See Stat. Weſtm. 1. 3 E. 1. cap. 44. and the Expoſitions thereupon. And ſee (A) ſupra. And ſee (D) pl. 16 &c.

‡ See tit. Protection.

(D) What Perſons ſhall have Eſſoign.

Fol. 818.

1. A Corporation aggregate, as Mayor and Commonaly, Dean and Chapter cannot have an Eſſoign de Malo veniendi, nor Malo lecti, becauſe theſe are to excuſe coming in proper Perſon, but theſe Corporations cannot come in proper Perſon, nor can they be ſick. 21 E. 4. 79. Curia. Br. Eſſoign, pl. 114. cites S. C.—Bendl. 121. pl. 154. Trin. 4 Eliz. The Mayor &c. of Lincoln's Caſe, Eſſoign was denied, and cites 21 E. 4. 79. —— S. C. cited

cited Ld. Raym Rep. 79. —— A Corporation aggregate are not intitled to an Eſſoign in any Perſonal Action; Per tot. Cur. Rules of Pract. in C. B. 8 Hill. 12 Ann. Symmonds v. Totneſs (Mayor of)

Br. Eſſoign, pl. 114. cites S. C. that they ſhall not have Eſſoign of de Servitio Regis, *nec de Ultra Mare, nec de Terra Sancta*; for by common Intendment they cannot all be in ſuch Condition at the ſame Time.

2. **Corporations aggregate** ſhall not have **Eſſoign** de Servitio Domini Regis ultra Mare. 21 E. 4. 79. b.

* And becauſe the Tenant being demanded did not come the Demandant recovered Seiſin of the Land. Br. Eſſoign, pl. 35. cites 7 H. 4. 6. —— Fitzh. Eſſoign, pl. 135 cites S. C.

3. If a Man tenders his Law by Attorney, **at the Day when he ought to perform his Law, his** Attorney ſhall not be eſſoigned; **becauſe he ought to appear in Perſon, and not by Attorney.** 21 E. 4. 79. b. * 7 H. 4. 6. for by Wager of Law **the Attorney is out of Court.** † 4 H. 6. 11.

† Br. Eſſoign, pl. 73. S. C. but not directly S. P. —— Fitzh. Eſſoign, pl. 93. cites S. C.

* Br. Eſſoign, pl. 75. cites S. C —— Fitzh. Eſſoign, pl. 93. cites S. C.

4. But **in this Caſe the** Tenant himſelf **may be eſſoigned.** 7 H. 4. 3. * 4 H. 6. 11.

* Br Diſcontinuance, pl. 6. cites S. C. —— Fitzh. Eſſoign, pl 155. cites S. C. —— After a Man has made an Attorney, the Attorney ſhall be eſſoigned, and not the Party. Br. Eſſoign, pl. 129 cites 40 E. 3. 34. —— By the Statute 12 E. 2. Stat. 2. Eſſoign lies not where the Party has an Attorney in his Suit.

5. If a Man has Attorney **in his Plea,** he himſelf cannot be eſſoigned; * 45 E. 3. 10 b. **for though he himſelf cannot come, yet his Attorney may.** 12 H. 4. 25. b. 1 E. 3. 2.

Br Eſſoign, pl. 46. cites S. C and if upon Trial it be found that he had Attorney, the Defendant ſhall have Writ to the Biſhop.

6. As **in a** Quare Impedit, **the Plaintiff cannot be eſſoigned,** and **his Attorney not eſſoigned alſo.** 14 H. 4. 12. b.

* Br Eſſoign, pl. 64. cites S. C. ——Fitzh Eſſoign, pl. 103. cites S. C. —— † Eſſoin *de Malo lecti* lies well, though the Tenant has Attorney in Court. Per Markham and Newton. For per Newton this Eſſoign lies not but only in Writ of Right, and there none can join the Miſe upon the mere Right, but the Maſter of the Attorney. Quod nota. Br. Eſſoign, pl. 66. cites 19 H. 6. 57. —— Br. Eſſoign, pl. 66. cites S. C.

7. **A Man who hath Attorney in the Plea cannot be eſſoigned, the** Attorney **not being** eſſoigned alſo. * 19 H. 6. 51. † 57. ‡ 21 E. 3. 45. b. 61. b. 21 Aſſ. Placito 17. adjudged.

‡ Br. Eſſoign, pl. 60. cites S. C.

* Br. Eſſoign, pl. 64. cites S. C. —— Br Eſſoign, pl. 66. cites S. C. that where the Party has Attorney in Court he cannot be eſſoigned de ultra Mare, nor verſus Sanctam Terram, and therefore not de Servitio Regis. Per Forteſcue.

8. **A Man cannot be aſſoigned by an Eſſoign** de ultra Mare, **where he hath Attorney in the Plea not eſſoigned.** * 19 H. 6. 61. b.

Any Eſſoign.

See pl. 8. in the Notes.

9. **Thus it is of an Eſſoign** ad Terram ſanctam. 19 H. 6. 61. b.

10. So it is of an Eſſoign de ſervitio Regis. 19 H. 6. 61. b. See pl. 8. in the Notes.

11. But a Man may be eſſoigned of an Eſſoign de malo lecti, where he has an Attorney in the Plea not eſſoigned, becauſe this Eſſoign lies only in a Writ of Right where no one may join the Miſe upon the mere Right, but the Maſter. 19 H. 6. 61. b. Br. Eſſoign, pl. 66 cites S. C. & S. P. by Markham and Newton.

12 In an Action brought by Baron and Feme, the Feme cannot be eſſoined, if the Baron makes Default; for the Default of the Baron is the Default of the Feme. 11 H. 6. 23. b.

13. But the Feme may be eſſoigned if the Baron appears. 11 H. 23. b.

14. If there be a Variance between the Warrant of the Eſſoign and the Writ, it ſhall be quaſhed. 18 E. 4. 4. b. *Præcipe* quod reddat againſt J. S. and Eſſoign *was caſt for J. S of the County of K.* and therefore ill by this Surpluſage by all the Juſtices Br. Eſſoign, pl 112. cites 18 E. 4. 4.

Eſſoign was *caſt for J. Michiel*, where the *Writ was Michel*, and it was not amended; For the Eſſoign ought to come in before the Writ comes in; Quære of other Eſſoigns which come upon the Iſſue or otherwiſe after the Original. Br. Eſſoign, pl. 143. cites 30 H. 6. 1.

15. If Aid be granted of Baron and Feme, and at the Day the Baron be eſſoigned de ſervitio Regis, and at the Day which he hath by the Eſſoin he does not bring his Warrant, by which there is a Default in him, yet the Feme may be eſſoigned, though ſhe cannot be received. 21 E. 3. 13. adjudged. The Feme was eſſoigned de ſervitio Regis. Br. Eſſoign, pl. 53 cites S. C——

Fitzh. Eſſoign, pl. 8. cites S. C.

Eſſoign de Servitio Regis.

16. A Feme may be eſſoigned de ſervitio Regis. 17 E. 3. 3. admitted. Fitzh. Eſſoign, pl. 1. cites S. C. reddat was

—— Br. Eſſoign, pl. 64. cites 19 H. 6. 51. S. P. per Newton —— A Præcipe quod brought againſt Baron and Feme; the Feme was eſſoigned of the Service of the King. Br. Eſſoign, pl. 128. cites 40 E. 3. 21.

17. A Feme may be eſſoigned de ſervitio Regis, becauſe Nurſe to the King's Child. 19 H. 6. 51. b. Br. Eſſoign, pl. 64. cites S. C per

Newton. —— Fitzh. Eſſoign, pl. 103. cites S. C. —— But unleſs ſhe be a Nurſe, or a Midwife, or commanded ad Ventrem inſpiciendum, it lies not de Servitio Regis by the Stat. 12 E. 2. Stat. 2. becauſe the Party is a Woman.

18. So ſhe may be eſſoigned de ſervitio &c. becauſe Waſher-Woman to the King. 19 H. 6. 51. b. Br. Eſſoign, pl. 64. cites S. C. per

Newton. —— Fitzh. Eſſoign, pl. 103. cites S. C.

19. A Man may be eſſoigned becauſe he is the King's Carver. 19 H. 6. 51. b. Fitzh. Eſſoign, pl. 103. cites S. C.

20. In *Præcipe* quod reddat the *Tenant made Attorney*, and *N. demanded Conuſance of the Plea and had it*, and Day was given in the Franchiſe, and there the *Tenant caſt Eſſoign*, and the Demandant challenged it, becauſe *he had Attorney in Bank not removed.* And ſo ſee that he who has Attorney ſhall not be eſſoign'd himſelf, and the Franchiſe ſhall not allow it, becauſe *it does not appear in the Record which is ſent to them that he has Attorney*, and becauſe the *Demandant would not Count they abated this Writ*, and *he brought Error*, and aſſign'd the

Matter of the Attorney and Eſſoign above, and the Judgment was revers'd. Br. Eſſoign, pl. 60. cites 21 E. 3. 45

21. In *Coſinage* the *Tenant pleaded to Iſſue by Attorney*, and the *Tenant was eſſoign'd*, and therefore ill, becauſe he had Attorney in Court, and after the *Roll made mention that the Attorney was eſſoign'd after Iſſue*, and therefore well. Br. Eſſoign, pl. 125. cites 40 E. 3. 34.

22. In *Formedon* the *Tenant vouch'd the Baron and Feme* who *enter'd into the Warranty, and* after *made Default*, by which *iſſued Petit Cape in Terra petita*, and the *Demandant at the Return of it pray'd Seiſin of the Land*, and the *Baron was eſſoign'd de ſervitio Regis*, and the *Feme appear'd*; Portman ſaid the Eſſoign does not lie; For the *Vouchee has Attorney in Court*, and alſo he who caſts this Eſſoign *ought of Right to warrant it*, and does not, and the Attorney is not remov'd, therefore he ought to be eſſoign'd, and not his Maſter, and Newton agreed that this manner of Eſſoign lies for the Attorney, and therefore the Party ſhall not have it, his Attorney not being remov'd, and the Eſſoign was diſallow'd. Br. Eſſoign, pl. 64. cites 19 H. 6. 51.

Fol. 819.

(E) What Perſon may be eſſoigned.

Br. Eſſoign, pl. 31. cites S. C.—— Fitzh. Eſſoign, pl. 131. cites S. C.

1. IN Writ of Annuity againſt Parſon, after Aid granted and the Praiees are aſſoigned, at another Day the Attorney of the Plaintiff may be eſſoigned. 2 H. 4. 4.

This Manner of Eſſoin lies for the Attorney. Br. Eſſoign, pl. 64 cites S. C.

2. The Attorney may be eſſoigned de Servitio Regis as well as by a common Eſſoign; for the King may command him to go in his Service. 19 H. 6. 51.

Br. Eſſoign, pl. 43. cites 12 H. 4 25. but not S. P.——Fitzh. Eſſoign, pl. 174, cites S C.

3. The Attorney of the Tenant may be eſſoigned without the Tenant himſelf. 12 H. 4. 26.

Br. Eſſoign, pl. 38. cites S. C. and

4. If a Man hath two Attornies in a Plea both ſhould be eſſoigned, and not one only. 11 H. 4. 54.

the one being eſſoigned after Appearance without the other, it was alleged to be Diſcontinuance, and the Opinion was that it was no Diſcontinuance, and principally becauſe the Eſſoign was adjudged and adjourned before Exception taken; but Quære; for it was adjourned. See (A. 2) in the Notes there.——Fitzh. Eſſoign, pl. 174. cites 12 H. 4. 25. [a Continuation of the S. C.]——Br. Diſcontinuance de Proceſs, pl. 10. cites 11 H. 4. 53.

Br Eſſoign, pl. 43. cites S C. but not S. P.——Fitzh. Eſſoin, pl. 174. cites S. C.

5. This is true where the Attornies are made jointly, for there the one hath no Power without the other. * 12 H. 4. 26. H. 6. 20.

* Fitzh. Eſſoign, pl. 101. cites S. C.

6. But if the Warrant be in the Disjunctive, ſcilicet, talem vel talem, the one may be eſſoigned without the other, and it ſhall be good. 12 H. 4. 26. Dubitatur. Contra * 18 H. 6. 20.

7. If

7. If the Attorney wages his Law, and hath a Day for his Maſter to perform it, at this Day the Attorney cannot be eſſoigned; becauſe the Maſter ought to perform it in Perſon, and the Day is given to him, and ſo the Attorney is out of Court. 19 H. 6. 30. b. Br. Eſſoign, pl. 63. cites S. C. —— In *Dower at the Grand Cape the Tenant by Attorney waged his Law of non Summons*, and had Day &c. and at the Day *one caſt Eſſoign for the Tenant*, and it lay well *notwithſtanding he had Attorney in Court*; For at this Day the *Tenant himſelf ought to appear in Perſon to make the Law*, the Eſſoign lies well for him who ought to appear and do the Thing &c. which is the Tenant himſelf, as here, and not his Attorney. Br. Eſſoign, pl. 75. cites 4 H. 6. 11.

8. In *Formedon after the View the Tenant was eſſoigned*; Huls. ſaid *he has Attorney of Record*, and yet the Eſſoign was allowed upon Challenge; Quod nota; and there it was *agreed, that if he had not Attorney in Court that he himſelf may be eſſoigned*; Quod nota. Br. Eſſoign, pl. 118. cites 2 H. 5. 2. and Fitzh. Eſſoign, 127.

9. In *Præcipe* quod reddat the *Tenant was ſuffered to have the View where the View did not lie*, and *at the Day of the Return of the Writ of View* the *Tenant would have been eſſoigned*, and *was not ſuffered*, becauſe the View does not lie in this Caſe. Br. Eſſoign, pl. 142. cites 10 H. 7. 6.

10. If the *Tenant in Præcipe* quod reddat *prays the View by Attorney*, his Attorney ſhall be eſſoigned upon the View, but *if he himſelf prays the View in proper Perſon*, then, by ſeveral, none ſhall be eſſoigned upon View but the Tenant himſelf; For *after Proceſs upon a Voucher* &c. he himſelf ſhall be eſſoigned, and by Conſequence likewiſe upon the View. Br. Eſſoign, pl. 116. cites 33 H. 8.

11. In *Dower againſt Baron and Feme*, the *Husband appears and was eſſoigned.* The *Wife makes Default*, as well ſhe might, becauſe they *appear by ſeveral Attornies*, and the *ſame Day is given to her*, at which Day *ſhe appeared and was eſſoigned*, and then the *Husband makes Default*, and Idem Dies given to him; and it was reſolved, that the Huſband and Wife might have ſeveral Eſſoigns. Noy 144. Raynor v. Holcroft & Ux'.

(F) Who may be eſſoign'd; and at what Time.

1. THE Tenant may be eſſoigned after the Vouchee is eſſoign'd before the Vouchee hath enter'd in the Warranty; for before this the Tenant is Party to the Action. 45 E. 3. 24. b. Br Eſſoign, pl. 28. cites S. C. —— Fitzh. Eſſoign, pl. 67. cites 23 Aſſ. 15. —— [N. B. 45 E. 3. 24. b. and 23 Aſſ. 15. is the S. P. and ſeems to be S. C.] —— After the Tenant has vouched, the Tenent may be once eſſoigned in Proceſs. Br. Eſſoign, pl. 12. cites 34 H. 6. 16.

2. If B. be vouched and upon a Summons ad Warrantizandum he is eſſoigned of a common Eſſoign, and afterwards of an Eſſoign de Service le Roy, and doth not bring his Warrant at the Day which he hath for the Eſſoign, yet on the ſame Day the Tenant may be eſſoigned; for none is Party but the Tenant himſelf till the Vouchee hath entered in the Warranty. 23 Aſſ. 15. adjudged. Br. Eſſoign, pl. 28. cites 42 E. 3. 24. S. P. —— And the Aſſiſe was adjudged and adjourned, and Idem Dies given to the Vouchee. Br. Eſſoign, pl. 95. cites 23 Aſſ. 15.

3. On a Sequatur ſub ſuo Periculo againſt a Vouchee, if the Writ be not returned the Tenant may be eſſoigned. 11 H. 4. 72. b. And the Eſſoignor, the Tenant, prayed Sequatur ſicut alias againſt the Vouchee, and had it &c. Br. Eſſoign, pl. 39. cites S. C.

4. If

Br. Eſſoign, pl. 40. cites S. C. and ſays this Point was touched in it, but adds Quære hoc.

4. If the Vouchee appears on a Sequatur ſub ſuo Periculo returned and demands the Lien, and the Tenant ſhews a Deed, and the Vouchee denies it, on a Venire Facias returned the Tenant may be eſſoigned. 11 H. 4. 82. But Quære.

In Præcipe quod reddat, the Tenant was eſſoigned, and after the Parol was without Day by Demiſe of the King, by which the Demandant ſued Reſummons, and the Tenant caſt Eſſoign, and the Demandant challenged it for the Cauſe aforeſaid; et non allocatur. Br. Eſſoign, pl. 132. cites 21 E. 3. 26.

5. If on Default of the Tenant, he in Reverſion be received, and after Iſſue the Parol is diſcontinued by Demiſe of the King, and a Reſummons is ſued ſolely againſt the Tenant by Reſceit, he may be eſſoigned. 1 E. 3. 7. adjudged.

So in Detinue the Jury found for the Plaintiff, and after the Parol was without Day by Demiſe of the King, by which the Demandant ſued Reſummons, and the Defendant caſt Eſſoign, and it was Diſallowed per Cur. quod nota. Br. Eſſoign, pl. 124. cites 1 R. 3. 4.

6. *Annuity againſt a Parſon*, the Sheriff *returned Quod Clericus eſt Beneficiatus non habens laicum feodum*, by which *Venire Facias iſſued to the Biſhop*, and at the Day the *Parſon caſt Eſſoign*, and the Eſſoign was rejected; For *the Biſhop is Party now*. Br. Eſſoign, pl. 52. cites 38 E. 3. 21.

7. In *Præcipe* quod reddat, the *Tenant vouched* and *Proceſs continued againſt the Vouchee till the Sequatur returned* &c. at which Day the *Tenant was eſſoigned*; quod nota that Eſſoign *lies after Appearance and before Iſſue, and upon the Sequatur, but* by 39 E. 3. 28. it does *not* lie *for the Vouchee* at this Day, per Thorp and Belk. *becauſe* it appears by the Proceſs that the Vouchee *was never ſummon'd*. Br. Eſſoign, pl. 119. cites 45 E. 3. 19.

8. In *Præcipe* quod reddat, *as to part they were at Iſſue of Nontenure*, and *as to the reſt the Tenant vouched*, and *Proceſs continued to the Sequatur* &c. and *Nul breve returned*, and *as to this the Tenant was eſſoigned*; And per Thirn the Eſſoign does not lie; For the *Tenant ought to appear upon the Iſſue for the other Parcel, and then he may be eſſoigned*, and appear all at one and the ſame Day upon one and the ſame Original. Br. Eſſoign, pl. 40. cites 11 H. 4. 82.

9. *And* after the *Tenant was demanded for the other Parcel and made Default*, and the *Eſſoign ſtood for this Parcel in the Voucher, but* it was *not challenged for the Demandant*; therefore Quære. Ibid.

10. *Entry in Nature of Aſſiſe*, the *Tenant ſaid that he held for Life the Reverſion to J. S. and prayed Aid* of him and had it, and *at the Summons ad Auxiliand' returned the Tenant was eſſoigned*, and at the Day of the Eſſoign the *Prayee was eſſoigned*, and the *Eſſoign adjudged* &c. and at the Day &c. the *Prayee would have been eſſoigned again*, and was ouſted per Cur. For it is like to an Imparlance; For at the Day of Imparlance the Defendant or Tenant ſhall not be eſſoigned. Br. Eſſoign, pl. 115. cites 22 E. 4. 14.

(G) Who may be eſſoigned for a Collateral Reſpect.

Not a Man in Priſon.

1. IF a Man in Debt be attached in his Body, and findeth Mainpriſe, yet at the Day of the Return he may be eſſoigned of an Eſſoign quia Profecturus, for ſuch Protection hath always been allowed in ſuch Caſe, although he remains in Ward. 28 E. 3. 94. b. adjudged. Fitzh. Protection, pl 92. cites S. C.

2. [But] if a Man be upon Mainpriſe he cannot be eſſoigned en Service le Roy, or otherwiſe be eſſoigned; for he is in a Manner in Priſon. 9 H. 6. 58. The Mainpriſe *affirms him to be in Priſon and the Eſſoign at Large*; But a Protection ſhall be allowed. Note the Diverſity. Br. Eſſoign, pl. 4. cites S. C.

3. But if a Protection be caſt for a Man who is let to Mainpriſe, * by which the Parol is put ſine Die, and afterwards a Reſummons is ſued, he may now be eſſoigned de Service le Roy, notwithſtanding he was mainpriſed. 22 E. 3. 10. b. adjudged. * Fol. 820.

4. In Debt if the Defendant appears by a Cepi Corpus, and at the Day the Plaintiff is eſſoigned, the Defendant ſhall have a Day by Eſſoign alſo without Mainpriſe, 19 H. 6. 80. becauſe the Plaintiff has waived his Benefit by his Eſſoign. Defendant ſhall have Idem Dies without Mainpriſe, whereas had the Plaintiff appeared, the Defendant ſhould anſwer in Ward, and afterwards ſhould be by Mainpriſe till the End of the Plea. Br. Eſſoign, pl. 67. cites S. C.

5. If the Plaintiff in Replevin imparls till another Day of the ſame Term, at this Day he cannot be eſſoigned, becauſe this Day and the firſt Day are only one Day in Law. 11 H. 6. 31. b. Br. Eſſoign, pl. 121. cites S. C. but ſpeaks only of the Day of Imparlance Generally, viz. that at the Day of Imparlance the Plaintiff ſhall not be eſſoigned; for as the Defendant ſhall be condemned if he does not appear at the Day of Imparlance, ſo ſhall the Plaintiff be nonſuited if he does not appear at the ſame Day. —— Fitzh. Eſſoign, pl. 98. cites S. C accordingly.

6. The ſame Law ſhall be, if he had imparled till another Term he could not be eſſoigned at the Day. 11 H. 6. 31. adjudged. Br. Eſſoign, pl. 121. cites S. C. ſee pl. 5. in the Note.

7. The ſame Law ſhall be if the Defendant imparled till another Term; no Eſſoign would lie for him at the Day. 11 H. 6. 31. See pl. 5. in the Note.

8. If in Replevin a Day be given to the Parties till another Term, they may be eſſoigned at the Day, for this is the Act of the Court. 11 H. 6. 31. b.

9. An Eſſoign lies not for him who is ſeen in Court. * 11 H. 53. * Br. Eſſoign, pl. 122. cites S. C. —— It is ſo enacted by Stat. 12 E 2. Stat. 2. —— And where the Defendant's Attorney was eſſoigned, yet becauſe the Attorney was preſent, they recorded his Preſence, and the Eſſoign was quaſhed. Br. Eſſoign, pl. 11. cites 34 H. 6. 4.

Br. Eſſoign, pl. 56. cites S. C. and there S. P. ſeems admitted; for the Court amended the Eſſoign and caſt it againſt all.

10. **In a Writ by** ſeveral Præcipes againſt three, **the Plaintiff** cannot be eſſoigned againſt one, and appear in Perſon againſt the others, **becauſe it is plain his Eſſoign is falſe.** 21 E. 3. 36. b. **adjudged.**

Br. Eſſoign, pl. 56. cites S. C. and Quære, Whether he may be eſſoigned againſt the one and appear againſt the other by Attorney by Warrant; And Brooke ſays, that it ſeems he may not. —— [But the Year-book gives no Opinion concerning it]

11. Nor **in this Caſe can he be** eſſoigned againſt the one, and appear by Attorney againſt the others; **for he might as well have made Attorney for all as for them.** 21 E. 3. 36. **quære.**

* Br. Eſſoign, pl. 122. cites S. C. and ſee (A) pl. 4. —— Fitzh. pl. 5. cites S. C. ——

12. **In Action againſt** Baron and Feme, **the** Feme may be eſſoigned **though the** Baron makes Default. * 11 H. 6. 53. 30 E. 3. 19. b. **Contra** 11 H. 6. 23. **becauſe the Default of the Baron is the Default of the Feme.**

13. So if Baron appears **the Feme may be eſſoigned.** 11 H. 6. 23. **b.**

In Treſpaſs it was agreed that Eſſoign of the Service of the King, nor other *Eſſoign caſt for the Baron will not ſerve the Feme.* Br. Eſſoign, pl. 18. cites 35 H. 6 4. —— Br. Eſſoign, pl. 122. S. C. but not S. P. —— Fitzh. Eſſoign, pl. 99. cites 11 H. 6. 53. S. P. [and it is the S. C. continued.]

* Fitzh. Eſſoign, pl 9. cites S. C. † Upon ſuch Return Thorp would not allow the Eſſoign. Br. Eſſoign, pl. 91. cites S. C. —— The Eſſoign was adjudged; for otherwiſe the Plaintiff ſhould be *nonſuited*, which would be an *Inconvenience*. Br. Eſſoign, pl. 93. cites 21 Aſſ. 11.

14. **If** in Aſſiſe **returned the** Plaintiff hath not found Pledges, **yet he may be eſſoigned; for he may be demanded and nonſuited, and notwithſtanding** the Writ **is not well ſerved, yet it** is ſerved in a Manner. * 21 E. 3. 54. b. **adjudged.** 21 Aſſ. pl. 11. † **Contra** 29 Aſſ. 46. **per Thorpe.**

In *Aſſiſe* the Plaintiff was eſſoigned, and the Writ indorſed Tarde, notwithſtanding which the Juſtices adjudged and adjourned the Eſſoign Quære &c. Br. Eſſoign, pl. 92. cites S. C. —— Fitzh Eſſoign, pl. 65. cites S. C.

15. **If an** Original **be** returned * tarde, **yet the Plaintiff may be eſſoigned.** 19 Aſſ. 12.

In *Præcipe* quod reddat the *Tenant vouched*, and *Proceſs continued to the Sequatur*, which was returned *Tarde*, and the Vouchee was eſſoigned, et non allocatur; for he cannot be eſſoigned; for he was never ſummoned. Br. Eſſoign, pl. 79. cites 39 E. 3. 28.

16. *Bill againſt one in Cuſtodia Mareſchalli, at the Venire Facias the Defendant caſt Eſſoign de Servitio Regis*, and the Eſſoignor ought of Right to warrant it that his Maſter is in Servitio Regis, and ſo he was ready to do, and it was caſt at the ſecond Day, and yet well as to this; For the Statute of the *firſt Day is intended of common Eſſoign only*, and the Statute of *Marlebridge*, *which gives that none ſhall be ſworn by Eſſoign warranted*, *is* alſo *intended of the common Eſſoign*, and not of this Eſſoign; but it was held by all the Juſtices, that this Eſſoign does not lie in this Caſe; for he ſhall be intended always in Ward, and though he be *by Mainpriſe*, yet he *is in Ward*, and alſo no Eſſoign lies upon the Original here, and *where it does not lie upon the Original it does not lie upon the Proceſs*, and upon Bill there is no Day certain, as from 15 to 15. as in Actions perſonal, or as in Plea of Land, and therefore cannot be adjourned to any Day certain, as it ought to be in other Actions. Br. Eſſoign, pl. 106. cites 5 E. 4. 70.

17. *Marſhal* or *Crier of the Court* who are impleaded ſhall not be eſſoigned; for it ſhall be intended that they are always there in Perſon. Ibid.

(H) Lies; againſt whom.

1. IN Quare Impedit **by the** King **the Defendant may be eſſoigned.** * 3 H. 4. 15. b. † 7 H. 4. 39. b. 20 E. 3. **Eſſoign** 24. * Br Eſſoign, pl. 33. cites S. C.

† Ibid. pl. 36. cites 7 H. 4. 39. —— Fitzh. Eſſoign, pl. 134. cites S. C.

2. **In Writ** of Right by the King **a common Eſſoign, and Eſſoign** de Service le Roy **lies for the Tenant. Dubitatur. Kelleway incerti Temporis,** 135. 119.

3. In Aſſiſe, *Writ of the King* came, which *mentioned that it was ordained by him and the Grandees of the Land that Aſſiſe brought againſt any who was in Servitio Regis ſhall thenceforth be continued, and teſtified that the Defendant was in Servitio Regis at Calice commanding them to continue the Aſſiſe*, and the Writ was *licet nomen ipſius J. poſtpoſitum ſit in brevi noſtro originali* &c. *Aſſiſam illam quamdiu ſteterit in obſequiis noſtris vel quouſque aliud inde vobis duxerimus demand'* &c. and by this the Aſſiſe was continued notwithſtanding the Statute, which wills that for the Grand Seal, nor Petit Seal, the Court ſhall not ſurceaſe. Br. Superſedeas, pl. 20. cites 22 Aſſ. 9.

(I) Lies; for what Cauſes.

1. A **Feme may be eſſoigned** de Service le Roy, **becauſe** Nutrix Dominæ Iſabellæ Filiæ Domini Regis. 28 E. 3. 96. b. Fitzh. Eſſoign, pl. 40. cites S. C. —— See ſupra (D) pl. 17. and the Notes there.

(K) At what Time it may be.

1. IN Aſſiſe, **if the** Parties demur, **and upon this they are** adjoured for Difficulty, **and the Aſſiſe is awarded, and a** Reſummons **awarded at the Return thereof in Pais, the Tenant may be aſſigned.** 30 Aſſ. 51. **adjudged becauſe this is** but a meſne Proceſs. Br. Eſſoign, pl. 98. cites S. C. but not S. P.

2. But **if an Aſſiſe be** diſcontinued by not coming of the Juſtices, **upon which** * **a Re-ſummons is ſued, at the Return hereof the Tenant may be eſſoigned; For this** revives the Original, **and is of the Nature of the Original.** * 30 Aſſ. 51. **adjudged.** * Fol. 821. The Reſummons revives the Original, but not all that was done before. Br. Eſſoign, pl. 42. cites 12 H. 14 —— * Br. Eſſoign, pl. 98. S. P. and cites S. C.

In Aſſiſe the Parties were at Iſſue, and after the Parol became without Day by not coming of the Juſtices, and Re-attachment was ſued by the Plaintiff and Re ſummons againſt the Jurors, and at the Return thereof the Tenant was eſſoigned, and it was adjudged and adjourned per Judicium, and yet upon the Aſſiſe he cannot caſt Eſſoign. Br. Eſſoign, pl. 134. cites 44 Aſſ. 24.

Though no Eſſoign for the Tenant lies in Aſſiſe of Novel Diſſeiſin, yet if the ſame be diſcontinued by the not coming of the Juſtices, or by the Demiſe of the King, in a Re-attachment the Tenant ſhall be eſſoigned; And ſo ſhall the Tenant be in a Re-ſummons after a Diſcontinuance in Aſſiſe of Mortdanceſtor. 2 Inſt. 249. Cap 42.

3. In *Aſſiſe* the *Tenant was eſſoigned in B R.* and becauſe it was *at the End of the Term, ſo that Day cannot be given in the ſame Term, and the Place was to remove* &c. where Adjornment cannot be made out of the County, the Tenant went ſine Die without Amercement of the Plaintiff. Br. Eſſoign, pl. 90. cites 12 Aſſ. 27.

4. In Aſſiſe of *Mortdanceſter* the Tenant *Infant pleaded Eſtoppel, which was no Eſtoppel*, by which for the Infant *Aſſiſe awarded at large, and Re-ſummons* awarded per Cur. *as well againſt the Jury as the Party*, Quod *Mirum!* For the Party appeared and pleaded before, and the *Tenant at the Day caſt Eſſoign*, and it was quaſhed per Cur. And ſo ſee that *upon Re-ſummons*, which is a meſne Proceſs, the *Tenant ſhall not be eſſoined.* Br. Eſſoign, pl. 98. cites 30 Aſſ. 51.

5. In *Præcipe* quod reddat *Conuſance of the Plea was granted*, and the *Tenant ſued Re-ſummons for failer of the Right*, and at the Day of Return of it the Tenant was eſſoigned, and admitted. Br. Eſſoign, pl. 78. cites 39 E. 3. 17.

6. In *Debt*, they were at *Iſſue upon the Cuſtom of London*, and *Day was given to certify it*, and at the Day the *Mayor of London certifyed it by their Recorder*, and *then the Defendant was eſſoigned*, and it lay well; Per Cur. Br. Eſſoign, pl. 113. cites 21 E. 4. 16. 74. 78.

7. So *upon Certificate of Baſtardy or Ne unques Accouple* &c. *to be certifyed by the Ordinary*, and if the Writ be returned or not, or deliver'd of Record or not, the Eſſoign lies, and *if it be not returned another Writ may Iſſue, Sicut Alias returnable the ſame Day* that is given upon the Eſſoign. Br. Eſſoign, pl. 113. cites 21 E. 4. 16. 74. 78.

Br. Jours, pl. 85. cites S. C.

8. In *Quare Impedit* they were *at Iſſue in the Time of R.* 3. and *Venire Facias returned*, and after it was *diſcontinued by Demiſe of the King*, and *Re-ſummons* was awarded, and the *Sheriff did not return it*, and *another Summons* was ſerved and *returned againſt the Party and the Jury*, and the *Defendant was eſſoigned*, and it lay well by all the Juſtices, except Nele and Townſend, though it be not at the firſt Day, and *it is the firſt Day after the Summons ſerv'd and return'd*, and the Jury at that Day ſhall not be amerced, *before the Writ ſerv'd and return'd no Party was demandable*, and after the Eſſoign was adjudg'd and adjourn'd. Br. Eſſoign, pl. 101. cites 1 H. 7. 8.

(L) By whom it may be caſt.

Common Eſſoign.

Br Eſſoign, pl. 42. cites 12 H. 4. 14. per Hanke.

1. IT is not material whether there be any ſuch Perſon in rerum Natura who caſts the common Eſſoign. 12 H. 4. 15.

2. For the Name of him who caſts it ſhall not be entered. 27 E. 3. 82. b.

(L. 2) *Service le Roy.*

3. **There** ought to be ſuch a Perſon in rerum Natura who caſts this Eſſoign; **otherwiſe it is not good**; becauſe he ought to avow it in proper Perſon. * 12 H. 4. 24. b. 27 E. 3. 82. b. * Br. Eſſoign, pl. 44 cites S. C. —— Fitzh. Eſſoign, pl. 139. cites S. C.

4. For **the** Name **of him who caſts the Eſſoign** ought to be entered. 27 E. 3. 82. b.

5. **The Eſſoign may be caſt** by one who is within Age. 21 E. 3. 33. b. Br. Eſſoign, pl. 55. cites S. C. —— Ibid. pl. 133. cites S. C.

(M) How it is to be caſt.

Common Eſſoign.

1. **AN Eſſoign cannot be caſt** by the Party in Perſon. 4 H. 6. 6. b. * 8. 4 H. 6. 6. b. Abbot of Bermondſey

v. Rois. —— Br. Eſſoign, pl. 73. cites S. C. —— Fitzh. Eſſoign, pl. 91. cites S. C. * Br. Eſſoign, pl. 74. cites S. C.

2. **He who is** let to Mainpriſe cannot **caſt an Eſſoign** de Service le Roy by himſelf; **for the Law adjudges ſuch a one to be always in Priſon.** 4 H. 6. 8. Br. Eſſoign, pl. 74. cites S. C and yet it was agreed there that Protection quia profecturus lies in this Caſe.

Eſſoign *de Service.*

3. **He who caſts his Eſſoign ought to** avow in proper Perſon. 12 H. 4. 15. 24. b.

(N) In what Caſes he ought to ſwear the Eſſoign to be true.

1. **IF a Man caſt an** Eſſoign de Service le Roy, **he ought to ſwear the Eſſoign true.** * 19 H. 6. 51. b. 20. b. * Br. Eſſoign, pl. 64. cites S. C. Per Portman. —— S. P. Br. Eſſoign, pl. 106. cites 5 E. 4. 70.

2. Eſſoignor was ſworn, who *ſaid that the Plaintiff was not in Servitio Regis*, and ſo the Plaintiff was *nonſuited*. Br. Eſſoign, pl. 65. cites 19 H. 6. 51.

3. He that caſts the Eſſoign *muſt appear in Perſon* in Court, to the End he may be ſworn &c. and that *Day* may be *given to bring in the Warrant* for the Eſſoign. 2 Inſt. 314.

(O) What ſhall be a good Swearing.

For the *Statute* of challenging Eſſoigns *wills that the Eſſoigner teſtify in Court &c.*

1. IT is not enough for him who caſts an Eſſoign de Service le Roy to ſay, That he is inform'd that his Maſter is in the Service of the King, unleſs it is expreſsly ſaid, that he is in Service of the King. 20 H. 6. 20. b.

Br. Eſſoign, pl. 5. cites S. C.

(P) How it ought to be enter'd.

In reſpect of the Thing.

S. P. per Hanke and Thirne, where the Rent is as of Inheritance.

1. IF the Tenant be eſſoign'd in Præcipe quod reddat of a Rent, this ſhall be enter'd de placito terræ, and not de Placito annui Redditus. 11 H. 4. 43. b.

Br. Eſſoign, pl. 37. cites S. C.

In reſpect of the Action.

Fol. 822.

Br. Eſſoign, pl. 47 cites S. C——
Fitzh. Eſſoign, pl. 142. cites S. C.

2. In Writ of Deceit, if the Eſſoign be eſſoign'd in Placito Deceptionis, this is not good. 14 H. 4. 18.

Br. Eſſoign, pl. 47 cites S. C.——
Fitzh. Eſſoign, pl. 142. cites S. C.

3. But if it be enter'd in Placito Deceptionis & Tranſgreſſionis, this is good. 14 H. 4. 18. b.

Br. Eſſoign, pl. 47. cites S C.——
Fitzh. Eſſoign, pl. 142. cites S. C.

4. So if it be only in Placito Tranſgreſſionis, yet it is good. 14 H. 4. 18. b.

5. In Writ de rationabili parte Bonorum an Eſſoign caſt by the Defendant ſhall be enter'd in Placito debiti, for this is a Debt. 17 E. 3. 17. b.

6. In Writ of Annuity, if the Defendant be eſſoign'd this ſhall be enter'd in Placito debiti. 17 E. 3. 17. b.

7. In a Recordari the Eſſoign of Service le Roy for the Defendant ſhall be entered de Placito detentionis Averiorum & Catallorum, and not de Placito captionis & detentionis &c. 27 E. 3. 82. b.

8. In Action upon the Caſe *againſt the Mayor and Commonalty* of W. *Eſſoign was caſt for them by their Name of Corporation in Plea of Treſpaſs*, and *another Eſſoign was caſt for them, in which Eſſoign all the Writ was rehears'd*, and [Brooke ſays] this ſeems to me to be for Doubt, *if Eſſoign in Plea of Treſpaſs ſhall be intended in the General Writ of Treſpaſs*, which Matter is not argued there. Br. Eſſoign, pl. 114. cites 21 E. 4. 79.

9. After

9. After the *Parties are at Iſſue*, and the *Defendant is eſſoign'd*, the Entry is Quod *jurata* &c. *ponitur in reſpectu hic* &c. *uſque talem Diem*, and *does not ſay* Quod *idem dies datus eſt partibus prædictis* &c. *in the Plea Roll, but not in the Eſſoign Roll*, and by all the Prothonotaries where ſuch Eſſoign is caſt, and the Plaintiff appears, the Eſſoign ſhall be adjourn'd, and by this the Parties have Day. Br. Diſcontinuance de Proceſs, pl. 32. cites 1 H. 7. 21. per Cur. Br. Eſſoign, pl. 102. cites S. C.

(P. 2) Enter'd. How.

In reſpect of the Parties caſting it.

1. *ASSISE in C. B. was Die Lunæ prox. poſt Oct. Mich.* and *at the Day the Plaintiff was demanded*, and *an Eſſoign caſt for him, which was allow'd*; But per Danby this ſhall be enter'd in the Record of the Aſſiſe, and not in the Eſſoign Roll; For this is for the Common Pleas, and not for Aſſiſe, and if it be miſ-enter'd it is Miſpriſon of the Officer, and ſhall be amended. Br. Eſſoign, pl. 123. cites 30 H. 6. 1. S. C. cited per Cur. Hutt. 28. Hill. 16 Jac. in Caſe of Egerton v. Egerton.

2. In *Præcipe* quod reddat *againſt ſeveral* if they *will be eſſoign'd ſeverally*, they ſhall be *every one by himſelf*, *as* to ſay *J. C. verſus H. P. De Placito terræ per A. B.* and *T. H. De eadem terra per N. C.* &c. *but* where the *Demandants will be eſſoign'd*, the Entry ſhall be entire, viz. *A. B. C. D. and E. F. verſus R. C. De Placito terre* &c. But ſee elſewhere if the Demandants cannot be ſeverally eſſoign'd if they will. Br. Eſſoigne, pl. 9. cites 33 H. 6. 25.

(Q) In what Actions and Suits Eſſoign may be.

Common Eſſoign.

1. **CO. 9. *Anne Bedingfeild* 15. b. adjudged that a common Eſſoign lies in Writ of** Dower, **and the Statute of 12 E. 2. Magna Charta 109. b. is to be intended of Eſſoigns** in Service le Roy. S. C. cited and S. P. reſolved accordingly. Noy 144. Raynor v. Holcroft.——In Dower, the Tenant was eſſoigned de Servicio Regis, and the Eſſoigner was demanded to ſee if he would avow the Eſſoign, and becauſe ſuch Eſſoign does not lie in this Action, therefore he diſavowed it, and the Tenant did not come, by which Grand Cape was awarded. Br. Eſſoign, pl. 23. cites 44 E. 3. 5.

2. **No Eſſoign lies in** Writs Judicial. 33 H. 6. 5. **b. adjudged that it does not lie in a** * Quem redditum reddit. Fitzh. Eſſoign, pl. 110. cites S. C.—— S. P. For the Quem Redditum reddit is only a Venire Facias ad attornandum and is a Judicial Writ. Br. Eſſoign, pl. 8. cites S. C.

* The Prothonataries ſaid the Tenant ſhould not be eſſoigned; Quære; and ſome held, that where it is brought againſt two, they ſhall not fourch by Eſſoign, and the Queſtion that occaſioned the Doubt was, whether this be Action Real or Perſonal, as to which Babington and Paſton differed. Br. Eſſoign, pl. 127. cites 9 H. 6. 21.

In Quare non admiſit the Defendant was ouſted of the Eſſoign by the Juſtices of both Benches; For this is a Writ Judicial, which ſhall Iſſue out of the Rolls, and therefore the Eſſoign was quaſhed. Br. Eſſoign, pl. 82. cites 21 H. 7. 10.——Kelw. 71. b. pl. 14. Mich. 21 H. 7. S. P. and notwithſtanding

withſtanding the Writ comes out of Chancery, and is originally ſued, yet it has Reſpect to the Record precedent; beſides, it is an Accuſation of a Contempt, for which the Party ought to anſwer to the King as well as to the Party.

Br. Eſſoign, pl. 135. cites S. C.—— 3. **It does not lie in** Scire Facias. 33 H. 6. 3. b. per Pri. not **in** Scire Facias **to execute a Judgment.** 39 H. 6. 50.

Scire Facias by three, and twowere eſſoigned, and the Eſſoign was quaſhed per Cur. becauſe Delays are ouſted in Scire Facias by the Statute of Weſtm 2 cap. 45 Quia de his quæ recordat' ſunt &c and Scire Facias ad ſequend' ſimul awarded againſt the two, and the one of the Tenants made Default, and his Default was recorded, and Day given over. Br. Eſſoign, pl. 120. cites 10. H. 6. 1.

Br Eſſoign, pl. 8. cites S. C.——Fitzh. Eſſoign, pl. 110. cites S. C. 4. **It lies not in** Venire Facias. 33 H. 6. 5. b. per Comberford.

Fitzh Eſſoign, pl. 112. cites S. C.—— 5 **In** Treſpaſs, **after a Protection allowed for the Defendant and repealed, the Plaintiff hath a** Re-attachment, **the Attorney of the Defendant may be eſſoigned.** 34 H. 6. 4. per Cur.

Br. Eſſoign, pl. 11. cites S. C.——In Treſpaſs of Battery againſt A. and two others, A. was eſſoigned, and the other two anſwered; and ſo ſee Eſſoign in Treſpaſs. Br. Eſſoign, pl. 109. cites 2 E. 4. 18.

Br. Eſſoign, pl 11. cites S. C.—— 6. **The ſame Law is in a** Re-ſummons in Plea of Land. 34 H. 6. 4. per Cur.

Fitzh. Eſſoign, pl. 112. cites S. C.

Per Wangford, and yet it was 7. **No Eſſoign lies in any** Attaint where it does not lie in the **firſt** Writ, **as an** Appeal of Mayhem. 34 H. 6. 36.

adjourned, and the Court ſaid, they would be adviſed if they ſhould adjudge it or not. And ſo ſee that in another Attaint it lies clearly. Br. Eſſoign, pl. 15. cites 24 H. 6. 36.——Tenant cannot be eſſoigned in this Action after Appearance, by the Statute of W. 1. cap. 41. Br. Eſſoign, pl 70. cites 21 H. 6 42.

In Attaint the Iſſue was joined that they made good Oath; the Plaintiff pray'd Niſi Prius immediately, and had it, becauſe Eſſoign is ouſted by the Statute, ſo that the Tenant ſhall not be eſſoigned. Br. Eſſoign, pl. 54. cites 21 E. 3. 16.

* Fitzh Eſſoign, pl. 33. 3. 4. cites S. C.— 8. **The** Defendant cannot **be eſſoigned** in Quare Impedit. * 22 E. 3. 4. b. **Contra.** † 22 E. 3. 7. b.

† Fitzh. Eſſoign, pl. 34 cites S. C.

* Fitzh. Eſſoign, pl. 33. cites S. C. — 9. [But] **an Eſſoign** lies **in Quare Impedit** for the Plaintiff. 14 H. 4. 12. b. * 22 E. 3. 4. b.

Common Eſſoign lies. Br. Eſſoign, pl 6. cites 27 H. 6. 1.

* Br. Eſſoign, pl. 81. cites S. C.— 10. **An Eſſoign lies not in an** Aſſiſe, **becauſe Delays are ouſted here.** * 14 H. 6. 22. b. **adjudged.** † 22 Aſſ. 79.

It lies not in Aſſiſe after Appearance by the Statute of W. 1. 41. Br. Eſſoign, pl. 70 cites 21 H. 6. 24.

† Br. Eſſoign, 94 cites 21 Aſſ 79. [but it is miſprinted and ſhould be 22 Aſſ. 79. as in Roll.]

* Br. Eſſoign, pl. 81. cites S. C.— 11. **In** Writ of Entry in Nature of an Aſſiſe **the Tenant may be eſſoigned.** * 14 H. 6. 22. b. **adjudged. Contra** † 22 Aſſ. 79.

† Br. Eſſoign, pl. 94. cites 21 Aſſ. 79 that it is ſaid there, that in B. R. they do not allow Eſſoign for the Plaintiff in any Aſſiſe, nor for the Tenants in Mortdanceſtor.

Br. Eſſoign, pl. 127. cites S. C. 12. **An Eſſoign lies not in a** Quem redditum reddit. 9 H. 6. 21. b.

13. An

13. An Eſſoign lies for the Tenant in Aſſiſe of Mortdanceſtor. 22 Aſſ. 79. Br. Eſſoign, pl. 94. cites 21 Aſſ. 79.

S. P [but it ſhould be 22 Aſſ]

14. Nor for his Vouchee. 22 Aſſ. 79. Vouchee was eſſoigned and was quaſhed. And Brooke ſays the reaſon ſeems to be, that it is the ſame Perſon and the Tenant himſelf cannot be eſſoigned. Br. Eſſoign, pl. 94. cites 21 Aſſ. 79. [And ſo are all the Editions as to the Year; but it ſhould be as in Roll, viz. 22 Aſſ. 79]

15. An Eſſoign lies not for the Plaintiff in Aſſiſe of* No. Diſſeiſin. 22 Aſſ. 79. nor in Mortdanceſtor. 22 Aſſ. 79. It is ſaid, that in B. R. they do not allow Eſſoign for the Plaintiff in Nul Aſſiſe, nor for the Tenants in Aſſiſe of Mortdanceſtor. Br. Eſſoign, pl. 94 cites 21 Aſſ. 79. [but it ſhould be 22 Aſſ. 79.]

[* This ſeems miſprinted as an Abbreviation of (Novel), whereas it ſhould be perhaps (Nul) for Br. is (nul), and the Year-Book is, viz in no Manner of Aſſiſe &c. nor for the Tenants in Mortdanceſtor. And ſays note, that they will allow Attachment in Aſſiſe of Novel Diſſeiſin of 8 Days and leſs —— [And nothing elſe is ſaid there of Novel Diſſeiſin.]

16. An Eſſoign lies in a Scire Facias. 19 H. 6. 31.

17. In Aſſiſe by two, if the one makes Default, and the other ſues a Summons Ad ſequendum ſimul, at the Return of this he who made the Default before cannot be eſſoigned. 10 H. 6. 22. Br. Eſſoign, pl. 144. cites S. C. —— Fitzh. Eſſoign, pl. 109. cites S. C. ——And ſays that the Eſſoign was quaſhed by good Advice, and he was ſevered by Award, quod nota bene, and yet ſee tit. Eſſoign in Fitzherbert the Eſſoign allowed at the Summons ad Sequend' ſimul, but this ſeems to be in Præcipe quod reddat, and not in Aſſiſe. Br. Eſſoign, pl. 144 cites 10 H. 6. 22.

Aſſiſe by two who were eſſoigned, and Day given over, and the Eſſoign adjudged, and at the Day the one came, and the other made Default, and Writ was pray'd de Summons ad proſenquend' ſimul and he againſt whom the Writ * iſſued was eſſoigned, and it was challenged; et non allocatur; but the Eſſoign adjudged and adjourned. And ſo ſee that upon Summons ad Proſequend' ſimul Eſſoign lies. Br Eſſoign, pl. 100. cites 45 Aſſ 2.

* The large and ſmall Edition is (iſſint) but the other and the Year-Book is (iſſued.)

Fol 823.

18. An Eſſoign de malo lecti lies not but in Writ of right. 19 H. 6. 61. b. Br. Eſſoign, pl. 66. cites S C. per Forteſcue.

19. By the Stat. of Weſtm. 2. Cap. 17. An Eſſoign is tolled in a Writ of right between two claiming by a Diſcent.

De Servitio Regis.

20. It is not allowable in a Quare Impedit, becauſe Lapſe may incur in the mean Time. 14 H. 4. 6. * 43 Aſſ. 21. per Thorpe. Br. Eſſoign, pl. 46. cites 14 H. 4. 12, 13. but that is a D. P.—— For this Eſſoign has Day for a Year. Br. Eſſoign, pl. 6. cites 27 H. 6. 1.

* Br. Delatories, pl. 10. cites S. C.—— Keilw. 135. b. in pl. 119. S. P. per Grantham, Caſus incerti temporis.

21. This Eſſoign lies not in Aſſiſe of Novel Diſſeiſin. 5 E. 3. cap. 6. 7. It lies not in Aſſiſe Br. Eſſoign, pl 70. cites 21 H. 6. 42.

22. This Eſſoin lies not in an Attaint, for it is tolled by the 5 E. 3. Cap. 6. & 7. becauſe of the long Delay ariſing thereby. Br. Eſſoign, pl. 70. S. P. cites 21. H. 6. 42.

Any Aſſoign.

23. **If a Man ſues a** Scire Facias **out of a Fine, and while that is depending ſues a Writ of** Eſtrepement, **no Eſſoign lies in this Writ of Eſtrepement,** 27 E. 3. 80. b.

The Defendant that is appealed of

24. *Weſtm.* 2. 13 *E.* 1 *cap.* 12. *In an Appeal of Death, the Appealer ſhall not be Eſſoigned.*

the Death of a Man ought to have convenient Expedition, and not to be detained in Priſon, or to live under the Infamy of a Murtherer longer than there is Cauſe, and this Statute was chiefly intended for the Benefit of the Defendant. 2 Inſt. 387.

25. In *Juris Utrum* the Tenant ſhall not have *Eſſoign after Appearance*; For the *Statute Ouſts it.* Br. Eſſoign, pl. 88. cites 6 Aſſ. 3.

26. In *Aſſiſe of Novel Diſſeiſin* the *Parol was put without Day by not coming of the Juſtices*, by which *Re-attachment was ſued, and Re-ſummons againſt the Jurors*, and *at the Day the Plaintiff caſt Eſſoign*, and it was adjudged and adjourned upon Argument; For this Re-attachment is as a new Original, and yet the Plaintiff had appeared and pleaded to the Aſſiſe before. Br. Eſſoign, pl. 24. cites 44 E. 3. 5.

27. *Where it does not lie upon the Original*, it does *not lie upon the Proceſs.* Br. Eſſoign, pl. 106. cites 5 E. 4. 70.

28. Eſſoign De Servitio Regis does not lie *upon a Bill againſt one in Cuſtodia Mareſchalli*; For he ſhall not only be intended always in Priſon &c. but upon Bill there is no Day certain as from 15 Days to 15 Days as in Actions Perſonal, nor as in Pleas of Land, and therefore there cannot be Adjournment to any Day certain as there ought to be in other Actions. See Br. Eſſoign, pl. 106. cites 5 E. 4 70.

29. Eſſoign [of a Voyage] *towards the Holy Land* does not lie in *Quare Impedit* by reaſon of Lapſe, becauſe this Eſſoign gives Day for a Year. Br. Eſſoign, pl. 6. cites 27 H. 6. 1.

30. Where the *Proceſs is by Summons and Re-ſummons*, Eſſoign lies, per Widelade. Br. Eſſoign, pl. 15. cites 34 H. 6. 36.

S. P. Br. Eſſoign, pl. 135. cites 39 H. 6. 50 and yet the Aid lies well.

31. *Scire Facias to execute Annuity*, the *Parſon pleaded that he found the Church diſcharged, and prayed in Aid of the Patron*, and had it, and at the Day of the Summons returned the *Patron was eſſoigned*, and per omnes the Eſſoign does not lie, becauſe *Delays are ouſted in Scire Facias*, and this *as well againſt thoſe who come a latere, as againſt thoſe who are Parties*; Quod nota. Br. Eſſoign, pl. 103. cites 2 H. 7. 10, 11.

32. Only common Eſſoins are allowed in *Dower*, but not Eſſoins de Servitio Regis, and the rather becauſe the *Stat.* 12 *E.* 2. which provides quod non jacet Eſſonium in breve de Dote has a Reaſon viz. Quia *videtur deceptio & prorogatio Juris*, and this properly to be intended of an Eſſoign of the Service of the King which is a Delay and Prorogation of Right for a Year; Reſolved. 9 Rep. 15. b. Hill. 18 Eliz. Bedingfield's Caſe.

Ibid. in Marg. cites Mich. 11 Geo. 2. Peter v. Regiter, that an Eſſoign was diſcharged,

33. The Court was unanimouſly of Opinion that a Corporation aggregate were not intitled to an Eſſoign *in a Perſonal Action.* And it was ſaid, that no Eſſoign lies in any Perſonal Action whatſoever, not even where a Peer or Member of Parliament is Party. Caſes of Pract. in C. B. 8. Hill. 12 Ann. Symmons v. Totneſs (Mayor of) becauſe it was a Perſonal Action.

(R) At what Time it may be.

1. AT Common Law in a Treſpaſs **the Plaintiff might be eſſoign'd** after every Appearance. 11 H. 6. 31.

2. **But** otherwiſe **it is** in **a** Replevin, **becauſe the Plaintiff may be Defendant in this.** 11 H. 6. 31.

3. At Common Law **it lay** after every meſne Appearance. * 21 E. 4. 16. b. 11 H. 6. 31. *Br. Eſſoign, pl. 113. cites S. C.

but not S. P. —— Fitzh. Eſſoign, pl. 121. cites S. C. & S. P. by Brian.

4. **The Eſſoign lies** after every Appearance in **an** Annuity. 2 H. 4. 4. Br. Eſſoign, pl. 31 cites S. C. ——

Fitzh. Eſſoign, pl. 131. cites S. C.

5. **In an** Annuity **againſt Parſon,** after the Prayees in Aid are eſſoigned, **at another Day the** Attorney of the Defendant may be **eſſoigned.** 2 H. 4. 4. And though the Eſſoign was challenged becauſe it was after Appearance, yet the Eſſoign was allowed; For if the Defendant makes Default at any Day after Appearance the Plaintiff ſhall recover the Annuity. Br. Eſſoign, pl. 31. cites S. C. —— Fitzh. Eſſoign, pl. 131. cites S. C.

6. After **a** Venire Facias **awarded** againſt an Infant to be viewed **where the Iſſue is on the Infancy,** or **after the** Guardian **is** commanded to bring the Infant into Court **to be viewed, the Infant cannot be eſſoigned.** 41 E. 3. 29. Br. Eſſoign, pl. 20. cites S. C. per Thorpe —— Fitzh. Eſſoign, pl. 146. cites S. C.

7. In Debt **Defendant came by** Capias, **and waged Law, and found Mainpriſe, at the Day which he had to perform his Law he cannot be eſſoigned.** 44 E. 3. 12. Br. Eſſoign, pl. 25. cites S. C. and ſays, that this it ſeems is by reaſon of the Mainpriſe; for 4 H. 6. 8. is, that he that is by Mainpriſe is in a Manner in Priſon, and therefore is preſent and cannot be eſſoigned. —— Fitzh. Eſſoign, pl. 150. cites S. S.

8. **On the** Exigent returned **in** Debt **the Plaintiff may be eſſoign'd.** 45 E. 3. 10. b. **But he ſhall render himſelf before the Return.** Fitzh. Eſſoign, pl. 155. cites S. C. —— The Defendant came in by Superſedeas upon Mainpriſe, and at the Day of Return of the Exigent the Plaintiff was eſſoigned, and the Defendant had Idem Dies without Mainpriſe; quod nota. Br. Eſſoign, pl. 127. cites S. C. ——— S. P. Br. Eſſoign, pl. 130. cites 38 E. 3. 18.

9. **At the** Return of a Summons Ad Warrantizandum **the Vouchee may be eſſoigned** before Entry in the Warranty, **yet he is not** Party **before.** 45 E. 3. 24. b. Br. Eſſoign, pl. 28. cites S. C. —— Fitzh. Eſſoign, pl. 67. cites 23 Aſſ. 15. [which is the S. P. and ſeems to be S. C. with 45 E. 3. 24. b]

10. After Demurrer on the Day of the Adjournment **Defendant may be eſſoigned.** 3 H. 4. 15. b. Notwithſtanding the King was Plaintiff. Br. Eſſoign, pl. 33. cites S. C. —— Fitzh. Eſſoign, pl. 133. cites S. C.

Adjudged

Adjudged [at what Time it may be.]

Br. Eſſoign, pl. 112. cites S. C.

11. **At the** fourth Day **it ſhall be adjudged and adjourned.** 18 E. 4. 4. b.

12. In *Attaint* the *Plaintiff caſt Eſſoign after Appearance.* and the Eſſoign was *adjudged for the Plaintiff* by Award; quod nota; For the Statute Weſtm. 2. cap. 30. ſpeaks only of Aſſiſe. Br. Eſſoign, pl. 91. cites 16 Aſſ. 10.

13. *Attaint* upon Verdict in Mortdanceſter, the Plaintiff was *eſſoign'd after Appearance*, and it was *quaſhed by the Statute Weſtm. 1. cap.* 41. Br. Eſſoign, pl. 96. cites 26 Aſſ. 25.

14. *Guardian was reſummoned at the Suit of the Heir of the Plaintiff againſt the Defendant, who died*, and *after* [*Reſummons*] *was ſued againſt the Executors of the Defendant, who pleaded that Plene Adminiſtravit*, by which *it was awarded that the Plaintiff recover the Ward*, and by this Award the Defendant cannot be eſſoigned at the *Venire Facias* upon this Iſſue, becauſe *this Iſſue is taken for the Damages and not for the Principal*; For Judgment was given upon the Principal before, and therefore *after ſuch Judgment Eſſoign does not lie upon the Iſſue for the Damages*; quod nota. Br. Eſſoign, pl. 72. cites 24 E. 3. 25. 26. 53.

15. In *Attaint Proceſs continued till the Habeas Corpus returnable* 15 *Paſch.* at which Day the *Plaintiff did not come but Eſſoign was caſt for him*, and *was challenged inaſmuch as the Statute is, That after Appearance in Court no Eſſoign ſhall be allowed in Attaint any more than in Aſſiſe.* Finch ſaid, *the Statute is intended in Plea Perſonal, and not in Plea Real*, and this Attaint is founded upon Formedon, and after the prior *Demandant was eſſoigned de Servitio Regis*; but Knivet ſaid, this does not lie any more than the other Eſſoign; Per Green J. *the Statute*, that Eſſoign does not lie in Aſſiſe after Appearance, is *intended the common Eſſoign*; For in Mortdanceſtor after Appearance the Demandant may be eſſoigned de Servitio Regis, and after the Plaintiff appeared by Attorney of his own free Will; But Green ſaid, that they might well have adjudged and adjourned the Eſſoign. Br. Eſſoign, pl. 99. cites 34 Aſſ. 6.

16. In *Coſinage* the *Tenant pleaded to Iſſue by Attorney*, and the *Tenant was eſſoigned*, and therefore ill, becauſe he had Attorney in Court, and after the *Roll made mention that the Attorney was eſſoigned after the Iſſue*, and therefore well. Br. Eſſoign, pl. 125. cites 40 E. 3. 34.

17. In Aſſiſe of *Nuſance* the *Parties had the View, and after the View eſſoigned*, and at the Day of Eſſoign made Default &c. And ſo ſee Eſſoign after View in Aſſiſe of Nuſance. Br. Eſſoign, pl. 22. cites 42 E. 3. 9.

18. In *Præcipe* quod reddat the *Tenant tendered his Ley Gager of Nonſummons*, and had Day &c. at which Day the *Demandant was eſſoigned*, and had Day &c. at which Day the *Tenant was eſſoigned*, and *at the next Day performed his Law*; quod nota. Br. Eſſoign, pl. 140. cites 44 E. 3. 38.

19. *At the Day of Imparlance* the Plaintiff *ſhall not be eſſoigned*; for as the *Defendant ſhall be condemned* by his Default if he does not appear at the Day of Imparlance, ſo *ſhall the Plaintiff be Nonſuit* if he does not appear at the Day of Imparlance; Per Cur. Br. Eſſoign, pl. 121. cites 11 H. 6. 31.

20. In *Treſpaſs* the *Sheriff returned the Defendant attached by* 20 *Sheep, Price* 20 *s.* and *at the Day the Defendant was eſſoigned*, and per Judicium it lies well. Br. Eſſoign, pl. 13. cites 34 H. 6. 28.

21. In

21. In Quare Impedit a Man may be eſſoigned *in any Action in which Eſſoign lies before that the Writ Original be returned*; quod nota; and yet no Suit is depending till the Writ be returned. Br. Eſſoign, pl. 107. cites 2 E. 4. 11.

S. C. cited per Curiam. Hutt. 28. Hill. 16 Jac. in the Caſe of Egerton v. Egerton

22. An Eſſoign caſt was reſolved not allowable, becauſe the *Appearance by their Attorney was entered and recorded*; and if an Eſſoign would lie it ſhould be as well caſt for the Attorney as for the Tenants; and when an Appearance by their Attorney is recorded, they cannot at the ſame Time be eſſoigned. Cro. C. 511. pl. 5. Mich. 14 Car. B. R. The King v. Dreidon.

23. An Eſſoign *after Appearance* is abſurd, but that *cannot be aſſigned for Error*, becauſe it is only dilatory, and the granting a Dilatory when it ought not to be granted is no Error; *but* is otherwiſe *to deny it when it is grantable*. Carth. 173. Hill. 2 & 3 W. & M. in B. R. in Caſe of Clobery v. Exon (Biſhop)

24. Eſſoign may be caſt at any Time *before a Ne Recipiatur entered*. Ld. Raym. Rep. 79. Paſch. 8 W. 3. Burghill v. Gibbons.

(S) At what Time it may be caſt.

1. THE Eſſoign for the Demandant ought to be caſt the firſt Day of the four; for it lies not after the firſt Day, becauſe he was demandable the firſt Day. * 12 H. 4. 24. b. Curia. † 18 E. 4. 4. b.

* Fitzh. Eſſoin, pl. 140. cites S. C.

† And ſo it ſhall be in every Action, or otherwiſe it does not lie if Exception be taken, but if Exception be not taken it may be caſt at the 4th Day. Br. Eſſoin, pl. 112. cites S. C.

2. The Eſſoign lies not for the Demandant at the 4th Day, although he be demanded. 10 H. 6. 3. b.

3. But by Aſſent of the Parties it may be caſt on the 2d or 4th Day. 18 E. 4. 4. b.

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Br. Eſſoign, pl. 112. cites S. C. but ſpeaks only of Exception taken or not, and ſays nothing of Aſſent.

4. But the Tenant may be eſſoigned at the 4th Day, becauſe there is no Neceſſity to appear before the 4th Day. Vide 12 H. 4. 25. Contra 10 H. 6. 3. b.

5. But if Eſſoign de Service le Roy be caſt for the Tenant the 1ſt Day, where there is no ſuch in rerum Natura, which is not good, at the 4th Day another Eſſoign cannot be caſt by another by him. 12 H. 4. 24. (Quære rationem.)

Br. Eſſoign, pl. 45. cites S. C. but not S. P. —Fitzh. Eſſoign, pl. 140. cites S. C.

6. In a Formedon if an Eſſoign be not caſt the 1ſt Day and recorded, it cannot be caſt afterwards, for the Tenant is demandable the 1ſt Day, but no Judgment lies on the Default till the 4th Day, and yet the Tenant need not to appear till the 4th Day. 12 H. 4. 24.

Br. Eſſoign, pl. 45. cites S. C. —— Fitzh. Eſſoign, pl. 140 cites S. C.

Fitzh. Eſſoin, pl. 145. cites S. C. —— Venire Facias Clericum was returned ſerved, and the Defendant was demanded, and Eſſoign was caſt for him and quaſhed; for the Statute of challenging Eſſoigns is ouſted in this Caſe. Br. Eſſoign, pl. 69. cites 21 H. 6. 17.

7. In Annuity againſt a Parſon, the Sheriff returns that he is a Clerk, upon which a Venire Facias iſſues to the Sheriff; he cannot be eſſoigned at the Return of it. 38 E. 3. 21. b. but Quære.

8. In *Attaint at the next Day after the firſt Day the Tenant was eſſoign'd*, and the *Eſſoign quaſh'd*. Br. Eſſoign, pl. 88. cites 6 Aſſ. 3.

9. *At the Common Law* in *Attaint* the Tenant *at the firſt Day* may be Eſſoign'd. Br. Ibid.

10. In *Præcipe* quod reddat, *the Abbot of B. demanded Conuſance after that the Tenant had made Attorney* in Banco, and *at the Day in Franchiſe the Tenant himſelf was eſſoign'd where he had made Attorney*, this Eſſoign is not good, and therefore they ought to award Seiſin of the Land or Petit Cape; Per Seton. The Reaſon ſeems to be there, becauſe the Party ought to have ſued Re-ſummons in this Caſe, Quære; For it was not adjudg'd in that Point. Br. Peremptory, pl. 51. cites 21 E. 3. 61.

11. *Præcipe* quod reddat *by two Demandants againſt one Tenant*, and *at the firſt Day the Demandants were eſſoign'd*, and *at the ſecond Day the Tenant was eſſoign'd*, and *at the third Day the Tenant demanded the View*, and had it, and *at the Day after the Demandants were eſſoign'd*, and *at the next Day after this the Tenant was eſſoign'd*, and ſo ſee that the Tenant himſelf who demanded the View in Perſon, may be eſſoign'd upon the View, quod nota; For per Priſot, the *Tenant may be eſſoign'd after any Act done by him*, viz. *at the next Day after ſuch Act done*, quod tota Curia conceſſit, *but at the ſecond Day after the View he ſhall not be eſſoign'd*; Contra at the firſt Day, quod nota, tit. Eſſoign in Fitzherbert 117. and therefore here the Tenant was ouſted of the Eſſoign at the ſecond Day. Br. Eſſoign, pl. 117. cites 39 H. 6. 28, 29.

Fitzh. Eſſoin, pl. 124. cites S. C. —— Hutt. 28. Hill. 16 Jac. S C. cited per Curiam, in Caſe of Egerton v. Egerton.

12. The *Demandant or Tenant in Præcipe* quod reddat may be *eſſoign'd the fourth Day, and any Day before the fourth Day*, notwithſtanding any Challenge by his Adverſary, *but in Writ judicial out of C. B.* the *Defendant ſhall caſt Eſſoign the firſt Day only*, and not otherwiſe if any Challenge be taken, Per Brian. Br. Eſſoign, pl. 141. cites 2 H. 7. 4.

13. An Eſſoign ought to be caſt *the firſt Day that the Writ is return'd*, notwithſtanding that the Writ be not put in till the Quarto Die poſt. Per Montague, and affirm'd by the other Juſtices. Dal. 3. pl. 2. Paſch. 3 E. 6. Anon.

If the Eſſoign be not caſt before the Return of the Writ, it ought not to be at all; for all Writs come in by Poſt Diem; Per Warburton. Hutt. 28. Hill. 16 Jac. in Caſe of Egerton v. Egerton.

14. If an Eſſoign be *not taken the firſt Day*, it ſhall never after be taken. Per tot Cur. Godb. 236. pl. 327. Mich. 11 Jac. C. B. in Vaughan's Caſe.

If the Writ is not returned at the Day but after, now the Exception is waived; for he that enters the

15. In *Dower* the *Tenant at the Day of the Eſſoign did not caſt any Eſſoign*, and the *Demandant enter'd her Exception*. The *Writ is not then returned*. Upon Motion that the Tenant may be eſſoigned, notwithſtanding the Exception, it was reſolved that he might, though the Writ was not return'd, and cites 2 E. 4. 11. 21 E. 4. 7. 8. 3 E. 6. 1. that an Eſſoign may be before the Writ be returned, and the 2 H. 7. 4. is there cited, in which a *Difference* is taken *between an original and judicial Writ*, and ſaid, that in the firſt the Eſſoign lies at any Time before the

the fourth Day, but in the Writ of Execution the Eſſoign muſt be the firſt Day, or not at all. Hutt. 28. Hill. 16 Jac. Egerton v. Egerton.

Exception ought to procure the Return of the Writ,

and though the Writ which is afterwards returned ſhall have Relation to the Day of the Return, yet the Exception once avoided by the Not returning it is not made good afterwards, and in ſuch Caſe Eſſoign ſhall be allowed before the Return of the Writ, though it be after the Day of the Eſſoigns; And ſo is the Courſe of the Court. Litt. Rep. 185. Mich. 4 Car. C. B. Anon.

(T) At what Time it lies.

1. IF he in Reverſion prays to be received **for Default of the Leſſee, and the** Receipt is counterpleaded, **he ſhall** not **be** eſſoigned before this is tried, **becauſe he is** not a Party before. 17 E. 3. 38. Fitzh. Eſſoign, pl. 2. cites S. C. —S. P. Br. Eſſoign, pl. 68. cites 21 H. 6. 14. that it was ſaid accordingly in the Time of H. 3. in which Caſe the Eſſoign was quaſhed; For he was not admitted, nor is he Party till he be received.

2. But after the Reſceit **he may be eſſoigned.** 17 E. 3. 38. b. Fitzh. Eſſoign, pl. 2 cites S. C.

3. A Prayee in Aid **may be eſſoigned** at the Return of the Summons **before he joins in Aid.** * 1 H. 6. 3. b. † 3 H. 6. 30. b. * Fitzh. Eſſoign, pl. 89. cites S. C. † Protection, pl. 2. cites S. C. —— Br. Eſſoign, pl. 12. S. P. cites 34 H. 6 16. —— Eſſoign de Servitio Regis does not lie for the Prayee in Aid to be received till he be received in Fact. Br. Eſſoign, pl. 48. cites 5 H. 5. 11.

4. [So] a Vouchee **may be eſſoigned at the Return of the Summons Ad Warrantizandum before the Entry into the Warranty, for the Demandant has made him** Privy by Grant of the Voucher. 3 H. 6. 30. Br. Protection, pl. 2 cites S. C.— Fitzh. Protection, pl. 3. cites S. C.

In Præcipe quod reddat the Tenant vouch'd, and at the Summons ad Warrant' return'd ſerved the Vouchee was eſſoign'd, and the Tenant made Default, and the Demandant appear'd, and the Eſſoigner pray'd that the Default of the Tenant be recorded, and that he be diſcharg'd, and the Demandant would not hold him to the Default; Per Finch, If the Vouchee was in proper Perſon, or by Attorney, it is Reaſon that the Tenant be demanded, but not as here. And the Proceſs was reſpited, and after the Vouchee appear'd, and the other not, & Idem dies was given to him who appear'd, and the Eſſoign ſtood for the other, and at the Day he who now appears cannot be eſſoign'd, and ſo infinite. Br. Eſſoign, pl. 26. cites 44 E. 3. 38.

5. But **if the** Writ **be** returned Tarde **he cannot be eſſoigned, becauſe he is not ſummoned.** 39 E. 3. 28. Br. Eſſoign, pl. 79. cites S. C. ——

Fitzh Eſſoign, pl. 144. cites S. C ——If a Formedon be returned Tarde, and the Demandant ſues an Alias Summons, there ought to be nine Returns between the Teſte and the Return. And if the Tenant is eſſoign'd upon Return of the Tarde, the Tenant may not be eſſoigned, for he ſhall have no Day in Court by this Return. Note, in the Alias Summoneas ſhall be the Words Si demand' fecer' te ſecur' de Clamore proſequendo, except there are Sureties found in Bank. D. 252. a. pl. 94. Paſch. 8 Eliz. Anon.

6. **In** Formedon **againſt** Baron and Feme, Baron makes Default **at** Nili Prius, and before the Day in Bank the King dies, **by which it was diſcontinued; if** a Reſummons **be ſued againſt Baron and Feme they cannot be eſſoigned.** 11 H. 6. 6. All is fine Die, and the Court held that the Eſſoign did not lie, and

that therefore it ſeems that this was a ſpecial Re-ſummons which revived the Plea, as it was the laſt Day in Court. Quære the Reaſon; For it is only a ſhort Note. Br. Eſſoign, pl. 84. cites S. C.

7. After

Though this be the ſecond Venire Facias, and the Reaſon ſeems to be, becauſe that which was abated was as none. Br. Eſſoign, pl. 58. cites S. C.

7. After Iſſue joined and a Venire Facias abated on Return of the new Venire Facias the Defendant may be eſſoigned, though it be not the firſt Day after the Parties have pleaded to the Inqueſt. 21 E. 3. 38 b. adjudged.

Hobart Ch. J. ſaid, That the Statute of Marlbridge gave not any Eſſoign, but only did reſtrain Eſſoigns; and therefore in real Actions the ſame is left as it was at the Common Law, and by the Common Law the Tenant might be eſſoigned after Iſſue joined. Godb. 236. pl. 327. Mich. 11 Jac. C. B. in Vaughan's Caſe.

* S. P. Br. Eſſoign, pl. 12. cites 34 H. 6. 16. that after Iſſue joined the Tenant may be eſſoign'd at the firſt Day if he be Party to the Iſſue ——— Br. Eſſoign, pl. 61. cites 7 H. 6. 14. S. P. [pl. 22. and Roll ſeems miſprinted, (17) for (14).

8. After * Iſſue joined and a † Venire Facias returned the Defendant may be eſſoigned. 7 H. 6. 17.

† S. P. Br. Eſſoign, pl. 106. cites 5 E. 4. 70. ——— In Formedon the Tenant pleaded Nontenure, and ſo to iſſue, and at the Day the Tenant pleaded that the Demandant had enter'd after the laſt Continuance, and the Demandant e contra, and at the Day of Venire Facias return'd, the Tenant caſt Eſſoign, Caundiſh ſaid, The Eſſoign does not lie, for this is no Iſſue; For when the Tenant pleaded Nontenure, the Demandant cannot enter upon him who is no Tenant, but Strange contra; For the Tenant may purchaſe the Land after the Plea pleaded, and then may the Demandant enter upon him, and ſo the Eſſoign was allow'd. Br. Eſſoign, pl. 61. cites 7 H. 6. 14.

Br. Eſſoign, pl. 2. cites S. C but Protection lies at that Day; For there the King himſelf by his Writing under his Seal certifies that he is in his Service; Note the Diverſity, for the one is more authentick than the other.

9. After Iſſue, and Iſſues returned againſt the Jurors upon the Diſtringas, and an Alias prayed with a Niſi Prius, the Defendant cannot be eſſoigned in Service le Roy, becauſe it is only the Suggeſtion of the Party. 3 H. 6. 55. b.

Entry in Nature of Aſſiſe, the Parol was without Day by Protection after Iſſue, and Niſi Prius, and the Demandant ſued Re-ſummons, and the Tenant caſt Eſſoign. Portman ſaid, The Tenant has Attorney in Court &c. But Forteſcue ſaid, he is remov'd, and ſo it was enter'd in the Roll that he was remov'd by Writ; And ſo ſee that the Attorney had remain'd at the Re-ſummons if he had not been remov'd. Portman ſaid, Yet the Eſſoign does not lie; For the Re-ſummons is to revive it in the ſame Plight that it was [when it was] put ſine Die, which was at the Day of the Petit Cape return'd, at which Day Eſſoign does not lie. But Forteſcue ſaid, that yet the Eſſoign lies; For upon Re-ſummons if the Tenant makes Default, Grand Cape ſhall Iſſue, notwithſtanding that Petit Cape was awarded upon the firſt Record. Br. Eſſoign, pl. 66. cites 19 H. 6. 57.

If the Parol be put without Day at the Diſtringas Juratores return'd after Iſſue by Protection &c. Yet upon the Re-ſummons the Tenant may be eſſoign'd, and yet upon the firſt Record he could not have been eſſoign'd. Per Paſton. Ibid.

10. In Replevin the Plaintiff may be eſſoigned after Iſſue joined, and on the Habeas Corpora. 11 H. 6. 31. b.

Br. Eſſoign, pl. 144. cites S. C. ——Fitzh. Eſſoign, pl. 109. cites S. C.

11. In Aſſiſe by two upon Default of one, if the other ſue Summons Ad ſequendum ſimul againſt him, he cannot be eſſoigned at the Return of it. 10 H. 6. 22.

Br. Eſſoign, pl. 66. cites S. P by Portman, and S. C.

12 At the Petit Cape returned, an Eſſoign lies not for the Tenant. 19 H. 6. 57. b.

Br. Eſſoign, pl. 66. cites S. C —— Fitzh. Eſſoign, pl. 105. cites S. C. ——— See the Notes at pl. 9. ſupra.

13. But if at the Return of the Petit Cape a Protection be caſt for the Tenant, and afterwards it is repealed and a Reſummons ſued, now the Tenant may be eſſoigned. 19 H. 6. 57. b.

Eſſoign after Eſſoign.

14. A common Eſſoign lies not immediately after another common Eſſoign. * 12 H. 4. 14. † 4 H. 6. 6. b. * Br. Eſſoign, pl. 42. cites S. C. per Hull.——Fitzh. Eſſoign, pl. 138. cites S. C——Br. Ibid. pl. 49. S. P. cites 9 H. 5 5.
† Br. Eſſoign, pl. 73. cites S. C.——Fitzh. Eſſoign, pl 91. cites S. C.

15. Eſſoign de Service le Roy lies not immediately after a common Eſſoign. 12 H. 4. 14. contra. Br. Eſſoign, pl 42. cites S. C.——Fitzh. Eſſoign, pl. 138. cites S. C.——After common Eſſoign an Eſſoign De Servitio Regis lies infinite. Br. Eſſoign, pl. 49. cites 9 H. 5. 5. per Strange.

16. A common Eſſoign lies not immediately after Eſſoign de Service le Roy. 12 H. 4. 14. contra. Fol. 825.

Br. Eſſoign, pl. 42. cites S. C. —— Fitzh. Eſſoign, pl. 138. cites S. C.

17. An Eſſoign de Service le Roy lies not after another Eſſoign de Service le Roy immediately. 12 H. 4. 14. Br. Eſſoign, pl. 42. S. P. per Hull. cites S. C.——Where the firſt Eſſoigner of the Service of the King at the Grand Cape returned did not appear at the 4th Day, another Eſſoigner of the Service of the King cannot be received after; But common Eſſoign may be amended in divers Caſes, and therefore the Court awarded, that Demandant recover Seiſin of the Land. Quod nota. Br. Eſſoign, pl. 44. cites 12 H. 4. 24.

18. Eſſoign de Service le Roy lies not after Eſſoign de Service le Roy, if the firſt be not warranted. 17 E. 3. 3. Fitzh. Eſſoign, pl. 1. cites S. C.

J. S. brought Writ of Right againſt C. who ſaid that ſhe held for Life the Reverſion to R. and his Feme, and pray'd Aid of them, and had it, and Summons awarded, and at the Day the Tenant was eſſoign'd, and at the Day of the Return of this [the Baron] was eſſoign'd, and at the Day of this return'd, [the Baron] was eſſoign'd, de Servitio Regis, and at the Day of this [he] did not bring his Warrant, and at this Day the Feme was eſſoign'd de Servicio Regis, and it was allow'd Nota. Br. Eſſoign, pl. 53. cites 21 E. 3. 13.

19. After Proceſs intermediate a Man may be eſſoigned after an Eſſoign. 12 H. 4. 14. Br. Eſſoign, pl. 42. cites S. C.

20. As if a Man be eſſoigned at the firſt Day, if he comes after the Day, he may be eſſoigned again. 12 H. 4. 14.

21. If a Man be eſſoigned de Service le Roy, and afterwards caſts a Protection, if a Reſummons be ſued, he may be eſſoigned of a common Eſſoign; for though the Reſummons receives the firſt Plea as to ſome Reſpects, yet here the Reſummons is an intermediate Proceſs. * 12 H. 4. 14. Vide * 1 H. 6. 6. * Fitzh. Eſſoign, pl. 138 cites S. C.—— The Reſummons does not

revive all which was done before, but the Original; For per Thirne, upon the Default thereupon lies Grand Cape upon the Re-ſummons, and not Petit Cape Br Eſſoign, pl. 42. cites S. C.——And Grand Cape ſhall iſſue notwithſtanding Petit Cape was awarded upon the firſt Record Per Forteſcue. Br. Ibid. pl. 66. cites 19 H 6 57.
† Br. Eſſoign, pl. 84. cites S. C. but not S. P.——Fitzh. Eſſoign, pl. 90. cites S. C.

22. The ſame Law is if the Parol be put ſine Die for any other Cauſe. 17. E. 3. 3.

23. In a Plea an Eſſoign de Service le Roy may be caſt by intermediate Proceſs after another Eſſoign de Service. 12 H. 4. 14. Br. Eſſoign, pl. 42 cites S. C. & S. P. by Hull.

Br. Eſſoign, pl 42. cites S C.—— Fitzh Eſſoign, pl 138. cites S. C.

24. If a Man be eſſoigned de Service le Roy, and afterwards makes Default on a Petit Cape returned, he may be eſſoigned de Service le Roy. 12 H. 4. 15.

Hob. 46. pl 52. S. C. —Brownl. 154. S. C. adjudg'd — S C. cited Win. 34 — S. C. cited per Cur. 2 Vent. 57 Trin. 1 W. & M in C. B.—— In Præcipe quod reddat the Tenant was eſſoign'd, and after vouch'd, and the Vouchee

25. In a Formedon en Reverter, if the Tenant be eſſoined after View, and afterwards pleads in Abatement of the Writ, and afterwards vouches two, viz. A. and B. of which A. is afterwards eſſoign'd, and then B. and the ſame Day given to the Demandant Tenant and Vouchee, and at the laſt Day of the Eſſoign both Vouchees appear, and on the ſame Day the Tenant caſts an Eſſoign for him and his Attorney; this Eſſoign lies for the Tenant, for though the Tenant had an Eſſoign before, it was in another Reſpect, ſcilicet, between him and the Demandant. But now it is in another Degree and Order of Plea, that is, between him and the other Vouchee, who never being entered in the Warranty might either vouch himſelf or the Tenant. But if he had been actually entered into the Warranty, then he could not at another Time be eſſoigned, nor the Tenant who had ended with the Vouchee, and was likewiſe barred of pleading againſt the Demandant, becauſe his Plea was put in the Mouth of the Vouchee. Hobart's Reports 64 between *Earl of Clanrickard and Lord Viſcount Liſle* adjudged. Contra 3 H. 7. 13.

was eſſoign'd, and at the Day the Tenant was eſſoign'd, and the Opinion of the Court was, that it does not lie, and it was ſaid that it has been adjudg'd, that at the Day of the Grand Cape Ad Valent. return'd, where the Vouchee makes Default when the Tenant has been eſſoin'd, that it ſhall be adjudg'd, and not adjorn'd, to the Intent that the Demandant ſhall have Judgment againſt the Tenant to recover, and he over in Value, and all the Court agreed to it, becauſe it is for the Advantage of the Demandant to have his Judgment, but contra in the principal Caſe; For there it is Delay to the Demandant. Br. Eſſoign, pl. 104 cites 3 H. 7. 13 ——Fitzh. Eſſoign, pl. 125. cites S. C.

In Formedon the Tenant vouch'd, and Proceſs continued till the Vouchee appeared ready to enter into the Warranty, and at this Day the Tenant was eſſoign'd, and the Eſſoign adjudg'd and adjourn'd; For it may be that he who appears as Vouchee is not the ſame Perſon who was vouch'd. Br. Eſſoign, pl 71. cites 22 H 6 3.——Hob. 46. pl. 52. in Caſe of Clanrickard v. Liſle. S. C. cited per Cur. and that 5 E. 3. Eſſoign 54 is the like, where the firſt Vouchee was eſſoign'd after an Eſſoign of his Vouchee; And 13 E 3. Eſſoign 6. and that a Roll of the Book of 22 H. 6. which is the very Caſe with the principal Caſe was found according to the Book between Crull *and* Manſell. Mich. 22 H 6. in the Eſſoign Roll. And ſo Hill. 34 H. 6. between Belgrave *and* Harding and divers others, but the Book of 3 H. 7. was not warranted by any Roll; For Hobart Ch. J. ſaid he had cauſed it to be ſearched.

This Statute extends not to a Demurrer in Law. 2 Inſt. 126.

In Action of Debt a *Cuſtom of London* was alleged, but denied by the Plaintiff; This Iſſue ſhall not be *tried* by In

26. 52 *H.* 3. *cap.* 13. Enacts that *after a Man has put himſelf upon an Inqueſt he ſhall have but one Eſſoign or one Default; ſo that if he come not at the Day given him by the Eſſoign, or make Default the ſecond Day, the Inqueſt ſhall be taken by his Default; * and if ſuch Inqueſt be taken in the County before the Sheriff or Coroners, it ſhall be returned upon the King's Juſtices at a certain Day; and if the Party Defendant come not at that Day, upon his Default another Day ſhall be aſſigned. And it ſhall be commanded to the Sheriff, that he cauſe him to come to hear the Judgment if he will according to the Inqueſt; at which Day if he come not, upon his Default they ſhall proceed to Judgment. In like Manner it ſhall be done, if he come not at the Day given unto him by his Eſſoign.*

queſt but by *the Certificate of the Mayor by the Mouth of the Recorder.* Proceſs iſſued to the Mayor to certify, at which Day the Defendant prayed to be eſſoigned, and ſo he was by the Opinion of the whole Court; for this was not a Trial per Patriam 2 Inſt. 126

Eſſoign here is taken for a *common Eſſoign*, and extendeth not to the Eſſoign De Servitio Regis &c. 2 Inſt. 126.

This Act reſtrains Delays, and therefore is to be underſtood where an Eſſoign does lie, and gives not any where none was before; and therefore after Iſſue in a Sci. Fac. the Defendant ſhall not be eſſoigned. 2 Inſt. 126.

But

But if there are divers Tenants in a Præcipe, or divers Defendants in a Perſonal Action, though in Law they are but one Tenant, or one Defendant, yet each of them ſhall have one Eſſoign. 2 Inſt. 126.

* The Meaning of this Clauſe is, that if after Iſſue joined in a baſe Court the Defendant hath had his Eſſoign, yet if the Plea be removed before the King's Juſtices, he ſhall have another Eſſoign before the Juſtices; for the Proceeding in the baſe Court is not of Record above. 2 Inſt. 127. cap. 13.

27. 13 *E.* 1. *cap.* 27. *After ſuch Time as any has put himſelf upon Inqueſt, one Eſſoign ſhall be allowed at the next Day, but at the other Days the taking of the Inqueſt ſhall not be delayed by Eſſoigns, whether he were eſſoigned before or no. Neither ſhall any Eſſoign be allowed after Day given Prece Partium, nor where the Parties conſent to come without Eſſoign.* This Act is to be *intended only of a Plea perſonal and of a common Eſſoign*, and not of an Eſſoign De Servitio Regis; for that he may caſt when he will. 2 Inſt. 417. —— Tho' the Words of the Act are general, yet it muſt be underſtood only in Caſes where an Eſſoign does lie, which is implied by the Word (allowed) and therefore if the Defendant comes in by Exigent, or Cepi Corpus, and joins Iſſue ad Proximum Diem he cannot be eſſoigned; for he remains either in Ward or goes by Mainpriſe, and therefore before this Statute could not be eſſoigned, and this is a Branch of Reſtraint and not of Inlargement. 2 Inſt. 417.

In Perſonal Actions before Iſſue joined every Default was peremptory, but after Iſſue joined, the firſt Default is not peremptory, but the ſecond is, and this is by the Statute of Weſtm. 2. cap. 27. and Marlb. Poſtquam aliquis ſe in Inquſitionem poſuerit, non habebit niſi unicam Defaltam; and this Unica Defalta is always upon the Return of the Venire, and not upon the Diſtringas; for the Unica Defalta muſt be ad Proximum Diem, which is the Day upon the Venire. And though the Defendant never appears now upon the Return of the Venire, yet heretofore the Tenant was then demanded ſolemnly, and if he made Default, there went out a Diſtringas againſt the Jury, with a Clauſe in it to diſtrain the Defendant, and if after this he made Default again, it was peremptory, becauſe there was no Proceſs left to fetch him in; Per Holt Ch. J. 1 Salk. 216. Trin. 2 Ann. B. R. in Caſe of Staple Hayden.

28. 3 *E.* 1. *cap.* 42. *In Writs of Aſſiſe, Attaints and Juris Utrum, after the* * *Tenant has once appeared, he ſhall be no more eſſoigned, but ſhall make his Attorney if he will, and if not, the Aſſiſe or Jury ſhall be taken through his Default.* This is not to be intended of an Aſſiſe of Novel Diſſeiſin, in which Writ the Tenant ſhall not be eſſoigned either before or after Appearance, but is intended of an Aſſiſe of Mortdanceſtor, and it is ſaid that the Juſtices of B. R. will not allow an Eſſoign for the Plaintiff in any Manner of Aſſiſe, nor for the Tenant in Aſſiſe of Mortdanceſtor. 2 Inſt. 249.

But if Aſſiſe of Novel Diſſeiſin be diſcontinued by the not coming of the Juſtices or Demiſe of King, the Tenant ſhall be eſſoigned in a Re-attachment, and ſo ſhall the Tenant in a Re-ſummons after a Diſcontinuance in Aſſiſe of Mordanceſtor. 2 Inſt. 349.

An Aſſiſe of Mortd' was brought in Cheſter, and the Tenant vouched a Foreigner to Warranty, whereupon the Record was removed into C. B 15. Paſch. The Tenant may be eſſoigned; For the Plea in Bank is not the Plea of Aſſiſe, but the Plea there is only upon the Warranty; For the Aſſiſe ſhall not be taken in Bank. 2 Inſt. 249.

This Statute is intended of the Tenant in an Attaint as well in a Plea Perſonal or mixt, As upon a Plea meerly in the Realty. 2 Inſt. 249.

* This extends as well to the Tenant in Law as to the Vouchee, and Tenant by Receipt as to the Tenant in Deed; For it is to ouſt Delay for the Expedition of Juſtice, and for the Eaſe and Benefit of the Jurors, and therefore being in equal Miſchief ſhall be in equal Remedy. 2 Inſt. 249.

The Eſſoign here though ſpoken of indefinitely is to be underſtood of a Common Eſſoign. 2 Inſt. 249.

29. *In Plea of Land at the Petit Cape returned the Demandant was eſſoigned*, and *had Day till now*, and the Demandant held him to the Default. Trewe ſaid, the *Default* cannot be taken; for it *is gone by Eſſoign*, and this notwithſtanding the *Tenant was compelled to anſwer to the Default.* Br. Eſſoign, pl. 87. cites 5 Aſſ. 10.

30. The *Parol* was *put without Day in Præcipe* quod reddat *againſt a Prior, becauſe the King ſent Superſedeas that he had ſeiſed the Land into his Hands by War*, becauſe the Tenant was a Prior Alien, and after the *Demandant brought Procedendo and Reſummons* where Parol was put without Day before, after *Venire Facias returned and the Jury appeared*, and *at the Day of the Reſummons returned the Prior was eſſoigned*, and it was *challenged*,

challenged, becauſe the Prior was at another Time eſſoigned upon the Venire Facias in the firſt Action; et non allocatur; but the Eſſoin admitted. Br. Eſſoign, pl. 59. cites 21 E. 3. 44.

31. In *Præcipe* quod reddat the *Tenant vouch'd to Warranty*, and the *Vouchee counterpleaded by the Statute*, and *at the Day of the Venire Facias returned the Tenant was eſſoigned*, and after *at the Niſi Prius the Demandant granted the Voucher*, and *in Bank Summons iſſued againſt the Vouchee who made Default*, and *at the Grand Cape Ad Valent' returned, the Tenant was eſſoigned again.* Thorp ſaid, he may well; for the *firſt Proceſs* upon which he was eſſoigned is *determined by the Grant of the Voucher*, and the Eſſoign was adjudged and adjourned. Br. Eſſoign, pl 77. cites 39 E. 3. 8.

32. Any Time that a common Eſſoign lies, Eſſoign of the Service of the King lies; But not e contra; For *at the Day of Return of Grand Cape or Petit Cape Eſſoign of the Service of the King lies.* Br. Eſſoign, pl. 42. cites 12 H. 4. 14. per Hank.

33. In *Debt* the *Defendant tendered his Law*, and had Day &c. and *at the Day the Plaintiff was eſſoigned* &c. and *at the Day the Defendant was eſſoigned* &c. and at the Day the *Plaintiff was eſſoigned again*, by which the Defendant went quit without his Law, per Judicium Curiæ. Br. Eſſoign, pl. 49. cites 9 H. 5. 5.

34. In *Replevin after Iſſue at the Day of the Habeas Corpora returned*, one *caſt Eſſoign de Servitio Regis for the Plaintiff*, and it was challenged, inaſmuch as after Iſſue a Man ſhall have but one Eſſoign or one Default, but it was ſaid that this is intended of Common Eſſoign. Per Brown, the Statute is general of Eſſoign; But per Forteſcue *this Eſſoign ſhall lie at what Day a Man will.* Br. Eſſoign, pl. 65. cites 19 H. 6. 51.

35 In Treſpaſs *Protection* was *allowed for the Defendant*, and *the next Day the Plaintiff caſt Repellance, and pray'd Re-attachment* againſt the Defendant, *and Habeas Corpora againſt the Jurors* and had it, and at the Day the Attorney of the Defendant was eſſoigned, and it lies well, per Cur. *So* upon *Reſummons.* Br. Eſſoine, pl. 11. cites 34 H. 6. 4.

36. In a *Formedon by ſeveral Demandants*, *ſome of them would not proceed*, whereupon a *Summons Ad ſequendum ſimul was awarded* againſt thoſe that would not Proſecute, and at the Return thereof the Defendants would have been ſeverally eſſoigned againſt the Demandants in a Writ of Summons &c. The Juſtices of C. B. awarded that *all the Defendants in the Summons* &c. *ſhall have but one Eſſoign for them all, and that ſhall be againſt the Tenant in the Formedon*; Per Cur. Bendl. 58. pl. 98. Trin. 4 & 5 P. & M.

37. In a *Formedon in the Deſcender*, the Tenant had been *eſſoigned upon the Summons, and alſo upon the View.* And afterwards *pleaded Ne dona pas*, the general Iſſue, and thereupon Iſſue was joined; And if he might be eſſoigned again after Iſſue joined was the Queſtion? And the Court was of Opinion, That *in a Real Action the Tenant may be eſſoigned after Iſſue joined*, but *not in a Perſonal* Action, by the Statute of Marlbridge. Godb. 235. pl. 327. Mich. 11 Jac. C. B. Vaughan's Caſe.

38. The *Formedon did abate by the Death of one of the Demandants*, and upon a *new Writ brought by Journies Accounts* the *Tenant eſſoigned*, and it was moved by the Demandant that the Eſſoign ſhould be quaſhed, becauſe the Tenant was eſſoigned upon the firſt Writ, but the Eſſoign was allowed by the Court. Brownl. 152. Brigham v. Goodwin.

39. If

39. If there are *three Defendants* and *one caſts an Eſſoign which is not adjourned*, the others have no Day in Court to caſt an Eſſoign. Ld. Raym. Rep. 79. Paſch. 8 W. 3. Burghill v. Gibbons.

(T. 2) Fourcher by Eſſoign.

1. *BY the Statute of W.* 1. *made* 3 *Ed.* 1. *cap.* 42. *For as much as Demandants are often delayed &c. it is enacted that Parceners or Tenants jointly infeoffed ſhall not fourch by Eſſoign, and ſhall have but one Eſſoign.* This Act extends only to Real Actions in reſpect of the Word

Demandant which is proper to Real Action; and alſo by the Words Parceners, Tenents, or Tenants jointly infeoffed; But not to Action of Debt upon an Obligation, Covenant, or other like Perſonal Actions. 2 Inſt. 251. Cap 43.

This Act is to be underſtood after Appearance; For that is no Fourcher but after former Eſſoigns and reciprocal Appearance. 2 Inſt. 251 cap. 43.

In a Writ of Writ of Annuity againſt a Parſon, he prayed in Aid of the Patron and Ordinary, and they, after each of them had had one Eſſoign, would have fourched, but could not by the Rule of the Court, and yet the Prayee is no Party to the Writ. 2 Inſt. 251. cap. 43.

This Statute is made againſt the Foucher by Eſſoign of the Tenants, and not of the Demandants. Ibid.

It extends not to Baron and Feme ſeiſed in the Right of the Feme, (but this is remedied by the Statute of Glouceſter;) But where the Baron and Feme are jointly infeoffed they are within the Purview of this Statute 2 Inſt. 251. cap. 43.

All Jointenants are within this Statute though their Eſtate is created by any other Conveyance than by Feoffment. Ibid.

This Statuteaids Jointenancy by Deed but not by Fine, unleſs in Caſe of Dower. See Jenk. 9. pl. 15.

2. *Stat. of Glouceſter* 6 *E.* 1. *cap.* 10. *provides, that where the Husband and Wife are impleaded in the Court of the King they ſhall not fourch by Eſſoign.* This Statute extends to Common Eſſoigns and not to Eſ-

ſoign De Servitio Regis; And it extends only to Real Actions, and therefore in Perſonal Actions they may fourch by Eſſoign. 2 Inſt. 321.

This Act extends to Eſſoigns after Appearance, viz. after all the Tenants have appeared, and therefore Baron and Feme may fourch by Eſſoign before Appearance notwithſtanding this Act. 2 Inſt. 321.

3. 9 *E.* 3. *Stat.* 1. *cap.* 3. *In a Writ of Debt brought againſt Executors they ſhall not fourch by Eſſoign.*

4. In *Præcipe* quod reddat *againſt four, two appeared* and *two were eſſoigned*, and *at the Day the two, who were eſſoigned, appeared*, and the *other two were eſſoigned*, which was challenged, and yet the Eſſoign was adjudged and adjourned; For per Thorpe, they may fourch *before Appearance* notwithſtanding the Statute; *Contra after Appearance.* Br. Eſſoign, pl. 131. cites 38 E. 3. 18.

5. In a Præcipe quod reddat, if a *Verdict at the Niſi Prius* be given *againſt the Tenant*, and the *Judgment is not given at the Day in Bank*, but the Parties are *adjourned till the next Term*, whether the Tenant can be then eſſoigned, Dubitatur. Kelw. 132. pl. 108. Caſus incerti Temporis.

6. In *Replevin by two*, the *one appeared*, and the *other was eſſoigned*, and *at the Day he, who was eſſoigned, appeared*, and the *other was eſſoigned*, and *at third Day he who firſt eſſoigned would have been eſſoigned again*, and *his Companion appeared*, and the Eſſoign was Ouſted, for he ſhall not fourch. Br. Eſſoign, pl. 3 cites 9 H. 6. 44.

7. In *Debt* the *Defendant tendered his Ley-gager* and had Day &c. and *at the Day the Plaintiff was eſſoigned*, and after *at this Day the Defendant was eſſoigned*, and after at this Day the *Plaintiff caſt another Eſſoign*, and it lay well, per Cur. For *as long as the Plaintiff and Defendant agree they may Fourch by Eſſoigns*; Quod nota. Br. Eſſoigne, Br. Eſſoign, pl. 7. cites 27 H. 6. 2.

8. The *Tenant may be eſſoigned after the View, and at the Day the Demandant may be eſſoigned, and this is no Fourcher, but if* at the Day &c. the *Tenant will be eſſoigned again*, then ſpeak of the Fourcher &c. by which the Eſſoign was adjudged and adjourned; Quod Nota. Br. Eſſoign, pl. 85. cites 39 H. 6. 28, 29.

9. Fourcher by Eſſoign *on the Part of the Tenant is, when* a Præcipe is brought againſt two or more Tenants, and after each of them has had one Eſſoign, which is due to them by Law, they over again delay the Demandant by ſucceſſive Eſſoigns. 2 Inſt. 250. cap. 43.

10. *As* if a Præcipe is brought againſt A. and B. and A. is eſſoigned, and B. appears and hath Idem Dies given him; at which Day A. appears, and B. is eſſoigned, (this is lawful) but then at that Day B. is eſſoigned again, & ſic Viciſſim & alternis Vicibus, this is called Fourcher by Eſſoign. 2 Inſt. 250.

11. To *fourch* in one of the Significations *is to divide*, and becauſe they divide themſelves in Delay of the Demandant, by Eſſoigns and Appearances interchangeably it is called Fourcher by Eſſoign Ibid.

12. The Statute 3 E. 1. cap. 43. Weſtm. 1. is not to be underſtood of a *Writ of Partition* where nothing is in Queſtion, but the Diviſion of the Land, but where the Right of the Land is in Queſtion, and the Words of the Statute import ſo much, which provides againſt the Delay of Right by ſeveral Eſſoigns; Per Hobart Ch. J. And the Prothonotaries ſaid, that their Precedents were ſo, and that in ſuch Caſe they might ſever after Appearance. Hob. 8. pl. 17. The Caſe of Eſſoigns.

13. In a *Formedon againſt ſeveral* Tenants, *one appeared and was eſſoigned*, and then *another appeared*, and it was moved whether he could be eſſoigned by reaſon of the Statute of Weſtm. 1. cap. 43. which ſeems to be that Parceners and Jointenants ſhall have but one Eſſoign, and that they ſhould not fourch. Cur. contra; the Statute is to be *underſtood of Eſſoigns after Appearance*, and ſo is the Book of 28 E. 3. 18. It is ſaid to have been the Law of the Times for Tenants to fourch before Appearance, and ſo is 2 Inſt. 250. Hob. 8. and 46. The Caſe of Eſſoigns, if the Tenant vouched two, one Eſſoign may be caſt for each of them ſingly. 2 Vent. 57. Trin. 1 W. & M. in C. B. Bowyer v. Milner.

(U) Trial of an Eſſoign.

By whom.

1. IF an Eſſoign be caſt, becauſe Nurſe to A. the King's Daughter, the Plaintiff cannot take Averment, that the ſaid A. is of full Age, and therefore is not to have a Nurſe, becauſe the Eſſoigner is not Party to it, and therefore the Eſſoign ſhall be adjudged and adjourned. 28 E. 3. 97. b. adjudged.

(U. 2) At what Time.

2. If an Eſſoign be challenged, becauſe it is for the Plaintiff, where he hath an Attorney, for whom the Eſſoign lies, this Challenge ſhall be tried at the Day which is given by the Eſſoign, and not immediately, becauſe the Eſſoigner cannot be Party to try any Challenge. 45 E. 3. 10 b. * 12 H. 4. 14. 1 E. 3. 2.

3. But where an Eſſoign is challenged becauſe he was ſeen in Court, this ſhall be tried the ſame Day, becauſe it lies in View and Record of Court. 45 E. 3. 10. b.

* Br. Eſſoign, pl. 42. cites S. C. but not S. P. —— Fitzh. Eſſoign, pl. 138. cites S. C. but not S P. —— If the Party be eſſoigned, and not his Attorney, this is a Diſcontinuance of the Proceſs; for the Attorney only ſhall be eſſoigned, and there he may put his Challenge upon the Eſſoign, that the Party has Attorney not removed, which ſhall be tried at the Day, and not before; for the Eſſoigner cannot be Party to the Trial of any Challenge; And ſo upon every Challenge upon Eſſoign, unleſs where it is challenged becauſe the Party was ſeen in Court the ſame Day, this ſhall be tried immediately by the View of the Party, and in recording of the Court if he was preſent or not. Br. Eſſoign, pl. 27. cites 45 E. 3. 10. —— Fitzh. Eſſoign, pl. 155. cites S. C.

(U. 3) For the Tenant.

4. If an Eſſoign be caſt by an Attorney, and the Demandant challenge it, becauſe another was made Attorney in the Plea, who was not eſſoigned; this cannot be tried immediately, viz. Whether or no the firſt Attorney was removed, or other Matter &c. becauſe the Eſſoiner is not Party to the Challenge to try it. 11 H. 4. 87. b.

In Formedon Conuſance of the Plea was granted, and the Demandant ſued Reſummons for Failer of Right in

5. When the Challenge cannot be tried immediately the Eſſoign ſhall be adjourned upon the Challenge but not adjudged.

the Franchiſe, and the Attorney of the Tenant caſt Eſſoign, where another Attorney was eſſoigned upon the Original, and becauſe this Matter of Challenge cannot be tried by the Eſſoigners, therefore per Cur. the Eſſoign ſhall be adjourned but not adjudged, and if the Allegation of the Demandant be true, that he has another Attorney in Court, the Eſſoign ſhall turn him in Default at the Day, by which the Attorney [who was eſſoigned] appeared and prayed the View; And it was there agreed, that if the firſt Attosney be not * retained he ought to be eſſoigned, and not the other Attorney; quod nota Br. Eſſoign, pl. 41. cites 11 H. † 8. 87.

* All the Editions are (retained) but Quære if it ſhould not be (removed.)

† All the Editions are as here, but it ſhould be 11 H. 4. 87. b. pl. 37. —— Fitzh. Eſſoign, pl. 137. cites S. C.

(X) In what Caſes it ſhall be adjourned and adjudged.

1. IN Quare Impedit if an Eſſoign be caſt for the Plaintiff, and Defendant ſaith that he hath an Attorney in the Plea, who is not eſſoigned, this ſhall not be adjudged, becauſe if it be true it ſhall be diſallowed, but it ſhall be adjourned, becauſe the Attorney may be removed by the Plaintiff. 14 H. 4. 13.

Br. Eſſoign, pl. 40. cites S. C. but there it is only, viz. That the Eſſoign ſhall

be adjourned, and the Challenge of the Defendant entered, and at the Day it ſhall be tried if true or not, and if he has Attorney, the Defendant ſhall have a Writ to the Biſhop. —— Fitzh. Eſſoign, pl. 141. cites 14. H. 4 12. S. C.

(X. 2)

(X. 2) In what Caſes adjudged and adjourned.

Br. Eſſoign, pl. 43. cites S. C. accordingly, & Poſtea adjornatur — Fitzh Eſſoign, pl 174 cites S. C.

2. If Demandant be eſſoigned, and the ſame Day a Protection is caſt for the Tenant the Eſſoign ſhall be adjudged, becauſe the Demandant ſhall not be nonſuited; but it ſhall not be adjourned, becauſe the Parol is put ſine Die by the Protection. 10 H. 4. 25. b.

3. In *Mortdanceſtor* the *Tenant vouched B. who at the Summons Ad Warrant' was eſſoigned of the Common Eſſoign, and after de Servitio Regis*, and *did not bring his Warrant at the Day*, and *at the ſame Day the Tenant was eſſoigned de Servitio Regis*, and the Eſſoign was adjudged and adjourned, and Idem Dies given to the Vouchee; for *none is Party but the Tenant till the Vouchee has warranted*, and therefore the Aſſiſe lies well for the Tenant. Br. Eſſoign, pl. 95. cites 23 Aſſ. 15.

4. In *Debt* the *Defendant came by the Exigent*, and the *Plaintiff was eſſoigned*, and therefore it was adjudg'd and adjourned, and *Idem Dies* given *to the Defendant without Mainpriſe*. Br. Eſſoign, pl. 21. cites 42 E. 3. 8.

5. *Mortdanceſtor againſt J. who vouched B. who was eſſoigned at the Summons ad Warrant'* and *at the Day was eſſoigned de Servitio Regis*, and *did not bring his Warrant*, and *at the ſame Day the Tenant was eſſoigned*, and the Eſſoign was adjudged and adjourned, notwithſtanding the Demandant prayed the Aſſiſe by Default of the Vouchee, who is not Party till he has entered into the Warranty; quod nota. Br. Eſſoign, pl. 28. cites 45 E. 3. 24.

At the Exigent the Plaintiff was eſſoigned, which was adjudg'd and adjourned, and Idem Dies given to the Defendant without Mainpriſe; quod nota. Br. Exigent, pl. 53. cites 48 E. 3. 23.

6. In *Præcipe* quod reddat *againſt the Baron and Feme* the *Baron was eſſoigned*, and the *Feme had Idem Dies*, and *at the Day the Feme caſt Eſſoign, which was challenged, becauſe they ſhall have only one Eſſoign as one Tenant*, but becauſe the *Statute is Quod poſtquam ſemel comparuerit in Curia, ideo 'allocet' ei Eſſon'*, which is *intended after Appearance*, therefore the Eſſoign was adjudged and adjourned, as it is often ſaid elſewhere, and 34 E. 3. as it is ſaid there. Br. Eſſoign, pl. 29 cites 48 E. 3 20.

7 In *Formedon in London*, the *Tenant pleaded Warranty and Aſſets deſcended in a foreign County*, by which the *Record was ſent into Bank*, and *Day given*, and after *Venire Facias iſſued*, and *at the Day the Tenant was eſſoigned*, and becauſe this is the *firſt Day*, *and he was not eſſoigned in London*, therefore it was adjudged and adjourned. Br. Eſſoign, pl. 30. cites 48 E. 3. 21.

8. In Deceit *after Day given to the Party Salvis Advantagiis* &c. the *Defendant was eſſoigned*, and *rehearſed all the Writ in this Eſſoign in Effect*, which was ſhewn to the Court, and the Eſſoign was adjudged and adjourned. Br. Eſſoign, pl. 32. cites 2 H. 4. 16.

9. *Quare Impedit by the King againſt two* who *pleaded to Judgment*, and they were *adjourned*, and *at the Day they were demanded, and* were *eſſoigned*, and it was adjudged and adjourned, notwithſtanding it was ſaid that the King was Party. Br. Eſſoign, pl. 33. cites 3 H. 4. 15.

10. In *Quare Impedit by the King, at the Venire Facias returned the Attorney of the Defendant was eſſoigned*, and after the Eſſoign adjudged, and before the Adjournment, the Attorney was ſeen in Court. Per Gaſc. this is not material after the Eſſoign is adjudged, and the *Eſſoign was*

was adjourned notwithstanding that the King was Party. Br. Effoign, pl. 36. cites 7 H. 4. 39.

11. *A Man had two Attorneys*, and the *one was effoigned, and the other not*; And per Hull, in this Case where a Man has two Attorneys, and the one is effoigned, this shall be *adjourned but not adjudged.* Br. Effoign, pl. 43. cites 12 H. 4. 25.

12. In *Præcipe* quod reddat the *Tenant had Aid of him in Reversion, who leased to him for Life*, and *at the Day of the Summons ad Auxiliand' returned the Prayee was effoigned*, and at the Day of this is effoigned, and it was adjudged and adjourned; quod nota; Per Cur. Br. Effoign, pl. 12. cites 34 H. 6. 16.

13. In *Debt at the Pluries Capias the Defendant came in gratis*, and the *Plaintiff was effoigned*, and it was adjudged and adjourned per Cur. *Contra* it shall be *upon the Exigent, or* if the Sheriff had returned *Cepi Corpus*; for the Defendant shall not be awarded to the Fleet, nor the Effoigner to Mainprise, unless the Plaintiff appears and be ready; quod nota. Br. Effoign, pl. 16. cites 34 H. 6. 45.

14. After the *Parties are at Issue*, and the *Defendant is effoigned*, if the Plaintiff appears the Effoign shall be adjourned, and by this the Parties have Day. Br. Discontinuance de Process, pl. 32. cites 1 H. 7. 21. by all the Prothonotaries.

(Y) Warrant of an Effoign.

In what Cases to be made.

1. BEFORE the Statute of Marlbridge cap. 20. [19.] at the Common Law, in an Effoign de Malo veniendi, the Effoignor ought to swear, that his Master was so sick by the Way, that he could not come. 12 H. 4. 24. b. 25. b. Br. Effoign, pl. 45. cites S. C.

2. But this is toll'd by the said Statute in Case of Common Effoigns. 2 E. 4. 17. Br. Effoign, pl. 106. S P. cites 5 E. 4. 70. per all the Justices.——Ibid. pl. 108. S. P. cites 2 E. 4. 16.

3. If a Man be effoign'd of an Effoign de Service le Roy, and afterwards a Protection is cast for him, if a Re-summons be sued, this revives the Whole, and therefore the Effoign ought to be warranted. 12 H. 4. 14. b. Br. Effoign, pl. 42. cites S. C. and that the best Opinion was that the Re-summons does not revive the Whole which was done before but the Original.——And Fitzh. Effoign, pl. 138 cites S. C. and that by Thirne the Plea is not reviv'd in the same Plight as it was before.——And the Year-Book at Fol. 15. is, That though the Parties are come to new Process after the Re-summons, it is Deceit and Falsity done to the Court at one Time, which Falsity is not purg'd by the first Summons, if he does not warrant the first Effoign.

4. An Effoign de Service le Roy ought to be warranted. 21 E. 3. 13. * 37. 62. * Br. Effoign, pl. 37 cites S. C.——Br. Effoign, pl. 53. cites S. C. and because the Baron who was effoign'd de Servitio Regis did not bring his Warrant at the Day of the Return, the Feme was effoign'd de Servitio Regis, and allow'd——And the Statute of Marlbridge is not intended of this Effoign Br. Effoign, pl. 106. cites 5 E. 4. 70. by all the Justices.——Ibid. pl. 108. cites 2 E. 4. 16. S. P. per tot. Cur.

Fitzh. Eſſoign, pl. 7. cites S. C.

5. If a Feme be eſſoign'd becauſe Nurſe to the King's Son, this Eſſoign ought to be warranted. 13 E. 3 19. b.

Fitzh. Eſſoign, pl. 7. cites S. C.

6. But when the Eſſoign is caſt, there is no need of ſhewing any Thing to prove the Feme a Nurſe to him, for the Eſſoign may be brought the next Day. 30 E. 3. 19. b.

Fitzh. Eſſoign, pl. 59. cites S. C.

7. If the Tenant be eſſoign'd de Service le Roy, and before the Day which he has thereby, the Parol is diſcontinued by the Demiſe of the King, and a Re-ſummons ſued, yet the Tenant need not warrant the Eſſoign at the Day; for he is not upon the Re-ſummons to anſwer for any Default; and the Juſtices now are not the Juſtices of the late King. 1 E. 3. 7. b. adjudged.

This Act ſpeaks generally of Eſſoigns, and yet it is particularly to be underſtood of one of the five Eſſoigns, and that it is of the common Eſſoign De Malo veniendi, ſo as in the Eſſoign De Servitio Regis and the reſt he that caſts the Eſſoign muſt ſtill be ſworn, the Delay in them being ſo great. 2 Inſt. 137.

8. *The Statute of Marlb. cap.* 19. *enacts, That in Counties, Hundreds, Courts Baron, or* * *other Courts, none ſhall need to ſwear to* † *warrant his Eſſoign.*

* Theſe general Words are interpreted to extend to the King's Courts of Record at Weſtm. and other Courts of Record, though the Act begins with Inferior Courts; For otherwiſe theſe General Words ſhall be void; For it cannot extend to Inferior Courts, and lower than theſe that are particularly named, and this is an Exception of the General Rule. 2 Inſt. 137.

† Warrantizare eſt jurare quod ita detentus fuit Ægritudine in veniendo verſus Curiam quod venire non potuit, which was the Oath of him that caſt the Eſſoign at the Common Law before this Act. 2 Inſt. 137.

9. Eſſoigner ought to appear in proper Perſon upon Eſſoign de Servitio Regis; For *if he does not bring his Warrant,* Action of *Diſceit lies againſt both.* Br. Eſſoign, pl. 44. cites 12 H. 4. 24.

10. *Bill againſt one in Cuſtodia Mareſchalli at the Venire Facias,* the Jury *ſhall not attend the diſcuſſing of the Doubt,* but *ſhall go and come again by Proceſs* when the Doubt is diſcuſs'd. Br. Eſſoign, pl. 106. cites 5 E. 4. 70.

11. If Tenant be *eſſoign'd de Sevitio Regis,* and has a Day to bring in his Warrant, and at the Day comes and *pleads, that the Demandant has releaſed to him all the Right* which he has in the Land, *but does not bring any Warrant to warrant the Eſſoign,* and whether he ſhall be received to plead this Releaſe dubitatur. And Keble took a Diverſity, whether the Releaſe was made before or after the Eſſoign caſt, and if after, ſaid, the Tenant had no Day before to plead it, and by the Releaſe the Right accruing by the Default was diſcharged. Kelw. 135. b. in pl. 119. Caſus incerti temporis.

(Z) At what *Time* it ought to be *ſhewed.*

* Br. Eſſoign, pl. 54. cites S. C. — Fitzh. Eſſoign, pl. 8. cites S. C.

1. WHEN an Eſſoign is caſt it ought to be warranted at the Day which he has by the Eſſoign; or otherwiſe there will be a Default at the Eſſoign caſt. 21 E. 3. * 13. † 37. 62. b.

† Br. Eſſoign, pl. 57. cites S. C.

2. If

2. If a Man be eſſoigned de Service le Roy, and at the Day a Protection be caſt, and afterwards the Reſummons is ſued, and the Party is ſummoned * of a common Eſſoign, he need not ſhew the Warrant of the firſt Eſſoign at this Day, becauſe his Abſence is excuſed by this. 12 H. 4. 14. b.

Br. Eſſoign, pl 42. cites S. C. —— * Mr. Danvers thinks the Senſe imperfect,

and that after the Word (ſummoned) theſe Words, viz. (caſts a common Eſſoin) ſhould follow, [which I ſuppoſe he intends inſtead of the Word (of)].

3. But at the Day which he has by the laſt Eſſoign he may ſhew both Warrants. 12 H. 4. 14. b.

Br. Eſſoign pl. 42. cites S. C. ——

Fitzh. Eſſoign, pl. 138. cites S. C.

4. If a Man be eſſoigned de Service le Roy before Appearance, and afterwards makes Default, by which a Grand Cape iſſues, if at the Return of it he appears and does not warrant the Eſſoign, he ſhall loſe the Land. 12 H. 4. 14. b. Curia.

Br. Eſſoign, pl. 42. S. P. per Thirne cites 12 H. 4. 14. —— Fitzh. Eſſoign, pl. 138. cites S. C.

5. *By the Statute of Glouceſter made* 6 E. 1. *cap.* 8. *In Treſpaſs and other Pleas, where Attachment and Diſtreſs lie, if the Defendant eſſoign himſelf of the King's Services, and bring not in his Warrant at the Day given by the Eſſoign, he ſhall recompence the Plaintiff Damages for his Journey* 20 *s. or more, at the Diſcretion of the Juſtices, and be amerced to the King.*

When the Demandant or Plaintiff is eſſoigned de Service le Roy, and at the Day brings not in his Warrant, this ſhall be adjudged a Nonſuit 2 Inſt. 314. —— The Statute ſays, where there is one Defendant &c. he ſhall pay 20 s. and if there are divers Defendants, and they are eſſoigned de Service le Roy, and at the Day bring in no Warrant, every one of them ſhall pay 20 s. For they are in Law ſeveral Eſſoigns.

And the Court by their Diſcretion may by Force of the Act increaſe it to a greater Sum, as ſometimes to 40 s. &c.

And albeit this Branch does not by expreſs Words determine what ſhall be further done, yet if the Eſſoign were caſt after Iſſue in a Perſonal Action, and ſeeing the Eſſoign for want of a Warrant is turned to a Default, it follows that by the Common Law the Inqueſt ſhall be awarded by Default, and therefore in that Caſe he ſhall have the 20 s. for the Journey by the Statute, and by the Inqueſt recover his Damages and Coſts by the Common Law; for Statutes made for the ouſting of Delays are ever conſtrued liberally and beneficially.

In a Real Action, if an Eſſoign be caſt for the Tenant de Service le Roy, and no Warrant is brought in at the Day, he ſhall not pay the 20 s. &c. for this Act extends not to Real Actions; but a Petit Cape, or a grand Cape, ſhall lie as upon a Default, as the Caſe ſhall require. 2 Inſt. 314.

6. In a Writ of *Dower* the Tenant was eſſoigned, and the *Eſſoign adjourned in Craſtino Purificat'* at which Day the *Demandant did not appear with the Writ*, and demand the Tenant, but would have a Grand Cape made out. This being ſhewn to the Court, they ſaid, the Demandant muſt be Nonſuit, he not being ready in Court at the Day of Adjournment of the Eſſoign to demand the Tenant, and the Tenant was therefore in no Default. 2 Vent. 117. Hill. 1 & 2 W. & M. in C. B. Anon.

(A. a) Warranty of the Effoign.

1. IF Effoign be caſt by a Stranger, and a Day given by the Effoign whether the ſame Day to bring in the Warranty of the Effoign ſhall be given to the Effoigner, or the Tenant himſelf dubitatur. D. 4. 5. Ma. 154. 16.

2. If an Effoign be caſt by a Stranger Octabis Trinitatis, if the Utas be Dies Dominicus and not Juridicus the Warranty ſhall be to warrant the Abſence of the Party Octabis Trinitatis generally, and not Die Lunæ in Octabis Trinitatis. D. 4. 5. Mar. 154. 16, 17.

(A. a. 2) [Warranty of the Effoign.]

How it ought to be.

Br Effoign, pl 42. cites S. P. per Hull. 12 H. 4. 14.—

3. An Effoign de Service le Roy ought to be warranted by Writ out of the Chancery, and not by the King's Letters Patent. 12 H. 4. 15.

Fitzh. Effoign, pl. 138. cites S. C.

4. The Warranty of the Effoign ought to be by Letters Patents or by cloſe Writ. Quære, D. 4 5. Ma. 154. 16.

5. The Warranty ought to recite the Effoign, and that the Effoiner has been ſworn (for he ſhould be ſworn De veritate Effonii.) Quære. D. 4, 5. Ma. 154. 16.

6. In *Præcipe* quod reddat the *Tenant was eſſoin'd de Servitio Regis*, and *at the Day caſt Protection without other Warrant of Eſſoign*, and well, per Cur. and the Protection allow'd; For the *one proves the other*. Br. Eſſoign, pl 34. cites 7 H. 4. 5.

7. Eſſoign of Service of the King muſt be warranted by the Eſſoigner *in proper Perſon*. Br. Eſſoign, pl. 42. cites 12 H. 4. 14. by Hank.

8. *At the Petit Cape the Tenant caſt Eſſoign de Servitio Regis*, and it was adjourn'd &c. and *Day given to bring in his Warrant*, and at the Day *he brought Warrant under the Privy Seal*, and it was held no Warrant; For *it ought to be under the Great Seal*, So of Protection; For the Juſtices ſit by Commiſſion under the Great Seal, and therefore that which diſcharges them ſhall be of as High Nature, and therefore the Eſſoign ſhall turn him in a Default, Per Judicium, quod nota. Br. Eſſoin, pl. 17. cites 35. H. 6. 2.

2 Inſt. 314. S. P. and the Warrant muſt teſtify that he is in the King's Service &c. which commonly is upon Certificate made to the Ld. Chancellor by the Captain of the Hoſt under whom he ſerves.

9. At the Summons ad Auxiliandum the Plaintiff was eſſoign'd de Servitio Regis, and had Day till the firſt Day of Eaſter Term to bring in his *Warrant under the Great Seal, and not under the Seal of the Captain*. Dal. 46. pl. 3. Anno. 5 Eliz. Anon.

(B. a) How it ſhall be made.

1. IF an Eſſoign de Servitio Regis be caſt for the Tenant in an Attaint, this may be afterwards warranted by Writ agreeing with the Eſſoign, though it does not agree with the Original of the Attaint. 4 Aſſ. 2. adjudged.

In Attaint the Tenant was eſſoign'd de Servitio Regis after Appearance, and it was adjudg'd and ſo adjorn'd notwithſtanding the Statute of Weſtm. 1. For this is taken of the common Eſſoign cap. 46. and after the Writ, which this warranted, did not agree with the Writ of Attaint in Quantity of the Land by which the Attaint was taken, quod nota. But ſee now the Statute 5 E. 3 of Eſſoign, tit. Attaint, the Eſſoign is ouſted. Br. Eſſoign, pl. 86. cites S. C. —— Fitzh. Eſſoign, pl. 63. cites S. C.

(C. a) Default or Appearance at the Day. The Effect thereof.

1. IN *Debt* the *Defendant was eſſoigned at the Venire Facias, and at the Day thereof was eſſoigned de Servitio Regis*, and at the Day of this *did not bring his Warrant*, and the *Plaintiff prayed the Inqueſt by Default*, and could have only 40 s. Damages for the Delay, and Niſi Prius awarded, where the Statute of Glouceſter cap. 7. is, that by ſuch Non-Warranty he ſhall loſe 20 s. for the Journey, or more, as the Diſcretion of the Juſtices ſhall ſerve. Br. Eſſoign, 57. cites 21 E. 3. 37.

2. In *Præcipe* quod reddat the *Baron and Feme prayed to be received by Default of the Tenant*, and the *Reverſion traverſed*, and *Ven. Fac. awarded*, and *at the Day the Baron made Default*, and the *Feme prayed to be received* and the *Reverſion traverſed*, and *Ven. Fac. awarded*, and at this Day the *Feme caſt Eſſoign and did not appear*, by which the *Demandant demurred*, and becauſe ſhe is not Party till ſhe be received in Fact, therefore the Eſſoign was *quaſhed*, and *Seiſin* of the Land was *awarded*. Br. Eſſoign, pl. 48. cites 5 H. 5. 11.

3. In *Præcipe* quod reddat the *Tenant made Default*; *Grand Cape was awarded*, and at the Day the *Demandant was eſſoigned*, and the *Tenant made Default*, and *one prayed to be received by Cauſe inſufficient, becauſe the Grant of the Reverſion bore Date before the Leaſe for Life*; and per Paſton and Hals. the Eſſoigner may *pray Seiſin* of the Land by the Default of the Tenant, and the Inſufficiency of the Cauſe. Br. Eſſoign, pl. 50. cites 9 H. 5. 10.

4. In *Præcipe* quod reddat the *Tenant waged his Law of Non-ſummons at the Grand Cape*, and it was adjourned &c. and at the Day the *Demandant was eſſoigned* and the *Tenant made Default*, and the Eſſoigner prayed *Seiſin* of the Land, and it was admitted that he well might. Br. Eſſoign, pl. 62. cites 8 H. 6. 36.

5. In *Treſpaſs* the *Sheriff returned the Defendant attached by* 20 *Sheep*, *Price* 20 *s.* and *at the Day the Defendant was eſſoigned*, and per Judicium it lies well, and if he appears at the Day that he has by the Eſſoign, he *ſhall ſave the Attachment*; For otherwiſe it is forfeited, per Aſhton. But ſee the Caſe next there that it is ſaved by the Eſſoign though

though he makes Default at the Day of Eſſoign adjourned, and he *ſhall have Writ to deliver to him his Goods immediately*; quod nota. Br. Eſſoign, pl. 13. cites 34 H. 6. 28.

6. *Dower againſt A. B. and C.* and *at the Day A. made Default*, and *B. was eſſoigned*, and *C. appeared*, and *Idem Dies was given to C.* &c. At the Day *A. made another Default*, and *B. appeared*, and *C. caſt Eſſoign*, and well; For every one ſhall have an Eſſoign notwithſtanding the Statute, but after they ſhall have no more Eſſoign; quod nota; by which he *prayed Seiſin of the Land againſt A.* who made Default after Default; but Danby ſaid No; For *it may be that when C. appears he will take the entire Tenancy*, and then there is no Reaſon that C. ſhould loſe a third Part by Default of A. and the Court may record the Default now; And therefore it ſeems that at the Day &c. *if C. does not take the entire Tenancy, Seiſin of the third Part ſhall be awarded againſt A.* Br. Eſſoign, pl. 110. cites 2 E. 4. 21.

(D. a) Default ſaved by Eſſoign.

In what Caſes.

Br. Eſſoign, pl. 1. cites S. C.

1. NOTE, per Martin and Bab. clearly for Law, that if *Tenant in Præcipe quod* reddat *returned makes Default at the Summons*, and after *at the Grand Cape he appears ready to ſave his Default*, and the *Demandant at this Day is eſſoigned*, this Eſſoign ſhall ſave the Default; quod nota; So that at the Day of the Eſſoign the Tenant need not ſave his *Default*; For this *is releaſed by the Eſſoign of the Demandant*, but he ſhall have Idem Dies; *But if* the Tenant *had made Default at the Day of the Grand Cape returned*, and the Demandant had been eſſoigned, this ſhall not ſave the Default of the Tenant; Contra if he appears at the Grand Cape; Note a Diverſity; and there the *Eſſoigner may pray Seiſin of the Land*; For there the Tenant who made Default cannot have Day by the Eſſoign, and then the Proceſs would be diſcontinued; Contra where he appears; quod nota Diverſity; But *where he appears at the Day of the Grand Cape and has Day by the Eſſoign, and makes Default at the Day of the Eſſoign*, Petit Cape ſhall iſſue; quod nota; Per tot. Cur. and per Brown Prothonotary. Br. Saver Default, pl. 5. cites 3 H. 6. 48.

2. *Præcipe quod* reddat *at the Grand Cape returned the Demandant is eſſoigned*, the Default of the Tenant is ſaved and releaſed; For *the Eſſoignor cannot declare, nor do any Thing but pray Proceſs.* Br. Saver Default. pl. 9. cites 33 H. 6 44.

3. *But* if the *Tenant tenders his Law of Non-ſummons* in Præcipe quod reddat, and has Day, *and at the Day the Demandant is eſſoigned*, the Default is not by this releaſed; For the Demandant has taken himſelf to the Default, and alſo this is an Iſſue which ought to be tried, quod nota Diverſity. Br. Saver Default, pl 9 cites 33. H. 6. 44.

4. Note per Pigot, Choke and Needham, if the *Tenant in Præcipe quod* reddat *make Default*, by which the *Tenant wages his Law of Non-ſummons*, and at the Day the *Demandant is eſſoigned*, this does not waive the Default; For *it is an Iſſue in Effect*, and ſee a Diverſity 5 and 9 [above] between theſe Caſes, and this Caſe; For *before Iſſue the Demandant may delay himſelf when it pends in Proceſs, but* here the *Ley Gager is Iſſue*, therefore Contra here. Br. Saver Default, pl. 34. cites 2 E. 4. 2.

5. In

5. In *Præcipe* quod reddat, if the *Tenant wages his Law of Non-ſummons*, and at the Day the *Demandant is eſſoigned*, this *is no Releaſe of the Default*; but *Contra if the Demandant be eſſoigned at the Day of the Petit Cape*, but Eſſoign of the Plaintiff upon Cepi Corpus returned ſhall make the Defendant to go without Mainpriſe. Br. Eſſoign, pl. 136. cites 8 E. 4. 2. per Choke, Needham and Pigot.

6. The *Caſting of an Eſſoign is no Appearance, but* is an *Excuſe for not appearing*; Agreed. Freem. Rep. 239. Mich. 1677. in Caſe of Fleming v. Lee.

(E. a) Quaſhed; for what.

1. *WRIT of Right was removed out of the Court of Ancient Demeſne by Recordare, for a Cauſe at the Suit of the Tenant*, and *at the Day the ſame Tenant was eſſoigned*, and it was quaſhed per tot. Cur. becauſe *if the Cauſe was inſufficient* or not true *the Parol ſhall be remanded*, and *if* it be true and *ſufficient*, the *Parties were at Common Law by Writ, and ſhall not proceed upon this Parol ſo removed*, and therefore the Eſſoign is to no Purpoſe quacunque via data, quod nota, and the like Matter Trin. 19 E. 3. and e contra 16 E. 3. Br. Eſſoign, pl. 14. cites 34 H. 6. 35.

2. Trinity *Term, and all the Days of the Return* thereof by Name, and Oct. Mich. *were adjourned* to 15 Mich. next, and therefore all Eſſoigns taken at the firſt Day were void; for no Roll is made there of Trin. Term, but all that ſhould be in this ſhall be at 15 Mich. for no Roll is made of the Term adjourned, but only of the Writ of Adjournment; quod nota. Br. Eſſoign, pl. 111. cites 4 E. 4. 21.

(F. a) Proceedings.

1. IF the *Defendant* be *eſſoigned at the Day of the Venire Facias return'd*, yet Habeas Corpus ſhall iſſue againſt the Jury returnable the ſame Day that the Eſſoign is adjourned; for otherwiſe the Proceſs is diſcontinued againſt the Jury. Br. Eſſoign, pl. 137. cites 21 E. 4. 20.

2. It in a *Formedon ſome of the Demandants refuſing to proceed* a *Summons Ad ſequendum ſimul iſſues againſt thoſe* who would not purſue, all the Defendants ſhall have but one Eſſoign, and it ſhall be againſt the Tenant in the Writ of Formedon; Per Curiam. Bendl. 58. pl. 98. Trin. 4 & 5 Ph. & M. Anon.

3. *When it appears that the Tenant was eſſoigned, and* the Eſſoign *adjourned till another Term*, the Parties thereby are out of Court, and their *Appearance cannot be recorded*; And becaute in the principal Caſe an Appearance is recorded, and a Plea pleaded on the Roll, it ſhall be intended a Practice and Miſ-entry, (as in Truth it was, and as appeared on Examination) then otherwiſe; Wherefore the firſt ſhall be intended the true Roll, and all Proceedings ſhall be according to it, and the Appearance after, when none of the Parties had Day in Court, is void; And ſo the Plea pleaded, and Trial and Judgment thereupon, are erroneous, and not aided by the Statute of Jeoffails; And for this Cauſe Judgment was reverſed. Cro. E. 367. pl. 2. Hill. 37 Eliz. B. R. Stokes v. Annesby.

If the Defendant has a Day given him on the Eſſoign Roll to a ſubſequent Term, he cannot enter his Appearance of the Term in which the Excuſe is given; For the Plaintiff by the Eſſoign-Roll has the ſame Day given him as the Defendant has, and the Defendant will not be allowed to

to appear and plead in the Abſence of the Plaintiff. Gilb. Hiſt. of C. B 11. —— If he eſſoigned, (viz. ſent his Excuſe for not appearing) the Excuſe was to be ſent on the Day that the Writ was returnable; for if he omitted that Day an Exception might be entered to his Non Appearance, and an Order had, that Non recipiatur Eſſonium Defendentis; and from this Exception the ſecond Day after the Return of the Writ was called the Day of Exception. Gilb. Hiſt. of C. B. 11. and in Marg. cites Cro. E. 367.

4. If the *Tenant be eſſoigned before the Vouchee enters into Warranty*, ſo that the Eſſoign is granted in reſpect of the Pleas which may ariſe between the Vouchee and Tenant, yet *it is to be entered between the Tenant and Demandant, and not between the Tenant and Vouchee*, and Idem Dies is ſtill to be given to the Parties not eſſoigned. Hob. 47. pl. 52. Earl of Clanrickard's Caſe.

5. Upon an Eſſoign of the Defendant an *Idem Dies ought to be given to the Plaintiff*; Agreed per tot. Cur. Carth. 173. Hill. 2 & 3 W. & M. in B. R. in Caſe of Clobery v. the Biſhop of Exeter.

(G. a) Pleadings.

Br. Cauſe, pl. 21. cites S. C.

1. IN *Mortdanceſtor* in Cheſter the *Tenant vouched foreign to Warranty*, by which the *Demandant cauſed the Record to come into Bank* 15 *Paſch.* at which Day the *Tenant was eſſoigned and challenged, becauſe after Appearance, where the Statute ouſts it*; to which it was *ſaid that the Plea here was no Plea of Aſſiſe, but all upon the Warranty*; for the Aſſiſe ſhall not be taken here, and as Herle was to have drawn the Eſſoign he ſaw that the Eſſoign was *in Placito Mortis Anteceſſoris* omitting this Word (*Aſſiſa*) Mortis Anteceſſoris, and becauſe the Word Aſſiſa was *wanting* the Eſſoin was quaſhed, and the Default of the Tenant recorded, and the Record remanded to Cheſter to take the Aſſiſe with the Record of it which was made in Bank. Br. Eſſoign, pl. 89. cites 8 Aſſ. 22.

2. A Man *cannot be eſſoigned againſt the one Tenant in Præcipe* quod reddat *brought by him againſt two by ſeveral Præcipes, and appear againſt the other*; but the Eſſoign was amended and caſt againſt all; The Reaſon ſeems to be becauſe a *Man cannot appear and be abſent at one Inſtant and one Place*. Br. Default, pl. 30. cites 21 E. 3. 36.

S. P. for an Eſſoign is only dilatory. Carth. 173. Hill. 2 & 3 W. & M. in B. R. in Caſe of Clobery v. the Biſhop of Exon.

3. The *granting of Eſſoign where Eſſoign does not lie* is not Error; Contra of *denying* Eſſoign *where it does* lie. Br. Eſſoign, pl. 116. cites 33 H. 8.

4. He who is *eſſoigned upon Summons* ſhall *not ſay that it was not upon Summons* &c. Per Wich. quod non negatur. Br. Eſtoppel, pl. 45. cites 46 E. 3. 30.

* S. P. Br. Eſſoign, pl 1. cites 3 H. 6. 48.

5. In *Præcipe* quod reddat the *Tenant at the Grand Cape waged his Law of Nonſummons*, and at the Day is eſſoigned, and the *Demandant appears*, and at the Day of Eſſoign the *Demandant was eſſoigned*, and the *Tenant made Default*; And per Marten J. the Eſſoigner may * *pray Seiſin of the Land*, quod Hully conceſſit. *But* the Eſſoigner *cannot counterplead the Reſceit* by which we will record his Preſence, ſuch as it is &c. Br. Eſſoign, pl. 83. cites 1 H. 6. 4.

6. In

6. In *Formedon* the *Tenant was eſſoigned*, and the *Eſſoigner pleaded to the Writ*. Martin ſaid, the *Eſſoigner may demand the Demandant to have a Nonſuit*, and the Eſſoigner *ſhall not plead Plea, but* may *allege it as Amicus Curiæ*, and ſo it may be, but not to have it by Way of Plea; quod tota Curia conceſſit. Br. Eſſoign, pl. 76. cites 4 H. 6. 16. Thel. Dig. 200. lib. 13. cap. 13. S. 1. cites S. C.

7. In Ceſſavit [againſt Baron and Feme who waged their Law and] *at the Day of the Law taken to be waged by the Tenant of Non-ſummons*, the *Attorney of the Demandant demanded the Tenements*, and the Baron made Default, and the Feme was received. Br. Eſſoign, pl. 10. cites 33 H. 6. 53. and Brooke ſays, So ſee That the *Eſſoigner may demand the Lands*.

8. *Formedon by T. and A. Eſqr. againſt A. Gent.* the *Tenant was eſſoigned after the View*, and had Day by Eſſoign till now, *and now A. Eſqr. was eſſoigned*, and *T.* the Demandant *ſaid that A. Eſqr. named Demandant, and A. Gent. named Tenant, are one and the ſame Perſon, and not diverſe*, and *prayed that the Eſſoign be quaſhed*; for otherwiſe they fourch infinite. Per Priſot, it cannot be tried now if they are one and the ſame Perſon or not in the Abſence of the other, and the *Tenant may be eſſoigned after the View, and at the Day the Demandant may be eſſoigned, and this is no Fourcher, but if* at the Day &c. the *Tenant will be eſſoigned again*, then ſpeak of the Fourcher &c. by which the Eſſoign was adjudged and adjourned; quod nota. Br. Eſſoign, pl. 85. cites 39 H. 6. 28. 29.

9. A Man may plead thoſe *Pleas* after an Eſſoign *which he cannot after a General Imparlance*; for an Eſſoign is before Declaration, and ſo the Defendant does not know what the Plaintiff's Charge will be; Per North. Freem. Rep. 205. pl. 209. Mich. 1675. Serle v. Bunnion.

For more of Eſſoign in General, See **Default, Protection,** and other Proper Titles.

Eſtate.

(A) By whom, and to whom to be made.

1. **AN Eſtate cannot be** limited to the Party himſelf **who gives it** upon a Grant. A Man by the Rule of Law cannot create in himſelf a particular Eſtate, nor give himſelf any Eſtate in Poſſeſſion or Remainder, unleſs peradventure in ſome Caſes by Concluſion; But inaſmuch as Uſes ſince the Statute 27 H 8. are only Truſts and Confidences, the Law tolerates them ſo long as they agree in the Declaration and Limitation of their Eſtates with the Rule of Law. 1 Rep. 127 a.——A Man cannot convey to himſelf an Eſtate by way of Conveyance at Common Law, but by way of Uſe he may; Per Hale Ch. J. Mod. 121 pl 27. Paſch. 26 Car. 2. B. R. in Caſe of **Pybus v. Mitford.**——Mod. 238. the Court agreed Paſch. 29 Car. 4. C. B. in Caſe of **Southcote v. Stowell**, that at Common Law a Man could

could not make his right Heir a Purchaſor without parting with the whole Fee, but that by way of Uſe he might, and ſaid that Criſwold's Caſe in Dyer is of an Eſtate executed.

2. **If a Man** gives to A. for Life, reſerving the Reverſion to himſelf for Life, **the Remainder over to another; this is a void Reſervation of the Reverſion to him.** 42. Aſſ. 2. **dubitatur.**

3. So **an Eſtate cannot be limited** to the Heir of the Donor upon a Grant.

Co Litt 22. b. S. P —— But when he departs with the whole Fee,

4. **If a Man** gives **to one** for Life the Remainder to the right Heirs of the Donor, **this is a void Remainder; Becauſe he** cannot make his right Heir a Purchaſor without departing from the Fee **out of him.** * **D. 4 & 5 Ma. 156. 25.**

As if a Man makes a Feoffment in Fee to the Uſe of himſelf for Life, and then to the Uſe of the Heirs Male of his Body, this is a good Eſtate Tail executed in himſelf, and the Limitation is good by way of Uſe; becauſe it is rais'd out of the Eſtate of the Feoffees which the Feoffor departed with, and that is apparant, for a Limitation of Uſe to himſelf had without Queſtion been good. Co. Litt 22. b. * See tit. Remainder (D) pl. 1. S. C. and the Notes there.

Fol. 828.

5. **A Man cannot** leaſe to one for Life reſerving a Fee Tail to himſelf, **he having Fee before.** 14 H. 4. 32.

Br. Tail, pl. 11. cites S. C. and cites 42 E. 3. 5. —— Br. Eſtates, pl. 14. cites 14 H. 4. 31. S. C. & S. P. and 42 E. 3. 5. S. P. —— Fitzh. Monſtrans de Faits, pl. 131. cites 14 H. 4. 30. S. P.

Fitzh. Monſtrans de Faits &c. Pl. 131. cites S. C. ——

6. **So if Tenant in Fee levies a** Fine to one for Life, reſerving a Tail to himſelf; **This is not good Tail.** 14 H. 4. 31. b.

Br. Eſtates, pl. 66. cites S. C. and 14 E. 3. 5. S. P.

(A. 2) What ſhall be ſaid an Eſtate.

1. WHERE *the King had Annum Diem & Vaſtum* of the Land in Attaint of Felony, this is only a Chattle, and the *Lord* of whom the Land is held *has the Franktenement.* Br. Eſtates, pl. 63. (bis) cites Fitzh. Aſſiſe 424. tempore. E. 1.

2. If *Baron ſeiſed in Jure Uxoris* be *attainted of Felony*, and the *King ſeiſes for Life of the Baron*, the King has only a Chattel, and the *Franktenement remains in the Feme.* Br. Eſtates, pl. 63. (bis) cites 4 E. 3. 47. and Fitzh. Aſſiſe 166.

3. *Office* was *not* accounted Frantenement at Common Law, by ſome. Br Præcipe, pl. 19. cites 10 Aſſ. 11.

4. An *upper Chamber in an Houſe* is no Frank-tenement; For it cannot continue; For if the Foundation fails the Chamber is gone, and per Huſſey and Fairfax the Chamber paſſes by Grant without Livery of Seiſin; For there is no Franktenement in it any more than in Trees growing. Br. Demand, pl. 20. cites 21 H. 6.

5. *Tenant by the Curteſy* had not any Eſtate during his Wife's Life, but was only ſeiſed in right of the Feme; But when he becomes Tenant by the Curteſy he is ſeiſed of an Eſtate for Life. See Keilw. incerti Temporis. 118. b.

6. Eſtate *ſignifies* ſuch Inheritance, Freehold, Term for Years, Tenancy by Statute-Merchant, Staple, Elegit or the like, as any Man hath in Lands or Tenements &c. Co. Litt. 345. a.

7. He

7. He that *enters by Virtue of a Power to hold till ſatisfied on arrear of Rent* leaves the whole Eſtate in the Owner of the Land, and not a Reverſion only. Per Ventris J. 2. Vent. 327. Trin. 1 W. & M. in Scacc.

8 An *extended Intereſt* makes an Eſtate in the Lands as much as any Demiſe or Leaſe. Per Ventris J. See 2 Vent. 327, 328. Trin. 1 W. & M.

(A. 3) What a Legal and what an Equitable Eſtate, and in whom it ſhall be ſaid to be, and How.

1. ARTICLES were *enrolled* importing a preſent Grant, yet the Eſtate being *mortgaged* the Legal Eſtate does not paſs thereby, it being in the Mortgagees; Nota. Vern. 230. Hill. 1683. in Caſe of Philips v. D. of Bucks.

2. *Deviſee* of Lands has the legal Eſtate; Arg. 2 Vern. 704. Mich. 1715.

3. *Lands deviſed to Truſtees* and their Heirs *until* his Son come to the Age of 25 Years; a Mortgage made by the Son at 21 is void in Law; For if it was a contingent and executory Deviſe, it is plain he had no Title till the contingent ſhould happen; but if the Eſtate Tail was executed in him then he might make a Title by ſuffering a Common Recovery. 9 Mod. 28. Trin. 9 Geo. Spencer v. Chaſe.

4. A legal and equitable Intereſt *cannot be incorporated together*. See Caſes in Equ. in Ld. Talbot's Time, 166. Hill. 1735. in Caſe of Sir John Robinſon v. Comyns.

5. The Caſe was, A. by Will *deviſed all his Lands to C. and his Heirs in Truſt to pay Debts, and then* in Truſt *for B. his Grandaughter and the Heirs of her Body*, Remainder *to C. and his Heirs, upon Condition that he marry B.* and gave C. his Perſonal Eſtate in Truſt for B. until ſhe attain 21, and made C. Executor and died. *B refuſed to marry C. and married J. R.* and afterwards at her Age of 21 *B. and J. R. made a Bargain and Sale to W. R.* to make him Tenant to Præcipe in order to ſuffer a Common Recovery, in which B. and J. R. was vouched, and the Uſes were declared to the Iſſue of the Marriage, Remainder to her own Right Heirs. One Queſtion was, what ſort of Eſtate the Remainder in John Comyns is? whether it be a Truſt, or a legal Eſtate? It is obſervable, that the whole Eſtate is given to the Defendant and his Heirs, to the Uſe of him and his Heirs, which is a compleat Diſpoſition of the whole Legal Eſtate, and being in Caſe of a Will would be ſo of the Equitable Intereſt likewiſe, unleſs the Teſtator's Intent appears to the contrary, as in this Caſe it manifeſtly does; for it is given in Truſt for Payment of his Debts &c. and ſo far is a Limitation of an equitable Eſtate, the Remainder of which (had the Teſtator gone no Farther) would, after the Purpoſes ſerved, return to the Heir at Law, as was determined upon Serjeant Maynard's Will. But then there comes a Remainder to the Defendant, and his Right Heirs &c. It is true, that the Word Remainder (properly Speaking) ſignifies only a Continuance of the ſame kind of Eſtate as is before limited, which here was only a Truſt-Eſtate; For when the whole legal Eſtate is diſpoſed of and Part of the equitable Intereſt likewiſe, there the Remainder muſt be an equitable Remainder; in this Caſe indeed it

is

is not an abſolute one, but conditional, which, when the Condition is performed, will veſt the Eſtate in him, and if the Condition be not performed, it will then deſcend to the Heir. The Teſtator therefore has conſidered it as an equitable Intereſt, and yet it is likewiſe true, that this equitable Intereſt, when veſted in the ſame Perſon with the legal one, muſt, as to ſome Purpoſes, be conſidered as a legal Intereſt. Caſes in Chan. in Ld. Talbot's Time. 165. Hill. 9 Geo. 2. Sir John Robinſon v. Comyns.

(B) Eſtate of Franktenement.

Cannot be granted to commence at a Day to come.

* Cro. C. 388. pl. 21. S. C. & S P. held per tot. Cur. and would not let it be argued.

1. IF a Man makes a Deed of Leaſe to have for Life from the Day of the Date, and makes Livery by Attorney the ſame Day ſecundum Formam Chartæ, this is a void Leaſe, becauſe a Franktenement cannot be granted in Futuro, for the Day of the Date is excluded. Mich. 10 Car. B. R. between * *Bull and Wyatt* per Cur. agreed without Queſtion, and admitted, and Judgment given upon other Matter, this being admitted. P. 11 Car. B. R. between *Sir Kenelm Digby and Jordan* per Cur. reſolved upon Evidence at Bar.

* Cro. J. 153. pl. 1. S. C the Jury found that he demiſed 10 June 44 Eliz. by Indenture of the ſame Date, ſo that it was a Demiſe at that Time, and when they afterwards find that Livery was made by Attorney the 23d July ejuſdem Menſis, this is repugnant and void, July not being mentioned before; and Popham, Fenner and Williams held it void; becauſe the Attorney had no Warrant; And Popham ſaid, that if the Deed had been deliver'd after the Day of the Date, and then Livery had been made by Attorney it had been well enough, and that ſo it had been adjudged.

2. If a Man makes Leaſe of Land to have for Life from the Day of the Date, and makes Livery himſelf the ſame Day Secundum Formam Chartæ, this is a void Grant, becauſe the Day of the Date is excluded by the Deed, and the Livery has Reference to the Deed, and a Franktenement cannot be granted in Futuro. P. 15 Ja. in the Star-Chamber this was agreed by the Judges and the Court. Mich. 15 Ja. B. R. between *Seybrook and Ball* admitted by the Court; which was the ſame Caſe as was in the Star-Chamber, and in both Courts the Queſtion was, Whether the Deed was from the Day of the Date, or at the Day of the Date at the Time of the making, or made ſo after? And it was found that this was at the making, from the Day of the Date, and ſo by Conſequence the Leaſe void. P. 5 Ja. B. R. agreed by three Juſtices in the Caſe of * *Hemings v. Pancharden.*

Cro C. 546. pl. 1. S C. and all the Juſtices argued for the Plaintiff. —Mar. 31. pl. 66. S. C. the Chief Juſtice, Crooke J. and Berkley J. were clear that it was a

3. If A. be poſſeſſed for Years of a Portion of Tithes, the Reverſion being to B. in Fee, and B. by Indenture made between him of one Part, and A. and C. of the other Part, recites the ſaid Leaſe and confirms it, and then grants the Tithes to A. and C. Habend' to C. after the Expiration of the ſaid Leaſe for one Month, and after to A. in Fee, this is a void Grant of the Fee, becauſe this is to commence at a Day to come; for this cannot paſs by the Intent of the Deed as a Reverſion, inaſmuch as by the ſame Deed he confirms the Leaſe and grants the Fee to the ſame Leſſee, the which, if it ſhould be a Reverſion, then this will extinguiſh the Leaſe after the Month ended, and the Rent reſerved upon the Leaſe extinguiſhed, and C. ought to have a Month after the Expiration of the firſt Term

Term, therefore cannot have it as a Reverſion immediately. Tr. 15 Car. B. R. adjudged per Cur. upon a ſpecial Verdict between *Swift and Ayres.* Intratur Tr. 12 Car. Rot. 426.

Grant of a Freehold, to begin at a Day to come which

without Doubt is void, and cited 8 H. 7. 39 H. 6. and 3 Rep. Buckler's Caſe, and that in 8 H. 7. the Difference is taken betwixt the Grant of a Rent in Eſſe, and a Rent De Novo; A Grant of a Rent De Novo may be granted in Futuro, but not a Rent which is in being. But Jones J. held, that here was any Grant of a Freehold to commence at a Day to come.——Jo. 435. pl. 2. Vicar's Choral of Litchfield v. Ayres, S. C. & S P. agreed by all that the Grant in Fee was not good.

4. If a Man makes a Leaſe for Life habend' a Die Datus, and makes Livery himſelf ſecundum Formam Chartæ the next Day, this is good Eſtate for Life; for the Eſtate doth not paſs only by the Deed, but principally by the Livery; for the Deed is not of Effect till the Livery, and therefore it cannot be ſaid that the Fabrick of the Deed is void when nothing as yet paſſes, and here the Inconvenience of the Operation of the Livery in Futuro is taken away by the making of Livery the next Day; for this doth not relate to paſs the Eſtate from the Delivery of the Deed.

Cro. J 563. pl. 11. Hill. 17 Jac. B. R. reſolv'd that the Livery was good. Greenwood v. Tyler.—Hob. 314. pl. 391. S. C. & S. P. reſolv'd in B. R.——Palm. 29, 33. S. C & S. P. reſolv'd.——S. C. cited as reſolv'd accordingly. Hetl. 21, 22. but the Fol. is miſprinted, and ſhould be (23 & 24.)——Cro. C. 95. cites S. C. as adjudg'd.

5. So it ſeems it ſhall be though the Leſſor made a Leaſe of Attorney to make Livery, and the Attorney made Livery Secundum Formam Chartæ the next Day, this is a good Eſtate; for he has given Power to the Attorney to make the Livery the ſame Day, and ſo to make it void, or to deliver it the next Day, and ſo to make it good. P. 5 Ja. B. R. between * *Hemings and Pantherden*, upon a ſpecial Verdict this was a Point not reſolved, but adjudged upon other Matter. Contra Tr. 13 Ja. B. R. adjudged between *Butler and Fincher.*

Fol. 829. * Roll Rep. 229 pl. 37. S. C but no Judgment ——2 Bulſt. 302. S. C but not adjudg'd —— The Difference is where Livery is made by the Leſſor in Perſon, and where by Letter of Attorney being in the ſame Charter Generally made; But if the Letter of Attorney be to make Livery after Mich. (where the Habendum was for three Lives after Mich.) then in both Caſes it is good enough; For there is no Intention that the Livery ſhould operate futurely, but that it ſhould be made when it ſhould operate, and the Eſtate ſhould be good preſently. Cro. J. 563. Hill. 17 Jac. reſolv'd in Greenwood v. Tyler's Caſe.

6. If a Man makes a Writing of a Leaſe for Life habend' a Die Datus, and ſeals it the next Day, and then makes * Livery, this is a good Leaſe. Paſch. 5 Ja. B. R. Per Popham; between *Hemings and Pantherden.*

* See ſupra, pl. 2. S. C. and the Notes there.

7. If A. being Leſſee for Years of the Tonſure of a Meadow, the Reverſion in Fee to B. and B. grants the Tonſure to C. for a Month, to commence after the Expiration of the Term for Years of A. the Remainder after the Month ended to D. in Fee, this is a void Remainder to D. becauſe this Remainder, being a Franktenement, cannot commence at a Day to come, as it ought in Caſe it were a good Remainder, inaſmuch as it depends upon an Eſtate which is to commence at a Day to come, & Prima Facie it ſhall be intended that he who has the Tonſure has the Soil alſo. P. 10 Car. B. R. between *Ward and Petteſer*, per Cur. reſolved upon Evidence at the Bar, which concerned the Choriſters of Litchfield.

Cro C 362. pl. 5. S. C.

8. If A. ſeiſed in Fee of 100 Acres, makes Feoffment of 18 of the 100 Acres habend' ſibi & Hæredibus ſuis ad Electionem ipſius B. & Hæredum ſuorum, which they pleaſe, (without deſigning any particular Acres of the 100) this is a void Feoffment for the Uncertainty;

Mo. 81. pl. 215 Bullock v. Burdet S. C. ſays it was

adjudged that Election cannot be made in the Time of the Succeſſor

for a Livery cannot operate in Futuro, but ought to operate at the Time of the making or never. D. 11 El. 280. 17, 18, 19. adjudged.

of the Biſhop, as Benlows reports in his Book. ——— Bendl. 148. pl. 206. S. C. adjudged. ——— And. 11. pl. 24. S. C.

2 Rep. 55. Mich. 39 & 40 Eliz. C. B. Buckler's Caſe

9. *Reverſion* cannot be *granted* to commence in Futuro. Pl. C. 197. 1 Eliz. in Caſe of Wrotelley v. Adams.

S. P. ——— Cro. E. 450. Buckler v. Harvy. ——— Ibid. 585. ——— 2 And. 29. S. C. ——— Mo. 423. S. C. ——— Unleſs it be a Reverſion for Years. Le. 171. ——— 5 Rep. 94. b.

10. Eſtate of Franktenement cannot by the Common Law commence in Futuro, but ought to take effect immediately in Poſſeſſion, Reverſion or Remainder; And the *Diverſity is between a Leaſe for Life and a Leaſe for Years*; For a Leaſe for Years may commence in Futuro but not a Leaſe for Life, becauſe a Leaſe for Years may be made without Livery and Seiſin, which an Eſtate of Franktenement cannot be either in Deed or in Law, ſo that when a Man makes a preſent Leaſe to commence at a future Day, he *cannot make preſent Livery to a future Eſtate*, and therefore nothing paſſes. 5 Rep. 94. b. reſolved Trin. 39 Eliz. in the Exchequer in Berwick's Caſe.

A. ſeiſed of Rent in Fee grants the ſame for 20 Years from Mich. next

11. A *Rent* * *de novo* may be *granted* to commence after the Death of J. S. But otherwiſe it is of a Rent in *Eſſe*; Arg. Pl. C. 156. 3 Mariæ in Caſe of Throgmorton v. Tracy.

and good; For no Eſtate paſſes preſently but only an Intereſt. Le. 171. pl. 239. Hill. 31 Eliz. B. R. in Caſe of Palmer v. Thorp.

* Becauſe that being newly created there can be no Precedent Right to bring any Real Action for it; Arg. Show. 300. cites Palm. 29, 30.

S. C. cited Hob. 171. by Name of Hodge v. Croſſe.

12. A. made a Feoffment Habendum *poſt Mortem of A.* Adjudg'd a void Habendum, and a good Feoffment in Præſenti. Mo. 881. cites 33 & 34 Eliz. Hogg. v. Croſſe.

And yet where one having leaſed to three for their Lives, granted the Reverſion habend' to the Grantee for his Life, and then added theſe Words, "Which ſaid Eſtate for Life to begin after the Death of the three firſt Leſſees;" and that was adjudged a good Eſtate in Reverſion for Life; Per Hobart Ch. J. cites it as Hill. 34 Eliz. in B. R. in the Caſe of Underhay v. Underhay

And. 284. pl. 292. and Ibid. 289 pl. 298. Daſhper v. Milburn, S. C. adjudged for the Grantee of the Reverſion.

13. A *Reverſion upon a Leaſe for Life is granted for Life, cum poſt Mortem of the Tenant for Life acciderit*; The Queſtion was, if this ſhall refer to the Commencement of the future Time as to the Eſtate, or to have the Land in Poſſeſſion? and it was ruled it ſhall *not refer to the Commencement of the Eſtate, but to the having the Land in Poſſeſſion.* Cites 23 Eliz. Dy. 376. Cro. E. 323. pl. 14. Paſch. 36. Eliz. B. R. Milborne v. Daſhburne.

14. An *Office* may be granted Habend' *after the Death of A.* For it varies from the Caſe of Land; Per Walmſly J. Cro. E. 336. pl. 4. Trin. 36. Eliz. C. B. in Caſe of Ferrer v. Johnſon.

5 Rep. 93. b. S. C. & S. P. reſolved.

15. A Grant for Life was made *by the King of a Manor* by Patent, *Habend' a Die Confectionis*, and this was held void becauſe the Franktenant which paſſes cannot wait till the next Day after the Patent. Mo. 393. pl. 509. Hill. 37 Eliz. in the Exchequer, Berwick's Caſe.

Cro. E. 873. pl. 12 S. C. reſolved, that the ſe-

16. Husband and Wife, *Leſſees for their Lives*, by a new Indenture *took a new Leaſe to them two, and their Son, Habend' a Die Datus Indenturæ pro termino Vitæ eorum & cujuſlibet ipſorum* poſt alterum diutius viventi,

viventi, with a Letter of Attorney for Livery; The *Indenture was ſealed and delivered the Day of the Date*, and *Livery was made a Week after*, and then the Wife died. The Son and Husband entred. Reſolved that the Leaſe was good to begin a Die Datus, which is a Day to come, becauſe Livery was executed after the Day of the Date, but if it had been executed before it would not be good. Mo. 636. pl. 876. Trin. 43. Eliz. C. B. Mellow v. May.

cond Leaſe was void, foraſmuch as it is Habendum a Die Datus, and the Livery made ſo long after will not help it. Crooke ſtates the ſecond Leaſe to be made the 30 July 21 Eliz. and the Livery to be made 23 Eliz. ſecundum Formam Chartæ.

17. Grant of *Tithes* for Life to commence at a Future Day, though by Deed, is not good by way of *Intereſt* to the Owner of the Land, but by way of *Diſcharge* it may, but then Words of Diſcharge muſt be inſerted. Yelv. 131. Trin. 6 Jac. B. R. Edmonds v. Booth.

18. A *Diſcharge for Life* may well commence at a Day to come; As to be diſcharged of Suit of a Mill &c. but where a Grant of Frank-tenement enures by way of *Intereſt*, it is not good to commence at a Future Day; But in a Grant for Life, which is to operate by way of Diſcharge *of Tithes*, and the Grant is made to commence from a Day to come, it muſt be expreſſed in the Deed to be by way of Diſcharge. Yelv. 131. Trin. 6 Jac. B. R. in Caſe of Edmonds v. Booth.

19. *Reverſioner in Fee after two Eſtates for Life granted his Reverſion Habendum* the aforeſaid Reverſion *after the Death, Surrender, or Forfeiture of the Tenant for Life*; it happens that the Leaſe determines for the Life of the Grantee, and remains to another for Life; and reſolved that this ſhall be a good Grant of the Reverſion to the firſt Effect of Poſſeſſion, after the Deaths of the Tenants for Life according to 23 Eliz. Dy. 377. 27. and it ſhall not be intended to paſs as future Intereſt, as if it were void of the other Party, and ſo was the Opinion of all the Court. 2 Brownl. 299. 300. Paſch. 7 Jac. C. B. Denis v. More.

20. A *Leaſe* was *made 8th Day Auguſt* 6 Jac. *Habendum a Die Confectionis for three Lives*, and *Livery was made 9th September* following; Reſolved the Leaſe was good; For the Livery being made after the Day not working futurely was good enough. Cro. J. 458. pl. 15 Jac B. R. Smith v. Bole.

Mo. 759. pl. 1050. Paſch. 3 Jac. C. B. in Caſe of Banks v. Brown, S. P. agreed.

21. In *Feoffments* there is an Expectancy of Livery which may paſs the Eſtate, but in Caſe of a *Grant* to commence at a future Day the Grant is void ab Initio, and Attornment afterwards will not make it good; Agreed by all the Juſtices. Palm. 30. Mich. 17 Jac. B. R. in Caſe of Tiler v. Greenwood.

22. A Man cannot make Leaſe for Life in Futuro, For Poſſibility of *Franktenement* cannot be; but *Leaſe for Life Remainder over upon Poſſibility*, As if J. S. pay 10 l. &c. is good; Arg. 2 Roll R. 427. Hill. 21 Jac. B. R. in the Serjeant's Caſe.

23. *Covenant to ſtand ſeiſed* to Uſe of J. S. *when he pays* 10 l. is good. Arg. 2 Roll. R. 427. Hill. 21 Jac. B. R. in the Serjeant's Caſe.

25. There is a great Difference between Things that lie in *Grant* and a *Feoffment*, For a Grant a Die Datus cannot be made good; But where a Feoffment is made the *Deed is the Evidence, and all is not done before the Livery*, but in the other Caſe after the Livery nothing is to done by the other; Arg. Het. 23. Trin. 3 Car. C. B.

24. A Deviſe or *Feoffment to the Uſe of A. after my Death*, Remainder over is a Conveyance, becauſe it riſes out of my Eſtate; Per Bridgman Ch. J. Raym. 83. cites Mich. 13 Car. 1. B. R. Long v. Smith.

And in Caſe of a Deviſe. Cro. E. 919. Hamſworth v. Pretty.

And 874. Ibid. Pain's Caſe.

Ventris

26. Ventris J. ſaid, that he takes the *Preventing the Uncertainty of Freehold* to be the *Great Reaſon why a Freehold cannot be granted in Futuro*, becauſe it would be very hard and inconvenient that a Man ſhould be driven to bring his Præcipe or Real Action firſt againſt the Grantor, and after he had proceeded in it a conſiderable Time, it ſhould abate by transferring the Freehold to a Stranger by reaſon of his Agreement to ſome Conveyance made before the Writ brought; For otherwiſe *there is nothing in the Nature of the Thing againſt conveying a Freehold in Futuro*; For a Rent De Novo may be ſo granted, becauſe that being newly created there can be no Precedent Right to bring any Real Action for it. 2 Vent. 204. Trin. 2 W. & M. in C. B.

27. The King granted *an Office of Searcher to A. durante Beneplacito*, and afterwards granted the ſame *to B. to commence after the Death, Surrender, or Forfeiture of A.* The Grant to B. is good; and in this Caſe the King does not grant a Reverſion but in Reverſion, and that not being in reſpect of a Particular Eſtate, but becauſe he is pleaſed to grant in Futuro. 2 Salk. 465, 466. pl. 2. Trin. 7 W. 3. B. R. The King v. Kemp.

Skin. 580. S. C. and adjudged the Patent good —— Comb. 334 S. C. adjudged accordingly. —— 12 Mod. 77 S. C. adjudged accordingly. —— Carth. 350. S. C. adjudged accordingly. —— 4 Mod. 275. S. C. adjudged accordingly. —— Ld Raym. Rep. 49. S. C. adjudged accordingly.

A Freehold of Lands cannot be granted to commence in futuro, or depend upon an Eſtate at Will, but a new Office or a Rent de novo may be created to commence in futuro; for it is the Creature of him that makes it, and it is no otherwiſe in Being than it is in Grant; Per Cur. 2 Salk. 466. pl. 2. Trin. 7 W. 3. B. R. The King v. Kemp. —— Ld Raym. Rep. 52. S. C. Holt Ch. J. as to the Objection that a Freehold cannot be granted to commence in futuro, anſwered, that it muſt be underſtood of a Freehold in Eſſe, as 5 Co. 93. Berwick's Caſe, but a Rent de novo may be granted to commence in futuro, or maybe granted in Fee with Fractions, and cites 1 Co. Corbet's Caſe, or to commence upon any Contingency, becauſe it is a Creature of the Grantor, who may mould it in what Form he pleaſes; and the Grant of this new Office reſembles a Grant of a Rent de novo, for ſince there is no Eſtate in Eſſe, but it is new created by the King he may mould it as he pleaſes. And although there is ſuch an Office as this of a Searcher, yet the Eſtate is new, and ſubject to any Limitations, and no Reaſons can be given why a Grant in futuro of ſuch a new Office ſhould not be good, as well where there is ſuch Precedent as where there is none at all; for ſuppoſe there being before a Grantee for Life, the King grants to another to commence after the Death of the Grantee for Life, this firſt Grant for Life is of no Avail to make good the laſt Grant, for the laſt Grant is not a Remainder, for then it ought to have been created at the Creation of the particular Eſtate; nor is it a Reverſion, for neither the King nor any other has any Reverſion of the Office, and a Grant by ſuch Name is void, but the King may grant an Office in Reverſion, not in reſpect of the particular Eſtate, but it is only a future Intereſt to commence in futuro, and cites 1 Cro. Young v. Stawell, and Young v. Fowler; But if the King has the Inheritance of an Office, ſuch a Grant as this had been void.

28. Though a Freehold cannot commence in Futuro that is to be *underſtood* where it is *derived out of an Inheritance*. Per Holt Ch. J. 12 Mod. 80. in Caſe of The King v. Kemp.

(C) Where it may be Moveable.

Cro. E. 421. pl. 17 S. C. adjudged.— Mo. 302. pl. 453 S. C.— If a Man has a moveable Eſtate of Inheritance in 13 Acres, Parcel of a

1. IF there are 80 Acres of Meadow which have been uſed Time out of Mind to be divided between certain Perſons, and that a certain Number of Acres belong to every of thoſe Perſons; as to A. 13 Acres to be annually aſſign'd and allotted, ſo that ſometimes the 13 Acres lie in one Place, and ſometimes in another Place, and ſo of the Reſidue. A. in this Caſe has a moveable Fee in 13 Acres, and the Number only certain, but the Place where they be annually uncertain. Hill. 34 El. B. R. between *Welden and Bridgwater* adjudg'd, which ſee Co. Litt. 4. 48. a. b.

Meadow of 80 Acres, the Charter of Feoffment ought to be generally of 13 Acres lying within the Meadow

Meadow of 80 Acres, without bounding or deſcribing of it in Certainty, and Livery may be of the 13 Acres allotted to the Feoffor for the Year ſecundum Formam Chartæ, and this is good Livery to paſs the Content of 13 Acres in what Place ſoever it lies. Co. Litt. 48. b. cites S. C. —— And if the Owner of thoſe 13 Acres grants a Rent-Charge out of the 13 Acres generally, as lying in the Meadow of 80, without mentioning where they lie particularly, there, as the State in the Land removes, the Charge ſhall remove alſo. Co. Litt. 343. b. cites S. C.

2. If a Partition be made between two Coparceners that one ſhall have certain Land from Eaſter till Lammas to her and her Heirs, and the other ſhall have it from Lammas to Eaſter to her and her Heirs; Or the one ſhall have it the firſt Year, and the other the ſecond alternis Vicibus, in thoſe Caſes ſeveral Perſons have ſeveral Inheritances of the ſame Land at ſeveral Times. Co. Litt. 4.

And may either of them, during their ſeveral Seiſins, have Treſpaſs alone. Cro. E 421.

Welden v. Bridgwater, cites F. N. B. 62. and Temps E. 1. Partition 21. —— F. N. B. 62. (I). Co. Litt. 167. a. (i.) S. P. —— Co. Litt. 180. a. S. P.

3. If two Coparceners make Partition of two Manors, that the one ſhall have the one Manor for one Year, and the other the other Manor for the ſame Year, and the ſecond Year each of them ſhall have the Manor which he had not the Year before alternis Vicibus in perpetuum, this is a moveable Fee. Co. Litt. 4. 48. b.

F. N. B. 62. (K) S P. —S. C. cited Cro. E. 421, 422. —— Co. Litt. 167. a. b. S. P. —— 1 Rep. 87. a. b. S. P. by Walmſley, that it is good as to the Poſſeſſion and taking of the Profits; but it is no Severance of the Eſtate of Inheritance.

(C. 2) Eſtate altered.

In what Caſes it ſhall be ſaid to be altered.

1. IT hath been holden, that by the Words compris'd in the Clauſe of Warranty the Eſtate ſhall be altered. But the ſame is not Law as I think. And therefore if Lands be given by theſe Words, Sciant &c. Quod ego &c. *Dedi D. & J. uxori ejus ego* the Feoffor *Warr' prædict. Terras* &c. *dict. D. & J. uxori ejus & Hæred' de Corpore eorum exeunt.*' and Livery of Seiſin be made according to the Deed, they ſhall not have any Eſtate but for their Lives &c. Perk. S. 165, 166. cites 12 E. 3. Tail. 3.

2. If a Man be *enfeoffed* by Deed *of two Acres, to have* and *to hold three Acres, and Livery of* Seiſin be made unto him according to the Deed *in the two Acres*, the third Acre of which there was no Speech in the Premiſſes of the Deed, ſhall not paſs by the Deed, *but if Livery* and Seiſin *be made in this Acre*, then it ſhall paſs by the Livery of Seiſin &c. Perk. S. 165.

3. In Aſſiſe the *Baron alien'd in Fee, and re-took to him and his Feme and died*, the *Lord ſeiſed the Heir, and the Land for Ward, and aſſigned the third Part to the Feme in Dower, and gave to her* 100 *s. to be Content*, and *ſhe brought Aſſiſe of the ſecond Part recover'd* by Judgment, *and was remitted to the third Part by her Entry*, becauſe the *ſaid Endowment was not by Deed nor by Record.* Br. Acceptance, pl. 16. cites 17 Aſſ. 3.

4. *Confirmation by the Heir to the Tenant in Dower* ſhall not change her Eſtate. Br. Waſt. pl. 76. cites 38 E. 3 23.

5. If *Feoffee with Warranty* to him and his Heirs and Aſſigns *aliens in Fee, and re-takes* to him *in Fee, and aliens to another in Fee*, he may vouch as Aſſignee, for he is not in of other Eſtate. 2 Roll Voucher, (O) pl. 4. but cites contra 20 H. 6. 34. b.

6. If he in *Reverſion in Fee diſſeiſes his Tenant for Term of Life*, he is ſeiſed in Fee, viz. of the Franktenement by tort &c. Br. Eſtates, pl. 41. cites 9 H. 7. 25.

7. *And* if *Gift* be *for Life*, the *Remainder in Tail*, the *Remainder* in *Fee*, and he in the *Remainder in Tail diſſeiſes the Tenant for Life*, he is ſeiſed in Fee without Queſtion, and not in Tail; quod fuit conceſſum Per Cur. Br. Ibid.

8. *And* if he in *Reverſion and a Stranger diſſeiſes the Tenant for Life*, both are ſeiſed in Fee. Per Fairfax, quod Brian and Townſend conceſſerunt. Br. Ibid.

9. A. ſeiſed in Fee *leas'd to B. at Will*; and afterwards *releaſed to him all Accompts, Suits and Demands ab initio Mundi until the Day of the Date, by which he was ſeiſed for Life* &c. The Queſtion was, If the Eſtate of the Leſſee at Will was increaſed? And upon Motion reſolved by the whole Court, that the Eſtate is not enlarged, and the Plaintiff had Judgment. Cro. E. 268. pl. 7. Hill. 34 Eliz. B. R. Seyman v. Okely.

It forfeits his Eſtate, but it does not alter it;

10. *Tenant for Life accepts a Fine*, it is a Forfeiture, but does not change his Eſtate. Vent. 257. Paſch. 26 Car. 2. B. R. Anon. Per Hale Ch. J. Mod. 117. Green v. Proud, S. C.

11. Two *Jointenants in Fee accept a Fine* which is *to them and the Heirs of one of them*, yet they continue Jointenants in Fee as they were before. Arg. Vent. 258. Paſch. 26 Car. 2. B. R. Anon.

12. *Copyholder in Fee* ſurrendered into the Hands of the Lord *to the Uſe of himſelf and the Heirs Male of his Body*, but *dies without Admittance* on the Surrender; it was unanimouſly reſolved, That without Admittance on the Surrender he continued ſeiſed in Fee as before, for the Lord could otherwiſe have no Remedy for his Fine &c. Holt's Rep. 165. pl. 10. Trin. 5 Ann. Brown v. Dyer.

(C. 3) Altered.

The Effect thereof, and what is gone with it.

1. TWO *Jointenants with Warranty make Partition*, the Warranty is gone. Arg. 2 Roll Rep. 402. cites 29 E. 3. Fitzh. Warranty 70.

2. In Aſſiſe of Rent, B. was ſeis'd in Fee of 100 Acres of Land, and was condemn'd in 100 l. Damages, by which this *Land by* the *Elegit*, as a Moiety of all his Lands, *was deliver'd in Execution by extent*, and *after B. granted* 3 *l. of Rent-Charge out of this Land* to J. his Son and Heir apparent, *and then B. granted, ratified and confirmed by Deed to the Tenant by Elegit the ſame Land for Life of the Tenant, and* after *by another Deed with Warranty* of him and his Heirs *releaſed all his Right to the Tenant by Elegit*, and by Fiſhe, firſt the *Tenant by Elegit* ought to have held diſcharged, becauſe the Execution was made before the Charge, but after by the Confirmation to hold for Term of his own Life which enlarged his Eſtate, he *ſhall hold charged*, and the ſame Law by the Releaſe, *for he was in of other Eſtate than before*, quod nota, and ſo ſee that if the *Land* be *charged at the Time of the* making of the *Warranty*

ranty, ſo that he warranted the Land then charged, and not diſcharged, ſuch Warranty ſhall not make the Grantor to warrant the Land diſcharged, but *the Tenant to whom ſuch Warranty is made ſhall hold charged.* Quod nota bene. Br. Charge, pl. 29. cites 31 Aſſ. 13.

3. If *after Waſte done* the Leſſor grants over the Reverſion, and re-takes it to him and his Feme, and to his Heirs, yet he ſhall not have Action for the ſaid Waſte. Becauſe the Eſtate which was privy to the Waſte committed is altered. Co Litt. 53. b.

4. *Coparcener* in Fee makes Feoffment in Fee, and re-takes the Eſtate again, ſhe ſhall not have *Aid* of her Coparcener, but if the *Feoffment* be with Warranty and ſhe comes in by Voucher ſhe ſhall have Aid. Per Jones J. 2 Roll Rep. 418. Hill. 21 Jac. B. R.

(D) What ſhall be an Intereſt, and no Eſtate in Fee &c. for Life or Years &c.

1. IF A. deviſes his Land **at B. by his Will in Writing** to his Executors **for Payment of his Debts, and** till his Debts paid; **in this Caſe the Executors** have but a Chattel and an uncertain Intereſt till the Debts paid, **for if they ſhould have this for their Lives, then by their Death their Eſtate ſhould ceaſe, and the Debts remain unpaid; but being but a Chattel** * **this ſhall** go to the Executors of the Executors **for Payment of the Debts. Co. Litt.** 42. † 8 **Rep.** 96. *Mat. Manning's Caſe.* 4 **Rep.** 82. *Sir Andrew Corbet's Caſe.*

Co. Litt. 42. a. —— 8 Rep. 96. a. in S. C. cites Corbal's Caſe.

* Fol. 830.

But if ſuch Eſtate be made by Grant or Conveyance at Common Law, the Law will adjudge it a Franktenement. —— Cro. E. 315. S. C. held that if it was by Deed it had been a conditional Eſtate for Life. —— Co. Litt. 42. a. S.P. —— S. C. cited Jo. 25.

† S. C. cited All. 47. Arg. in Caſe of Price v. Vaughan.

2. Guardians in Chivalry who held over **for ſingle or double Value, have uncertain Intereſts, and yet but Chattles. Co. Litt.** 42.

3. In Aſſiſe, a Man ſeiſed of Laud deviſeable by Teſtament, *deviſed it to his Executors to ſell*, and died, and the Executors entered, and were ouſted by J. S. and brought Aſſiſe againſt him, and recovered, and of this Writ of Error was brought, and the firſt Judgment was affirmed, and ſo it ſeems that the Executors have Franktenement till they ſell. Br. Eſtates, pl. 37. cites 39 Aſſ. 17.

4. Where a *Feoffment* is made *of certain Lands, reſerving a certain Rent &c. upon* ſuch *Condition, that if the Rent be arrear, it ſhall be lawful for the Feoffor and his Heirs to enter and to hold the Land until he be ſatisfied or paid the Rent arrear* &c. In this Caſe if the Rent be behind, and the Feoffor and his Heirs enter, the Feoffee is not altogether excluded from this, but the Feoffor ſhall have and hold the Land, and thereof take the Profits until he be ſatisfied of the Rent arrear; and when he is ſatisfied, then may the Feoffee re-enter into the ſame Land, and hold it as he held it before. For in this Caſe the Feoffor ſhall have the Land but in Manner as for a Diſtreſs until he be ſatisfied of the Rent &c. though he takes the Profits in the mean Time to his own Uſe &c. Litt. S. 327.

The Feoffor by his Re-entry gains no Eſtate of Freehold, but an Intereſt by the Agreement of the Parties to take the Profits in Nature of a Diſtreſs. Co Litt. 203. a —— S. C. of Litt.

S. 327. cited Arg. Raym. 136. 137. And Ibid. Keeling J. ſaid, that this Caſe of Littleton cannot be maintained by Reaſon, but only by Authority of the Author.

5. Tenant

5. *Tenant by Statute Merchant, Staple, and by Elegit* have uncertain Intereſts in Lands or Tenements, and yet they have Chattels and no Freehold whoſe Eſtates are created by divers Acts of Parliament. Co. Litt. 42. a.

6. *Leſſee for Years before Entry* has no actual Eſtate but only an Intereſt. Co. Litt. 46. b.

Raym. 135. S. C. adjornatur, and Ibid. 158. S. C. adjudged for the Plaintiff. —— Saund. 112 S. C. adjudged, and Judgment affirmed in the Exchequer-Chamber. —— Sid. 223. pl. 13. adjornatur, and Ibid. 262. pl. 12. S. C adjornatur, and Ibid. 344. pl. 9 S. C. adjudged for the Plaintiff.

7. A *Rentcharge* is *granted in Fee* with a Clauſe of Diſtreſs, *provided that if it be Arrear by twenty Days it ſhall be lawful for the Grantee, his Heirs and Aſſigns, to enter &c. and to retain until ſatisfied of the Arrearages*, with Coſts and Damages *et ſic toties quoties*. The Rent is Arrear, the Grantee enters, and leaſes to the Plaintiff in Ejectment, et Judic' pro Quer. objected that by the Entry only an Eſtate at Will was gained, and ſo the Leaſe not good, or it cannot be a Freehold for want of Livery nor a Term for Years, becauſe not for a certain Time, and uncertain Intereſts of Continuance are always created by Acts of Parliament, as the Caſe of an Elegit, Uſes, or by Will for Payment of Debts, but not by Conveyances between the Parties; ſed non allocatur; for the Power of Entry is an Inheritance, and deſcends with the Rent to the Heir, but when the Entry is made it is but a Chattel-Intereſt in the Land, which ſhall go with the Arrears to the Executors; And per Twiſden, if it was not for the Words, viz. to retain until ſatisfied &c. it would be an Inheritance in the Land, to remain in the Heir as a Penalty, but theſe Words carry it to the Executors, who are the Perſons to be ſatisfied of the Arrears; and all held that after the Entry the Grantee cannot cut down Timber or commit Waſte, but only take the ordinary Profits. 1 Lev. 170. Trin. 17 Car. 2. B. R. Jemmot v. Cooly.

Siderfin ſtates it as a Rent-charge granted for Years with ſuch Proviſo, and the Court ſaid, that tho' the Common Law will not allow ſuch uncertain Intereſts to ſtand of itſelf, yet it may ſtand as long as the Rent, which is a fixed Eſtate, doth.

Palm. 174. Paſch. 19 Jac. B. R. The Bp. of Oxford's Caſe, the S. C. & S. P. ruled accordingly.

8. Grant of *Prima Veſtura* is but like a Grant of *Prima Tonſura*, and being for no certain Time, is but an Intereſt in the firſt cutting and taking of the Graſs; But agreed per omnes, If a Man grant primam Veſturam *from ſuch a Day to ſuch a Day certain*, the Grantee ſhall have the Soil, and mow it or feed it as he pleaſes. Cited Vent. 393. by Sir Francis North, out of a MS. Report, as the Caſe of Collins v. the Bp. of Oxford.

(E) In what Caſes an Eſtate ſhall be in a Perſon without Entry or Claim.

S. P. and ſo it is when Uſes are raiſed by Covenant upon good Conſideration. Co. Litt. 266. b.

1. **If a Man ſeiſed in Fee of Land** bargains and ſells it by Deed inrolled and dies, **the Franktenement is in the Bargainee before Entry or Claim, ſcilicet, a** Franktenement in Law. **Mich. 13. Car. B. R. between** *Hiblyn and Slacke* **per Cur. reſolved upon a Trial at Bar, and ſo they held in the Caſe of a** Deviſe.

2. If *Feme inheritable takes Baron* and has Iſſue, and the Feme dies, the *Law adjudges the Franktenement in the Baron as Tenant by the Curteſy immediately without Entry*, and Præcipe quod reddat lies *againſt him*. Br. Præcipe, pl. 38. cites 21 E. 3. 49.

3. *Deviſe*

3. *Deviſe* to A. *for Life, but if he does ſuch an Act his Eſtate ſhall ceaſe*, after ſuch an Act done though A. continues in Poſſeſſion and dies, yet there is no Freehold in him, and now he was but Tenant at Sufferance. Cro. E. 238. pl. 5. Trin. 35 Eliz. B. R. in Caſe of Allen v. Hill. 2 Le. 152. pl. 204. S. C. & S. P. admitted Arg.

4. A Freehold veſted in the Heir ſhall be deveſted *by Executors ſelling* thereof *by Virtue of a Will.* Cro. E. 669. pl. 25. Paſch. 41 Eliz. C. B. in the Caſe of Parman v. Bowyer

5. *Leaſe for Years with Condition to have Fee*, if the Condition be not performed the Fee returns without any other Act. Cro. E. 669. pl. 25. Paſch. 41 Eliz. C. B. in the Caſe of Parman v. Boyer.

6. If a Feoffment *to the Uſe of* another be made, the Ceſty que Uſe before Entry has ſuch a Seiſin of which he may be diſſeiſed; But he cannot bring Treſpaſs without an actual Entry. Ow. 87. Mich. 41 & 42 Eliz. C. B. Green v. Wiſeman.

7. Inheritance or Freehold in Uſe will not ceaſe without Claim or Entry after 27 H. 8. unleſs he, who has Power to ceaſe it, is *Tenant of the Freehold.* Mo. 605. pl. 835. Hill. 42 Eliz. B. R. Digges's Caſe. 2 And. 205. pl. 23 S. C. but S. P. does not appear.——1 Rep. 173. a. S. C. & S. P.

8. *If Feoffee pays not* 1000 l. at ſuch a Day, that the Land *ſhall remain over*; adjudged that the firſt Eſtate ceaſes, and Eſtate rais'd in the other without Entry or Claim, yet here were no Words of Ceſſer, but Ceſſer by Implication. Mo. 633. pl. 868. Paſch. 43 Eliz. C. B. cited by Walmeſly J. as the Caſe of Bracebridge.

9. If a *Tenant in a Præcipe* being ſeiſed of Lands in Fee *confeſs himſelf to be a Villain to* a *Stranger, and to hold* the Land in Villenage of him, the Stranger by his Acknowledgment is actually ſeiſed of the Freehold and Inheritance without any Entry. Co. Litt. 266. b.

10. Upon *Exchange* the Parties have neither Freehold in Deed or in Law before they enter. Co. Litt. 266. b.

11. Upon a *Partition* the Freehold is not removed until an Entry Co. Litt. 266. b.

12. Upon a *Livery within View* no Freehold is veſted before an Entry. Co. Litt. 266. b. And it muſt be made in the Life of the Feoffor and Feoffee. Jenk. 124. pl. 50.

13. *If Tenant for Life* by the Agreement of him in the Reverſion *ſurrender* unto him, he in the Reverſion has a Freehold in Law in him before Entry. Co. Litt. 266. b.

14. *Limitation or Condition* cannot make an *Eſtate ceaſe* as to one Perſon and not as to another; But Act of Parliament may. 6 Rep. 40. b. Mich. 3 Jac. B. R. Mildmay's Caſe.

15. Reſolved by the two Ch. J. and Ch. B. that upon a *Bargain and Sale for Years of Lands, whereof the Bargainor himſelf is in Poſſeſſion*, and the *Bargainee never entred*, it afterwards the *Bargainor makes a Grant of the Reverſion (reciting this Leaſe) expectant upon it* to divers Uſes, it is a good Conveyance of the Reverſion, and the Eſtate was veſted and executed in the Leſſee for Years by the Statute, though not to have Treſpaſs without Entry and actual Poſſeſſion. Cro. J. 604. pl. 32. Mich. 18 Jac. in the Court of Wards, Lutwich v. Mitton. Jo. 7. Mytton v. Lutwich. S. C. in C. B. and afterwards in the Court of Wards and there reſolved.—S. C. cited and admitted Arg. 2 Mod. 250.——The Bargainee by the Bargain and Sale has actual Poſſeſſion preſently ſo as he may ſurrender, aſſign, attorn and releaſe, yet he cannot upon this Poſſeſſion bring Treſpaſs; Per Bridgman Ch. J. Cart. 66. Paſch. 18 Car. 2. C. B.

Hutt 94. S. C. & S. P accordingly. —— Hetl. 50. 71 72. S. C & S. P. accordingly.

16. *Leaſe ſurrendered* though it is abſolutely determined between Leſſor and Leſſee, yet a *Stranger* who is to have Benefit thereby may well ſay that it is *in Eſſe* as to him; Per Curiam. Cro. C. 102. pl. 1. Hill. 3 Car. C. B. Peto v. Pemberton.

Arg Mo. 612. cites Brace-bridge's Caſe.

17. There is no need of Entry *to avoid* an Eſtate in Caſe of a *Limitation*; it veſts by Law till Diſagreement. 2 Mod. 7. Hill. 26 & 27 Car. 2. C. B. Anon.

18. Where a Poſſeſſion veſts without Entry, a Reverſion will *veſt without a Claim.* 2 Mod. 8. Hill. 27 & 28 Car. 2. Anon.

19. A *Deviſe* veſts an Intereſt without Entry; Per Holt Ch. J. Show. 74. Mich. 1 W. & M. in Caſe of Pierce and Smith.

20. A *Surrender* veſts the Eſtate in the Surrenderee without his expreſs Acceptance, and that before Notice. 2 Salk. 618. Hill. 9 W. 3. B. R. Thompſon v. Leach.

21. The Heir need not ſue a Scire Facias to *avoid the Feoffment of his Ideot Anceſtor*, but may enter without it. Comb. 468. Hill. 10 W. 3. B. R. Thompſon v. Leech.

(F) What ſhall be ſufficient Poſſeſſion to leaſe, give, or enfeoff.

Cro E 167. pl. 3. Willis v. Jermin, S C. and by Wray the firſt Leaſe doth clearly ceaſe before Entry; but Gawdy doubted. —— 2 Le. 97. pl 119. S. C. & S. P. by Wray; but Gawdy doubted.

1. IF a Man leaſe for Years, reſerving Rent to be paid at a Place out of the Land, upon Condition for Nonpayment that his Eſtate ſhall ceaſe, and the Leſſor demands the Rent at the Day and Place, and it is not paid, and Leſſee continues Poſſeſſion after, yet the Leſſor may leaſe this to another before any Re-entry; for the Leſſee by Continuance of Poſſeſſion was but Tenant at Sufferance. H. 32 El. B. R. adjudged between *Germin and Willis.*

2. If a Man be diſſeiſed, he cannot leaſe this for Years to another before Re entry.

Cro. E. 167. Willis v. Jermin, S. C but not clear as to the S. P. being agreed —— 2 Le. 97 pl. 119. S. C. but S. P. does not appear to be agreed. ——— See tit Faits (N) pl. 14. and the Notes there. ———Cro. E 483. pl. 19. Trin. 38 H. 8. C. B. Stephens v. Elliot, S. P. accordingly.

3. So the Diſſeiſee cannot ſeal and deliver a Deed of Leaſe, and give Power to another to enter into the Land, and deliver the Land to the Leſſee to make this a good Leaſe; for at the Time of the ſealing and Delivery he had not Power to contract for the Land, having but a Right. Hill. 32 El. B. R. agreed between *Germin and Willis.*

Cro. E. 167. pl. 3. S. C. & S P. accordingly. — Jo 170. Hill. 3 Car. B. R. in

4. If a Corporation be diſſeiſed, and after ſeals a Deed of Leaſe, and makes Letter of Attorney to J. S. to enter into the Land and deliver it as their Deed, and he does it accordingly, yet it is no good Leaſe; for there needs not any Delivery of a Deed of a Corporation, but the firing of the Seal makes it a perfect Deed; and they cannot ſtay the Perfection of the Deed by the Warrant of Attorney

torney to deliver it as their Deed, and they might have made the Letter of Attorney to ſeal and deliver it as their Deed. Contra H. 32 El. B. R. per Cur. between *Germin and Willis.* Caſe of Haywood v. Fulcre, S. P. and Jones and Doderidge thought the Deed took no Effect till it was delivered on the Land, and cited 9 E. 4. 39. b. per Choke and Jenny, and Carter and Cromwell's Caſe, 39 Eliz. B. R. and cited Pl. C. Croſſe v. Powell, where Leaſe was delivered as the Deed of a Corporation by Letter of Attorney and good; but Whitlock e contra; and Hyde ſaid nothing, but told the Reporter that he was of the ſame Opinion with Whitlock ——— Palm 504. Jones J. cited the Caſe of Carter and Cromwell 36 Eliz. C. B. which was a Letter of Attorney by Warden and Scholars to deliver a Leaſe on the Land to try a Title, and upon Writ of Error it was adjudged a good Leaſe, and Doderidge accordingly; for it is not a Leaſe by the ſealing, but by the Delivery, and Dean and Chapter cannot enter but only by Attorney. ——— See tit. Faits (I) pl. 6 and the Notes there. S. P. adjudged according to the Opinion of Doderidge and Jones. ——— 3 Keb 307. pl. 50 Paſch. 26 Car. 2. B. R. Hale Ch. J. ſaid, that ſince he came to this Court it had been ruled that the later Execution is good, and that the firſt Leaſe ſealed is only as an Eſcrow when the Letter of Attorney is delivered at the ſame Time.

5. If a Diſſeiſee delivers out of the Land a Deed of Leaſe to a Stranger as an Eſcrow, and commands him to enter into the Land, and deliver it upon the Land as his Deed to the Leſſee, who does it accordingly; this is a good Leaſe. Adjudged 3 Rep. 35. b. *Jenning's Caſe.* Cro. E. 446. pl. 11. Jennings v. Bragg, S. C. and Anderſon ſaid it was a good Leaſe; for it was not his Deed till the ſecond Delivery, at which Time he had good Power and Right to leaſe it; ſed adjornatur. ——— Co. Litt. 48. b. towards the Bottom S. P.

6. So he may make a Leaſe, and command another by Parol to enter, and ſeal and deliver the Leaſe; this is good without any Warrant of Attorney. Tr. 7 Ja. per Cur. between *Maſon and Street.*

7. Where *A. grants Common to C. who uſes the Common*, and commons *and grants it over to J. who does not uſe* the Common, and after *J. grants it to W.* yet the Grant of J. is good, and W. may uſe the Common. Br. Common, pl. 27. cites 36 Aſſ. 3.

8. The *Grandfather in Tail enfeoffed* ſeveral, *and declared* by his Will *that the Feoffees ſhould hold* the Land *till his Debts were paid, and after ſhould enfeoff his Heir of his Body*, and died; the *Father entered, and made a Feoffment, the Debts not paid*, and levied a Fine, and *ſuffered a Recovery*, and cauſed a *Collateral Warranty* to be made, and died, and the Son entered. It ſeems to be admitted that the Feoffment of the Father was good before the Debts paid, nevertheleſs, Brooke ſays it ſeems to me the ſecond Feoffees ſhall be ſeiſed to the firſt Uſe of the Debts till they are paid, and then to the Uſe of the Eſtate Tail. Br. Feoffments al Uſes, pl. 21. cites 3 H. 7. 13.

9. If a *Tenant ſurrenders to him in Reverſion, to which he agrees*, yet he *is not in Poſſeſſion till he has entered*; Per Brook J. quod nemo negavit, and therefore he cannot grant it. Br. Surrender, pl. 15. cites 14 H. 8. 20.

10. J. S. makes a *Leaſe for Years to commence after the Death of a Tenant for Life*, or after *the End of a Leaſe for Years in Being*; an *Eſtranger after the Death of the Tenant* for Life, or the End of the Leaſe, *enters by Tort.* It was agreed by the Court, that notwithſtanding the Entry, the Leſſee may grant over his Term. Cro. E. 15. pl. 4. Paſch. in C. B. Bruerton v. Rainsford.

11. *But* if the *Leſſee had entered*, and been afterwards put out, he cannot grant his Term till he re-enters. Cro. E. 15. pl. 4. Paſch. 25 Eliz. C. B. Bruerton v. Rainsford.

12. Ejectione Firmæ; It was held clearly by the Court, that if J. S. makes a *Leaſe* to B. *to commence two Years after*, that *after the two Years are expired, B. before any Entry, may grant his Term*, although the Leſſor Le. 118. pl. 140. Wheeler v. Two-

good, S C. & S. P. held per Curiam accordingly.

ſor doth continue in Poſſeſſion. Cro. E. 127. pl. 8. Hill. 31 Eliz. B. R. Wheeler v. Thorogood.

13. It was held upon Evidence, that if the *Leſſee for Years of the Queen* be *ouſted by a Stranger*, yet although he be out of Poſſeſſion, he may aſſign over his Term; for the Reverſion being in the Queen, he cannot be out of Poſſeſſion but at his Pleaſure. Cro. E. 275. pl. 4. Hill. 34 Eliz. C. B. Wyngate v. Mark.

14. If a Man makes a *Leaſe for Years to commence at a future Day*, and *before the Day the Leſſor is diſſeiſed*, yet the *Leſſee may grant over* his Intereſt; for ſuch Intereſſe Termini cannot by Diſſeiſin or Feoffment be deveſted or turned to a Right any more than Rent or Common &c. Arg. 5 Rep. 124. a. Paſch. 3 Jac. C. B. in Saffyn's Caſe.

15. Leſſee before Entry hath an Intereſt, *Intereſſe Termini* grantable to another. Co. Litt. 46. b.

3 Le 114. in pl. 194. Hill. 28 Eliz. S. P. accordingly as to the Common by Periam J.

16. A Man *ſeiſed of Land whereunto Common is appendant*, and is diſſeiſed, the *Diſſeiſee cannot uſe the Common until he enters into the Land* whereunto it is appendant. *But if* a Man be *diſſeiſed of a Manor whereunto an Advowſon is appendant he may preſent unto the Advowſon before he enters into the Manor.* And the Reaſon of this Diverſity is, becauſe in the Caſe of the Common it ſhould be a Prejudice to the Tenant of the Soil; For if the Diſſeiſee might do it, the Diſſeiſor might alſo put in his Cattle, which ſhould be a double Charge to the Tenant, but not ſo of the Advowſon. Co. Litt. 122. b.

2 Salk. 563. pl. 1. Trin. 3 W. & M. in B. R. Hammond v Wood, S. P accordingly. ——— 4 Mod 48. Hannam v. Woodford S. P. held accordingly. — Skinn 300. pl 4. S C. and by Holt Ch. J. and Eyre clearly there ought to be an actual Entry and Continuance in Poſſeſſion.

17. *Conuſee of a Statute* cannot aſſign the Land *after Liberate* without actual Entry or Recovery in Ejectment. 3 Lev. 312. Trin. 3 W. & M. in B. R. Stephens v. Hanham.

(G) In what Caſes an Eſtate ſhall be ſaid to be ended and void without Entry or other Act; And where not.

Cro. C. 397. pl. 8. S C. and Judgment affirmed per tot. Cur. ——— Jo. 354. pl. 2. S. C. & S. P reſolved by three Juſtices, (Richardſon being dead).

1. IF Baron ſeiſed in Fee in Right of his Wife has Iſſue by the Feme, and after makes Leaſe for Years, reſerving Rent, and after the Wife dies, and then the Baron dies before the End of the Years, yet it is void and ended in Law before any Entry of the next Heir of the Wife, inaſmuch as he cannot * make it good by any Acceptance of the Rent, the Leaſe being made ſolely by the Baron. H. 10 Car. B. R. between *Miller and Manwaring*, per Cur. adjudged in Writ of Error upon a Judgment at Cheſter, which concerned Sir Randal Crew. Intratur Tr. 10 Car. Rot. 321.

* Fol. 831

The Caſe was, that the Iſſue after the Death of his Father, Tenant by the Curteſy, before Entry recites a Leaſe made by his Father, and that the Reverſion was in him, and grants the Reverſion of the Land to another for Years, after the Expiration of the ſaid firſt Leaſe, this is a void Leaſe; for he has no Reverſion at this Time, the firſt Leaſe being determined. Jo. 355. pl. 2. Hill. 10 Car. B. R. Miller v. Manwaring.

2. If

2. If Tenant in Tail leaſes for 40 Years, **rendering Rent** to commence 10 Years after, and dies, **the** Iſſue enters and enteoffs A. **the** 10 Years expire, **the** Leſſee enters; **if** A. accepts the Rent **the Leaſe is made good, for he ſhall have the ſame Election that the Iſſue had; For the Entry and Feoffment of the Iſſue before the Commencement of the Leaſe he has not made it void. Co. Litt. 46. b. Pl. C. 437.** See (H. a) pl 4. S. C. and the *Notes there.*

3. If a Prebendary, Parſon or Vicar leaſes **for Years** not according to the Statute, **this is void by his Death before Entry of the Succeſſor. Co. Litt. 45. b.** Br. Leaſes, pl 24. cites 7 Aſſ. 19. S. C. —— Br. Acceptance pl. 9. cites 19 Aſſ 9. S. P. —— Br. Leaſe, pl 18. cites 38 H. 8. S. P. —— Br. Dean and Chapter, pl. 20. cites S. C. —— Br. Encumbent, pl 18. cites S. C.

4. But otherwiſe **it is** of a Leaſe for Life. **Co. Litt. 45. b. For this is but voidable for the** Livery, **by which it was created.** But the Reporter adds a Nota, that it appears to him, that in the Caſe of a Leaſe for Life, if the Leſſor accepts the ſame Rent which was demanded, he has affirmed the Leaſe; becauſe he cannot receive it as due upon any Contract, as in the Caſe of a Leaſe for Years, but he ought to receive it as his Rent, and thereby he affirms the Leaſe to continue; for when he accepts the Rent he cannot have Action of Debt for it; but his Remedy then was by Aſſiſe in Caſe he had Seiſin, or by Diſtreſs; and therefore it ſeems to the Reporter, that in ſuch Caſe the Acceptance of the Rent will bar his Re-entry.

5. Baron ſeis'd in Jure Uxoris leas'd the Land for ſeven Years and died within the Term. The Wife enter'd and inſeoſſ'd G. but did not ouſt the Termor, and yet this is a good Feoffment. For by her Death the Term is void; but if the Termor ſow'd the Land in the Life-time of the Baron, and the Baron died before Severance, the Termor ſhall have the Emblements. Br. Leaſes, pl. 24. cites 7 Aſſ. 19.

6. Tenant in Dower leaſes for Years rendring Rent and dies; The Heir brought Debt for the Rent, but it ſeems it does not lie. Br. Leaſes, pl. 19. cites 4 H. 6. 26.

7. Baron ſeiſed in Right of his Wife makes a Leaſe for Years. The Wife dies without Iſſue, ſo as the Baron cannot be Tenant by the Curteſy; Per Babbington and Martin the Baron may bring Debt or make Avowry for the Rent arrear till the Heir of the Wife enters; But per Paſton, he ſhall not make Avowry; becauſe this Leaſe is no Diſcontinuance, and therefore the Reverſion and Franktenement is in the Heir and not in the Baron; but it ſeems that the Tenant who claims by him ſhall not plead it. Br. Leaſes, pl. 4. cites 9 H. 6. 43.

8. If a *Biſhop grants a Fee to a Steward for Life, or makes Leaſe for Life* and dies, the Leaſe or Grant is not void but Voidable; For if the Succeſſor ſuffers it then it is good, but not if he enters upon him; Per Danby Ch. J. But per Moyle and Chock J. the Grant of the Fee to the Steward is void by the Bp's Death; But Brooke ſays, Quære of a Leaſe for Life, it ſeems otherwiſe, and the ſame ſeems of a Leaſe for Years by a Bp. that it is not void but Voidable; becauſe he has a Fee-Simple; but contra of ſuch *Leaſe by Parſon*, this *is void by his Death; For he has not the Fee-Simple*, but it is in Abeyance, and this Diverſity is agreed for Law in Chancery by the Juſtices, Hill. * 2 E. 6. and the Bp. may have Writ of Right or Writ of Entry ſine aſſenſu Capituli, whereas a Parſon ſhall have only a Juris utrum; And therefore if Succeſſor of Bp. Dean, Prebendary and the like who have Fee and leaſe and die, affirms it, the Leaſe is good, but contra of ſuch Acceptance by Succeſſor of Parſon that makes ſuch Leaſe, becauſe ſuch Leaſe is void immediately; But if *Chantery-Prieſt makes a Leaſe* his Succeſſor ſhall avoid it notwithſtanding his Predeceſſor had Fee, becauſe he is

* 3 Rep. 65. a. S. P. per Cur. and cites 11 E. 3. Abbot. 9. 8 H. 5. Br. Leaſes 19. and F. N. B. 50.

Donative or Preſentative, and then ſuch Leaſe is not perdurable, unleſs confirm'd by the Patron in the one Caſe, and by the Patron and Ordinary in the other. Br. Leaſes, pl. 33. cites 5 E. 4. 105.

9. If a Man *infeoffs another* upon Condition perform'd, *that the Feoffment ſhall be void, or that the Feoffor may re-enter*; in the one Caſe nor the other upon the Condition perform'd the Franktenement is not in the Feoffor till he has re-enter'd, quod nota, Per Brian Ch. J. Br. Conditions, pl. 249. cites 11 H. 7. 21.

3 Le. 152. pl. 204. S. C. accordingly.

10. A. *deviſed a Houſe to B. for Life*, Remainder to C. &c. *Proviſo that if B. clearly departs out of London and dwells in the Country*, that *then ſhe ſhall have a Rent out of the ſame Houſe* &c. B. clearly departed out of London, and lived in the Country wholly. Agreed that this is a good Proviſo to determine the Eſtate, though there are no Words (to ceaſe) or (that it ſhall be void) but being in a Will it ſhall be imply'd in the Words (That then ſhe *ſhall have a Rent*) which cannot be if the Eſtate be not determin'd, and B. is but Tenant at Sufferance. Cro. E. 238. pl. 5. Trin. 33 Eliz. B. R. Allen v. Hill.

11. Leaſe by A. *to B. for Life*, Remainder *to C. for Life, Provided if A. has Iſſue &c that the Eſtate limited to C. ſhould ceaſe*, and it ſhould remain to the Son in Tail; A. afterwards had Iſſue, yet adjudged that this Remainder to C. cannot ceaſe without Entry or Claim. Cro. E. 360. pl. 20. Mich 36 & 37 Eliz. C. B. Cogan v. Cogan.

12. *Uſes* have not any Quality without Claim or Entry to ceaſe the Poſſeſſion, becauſe it is againſt the Principles of the Common Law; Per Anderſon and Kingſmill. Mo. 633. pl. 86. Paſch. 43 Eliz. C. B. Mildmay's Caſe.

13. It is the Office of a Limitation generally to *determine the Eſtate without Entry* or Claim, and that a *Stranger* at Common Law may *take Advantage* of a Limitation; But there is a *Difference between a Limitation dependent upon a collateral ſingle Act to be perform'd Unica Vice*, and a Limitation dependent on payment of Rent which ariſes out of the Land, which by its Creation may have Continuance of *ſucceſſive Acts*; Per Jones Serjeant, Arg. 2 Jo. 32. Hill. 19 Car. 2. C. B.

14. A *Leaſe for Life* upon Condition, requires the Circumſtance of Entry to avoid it, although the Condition be broken, upon the Breach of which the Leaſe is to be void; *So* in a *Leaſe for Years rendring Rent, and upon Default of Payment to be void*, this Leaſe is not void upon Default of Payment only, without a Demand of the Rent, and this Leaſe for Years upon Demand of the Rent is void without Entry. Jenk. 121. pl. 43.

(H) Limitation of Eſtates in Law.

What ſhall be a Determination upon a Limitation in Law.

Jo. 15 in pl. 1. S. C. cited —— S. C. cited by Ld. Chancellor Nottingham, Select Caſes in Chancery 30. —Wms's

1. IF A. poſſeſſed of a Term for Years deviſes it to B. and to the Heirs Male of his Body **begotten, and after** B. dies without Iſſue Male within the Term, **yet his Executors ſhall have the Reſidue of the Term, and not the Executors of A. for this is a void Limitation of the Grant to limit to B. and Heirs Male of his Body; For his Heir Male of his Body could not have it if he had had any Iſſue Male, but his Executors, becauſe an** Entail cannot be of a Term, **and then this is a** Deviſe of the Term abſolutely without any

any Limitation, and ſo the Executors of the Deviſee ſhall have it, and there ſhall not be any Reverter to the Executors of A. the Deviſor, upon the Death of the Deviſee, without Iſſue Male. P. 11 Car. B. R. between *Leventhorpe and Aſhby* reſolved per Cur. upon Evidence at the Bar. And they would not ſuffer it to be found ſpecially for the Clearneſs, becauſe they ſaid it had been ſo adjudged diverſe Times. Intratur Mich. 10 Car. Rot. 120. upon the Will of *Thomas Leventhorpe*. Rep. 562. Arg cites this and following Caſe in pl. 2. and infers from both, that it is plain that even the Law diſtinguiſhes betwixt a Term created de nova out of an Inheritance, and a Term in Groſs.

2. If A. ſeiſed in Fee of Land deviſes to J. S. and the Heirs Males of his Body begotten, from his Death for 500 Years, this is an Eſtate for 500 Years determinable upon his Death with Iſſue Male by way of Limitation, but his Executors ſhall have it, and not his Iſſue Male. 10 Rep. 87. Paſch. 9 Jac. Leonard Lovie's Caſe. S. C. cited by Serjeant Hedley, 2 Roll Rep. 424 in the Serjeant's Caſe. —— See tit. Deviſe (B. b) pl. 5. and the Notes there, and this Caſe denied.

3. If two Jointenants for Life are, and one leaſes for Years his Part, and the other Jointenant ſurrenders his Part, and after he who made the Leaſe for Years dies, the Leaſe for Years is determined, though at the Creation of the Leaſe for Years this was determinable upon the Death of both the Jointenants, for the Limitation of the Leaſe for Years depends upon the Limitation of the Eſtate for Life, and for this the Survivor of the Eſtate for Life being determined by the Surrender of the Leaſe for Years, is alſo determined by a Conſequent. H. 13 Ja. B. R. adjudged between *Daniel and Waddington*. Cro. J. 377. pl. 5. S. C. adjudged. —— Roll Rep. 309. pl 20. S. C. adjudged. —— 3 Bulſt. 130. S. C. adjudged.

4. If a Man poſſeſſed of a Leaſe for Years of Land deviſes the Land to another generally, the Deviſee ſhall have all the Term without any Limitation to determine upon his Death. Mich. 13 Ja. B. R. per Cur. D. 307. b. pl. 69 Paſch. 14 Eliz. S. P. held accordingly. —— S. C. cited by Coke Ch. J. Roll Rep. 371.

5. If a Man poſſeſſed of a Leaſe for Years grants a Rent out of it generally, without limiting any Eſtate, this ſhall be during all the Term, and not determinable by the Death of the Grantee. Mich. 13 Ja. B. R. Held. Roll Rep. 247. pl. 17. Goff v. Hayward. S P. upon a Deviſe, and ſeems to be S. C adjornatur. —— Ibid. 368. S. C. but no Judgment. —— 3 Bulſt. 121. to 130. S. C. debated by the Court who were divided, and ſo no Judgment. —— Bridgm. 52. Gouge v. Hayward S. C. the Court divided.

6. If a Man grants Land to another Habend' to him and A. his Wife, and one of the Sons of him and A. according to the Cuſtom of the Manor, this being void to A. and their Son for the uncertainty which of them ſhall firſt take, it ſhall not be an Eſtate to the Grantee for his Life, and the Lives of the other two, for it was not the Intent of the Grantor to make * them to be the Limitation of the Eſtate of the firſt Man, but that they ſhould take alſo for their Lives. Mich. 11 Ja. B. R. per Cur. between *Cobb and Betterton*. Fol. 832. * The Intent was that they ſhould take jointly and being void in that Reſpect it does not extend to A. &c. by way of Limitation. See Jo. 310. S. P. —— But if there had been but one Son and ſo averred it had been good. Cro. J. 374 S. C. and there Coke cited it adjudged 29 Eliz. in Winkmores Caſe S. P.

7. If

7. If Lord and Tenant be, and the *Lord grants his Seigniory for Life* unto a Stranger, and the *Tenant attorns, and dies without Heir*, and the Grantee enters for *Eſcheat*, he ſhall not have a greater Eſtate in the Tenancy than he had in the Seigniory, becauſe the Tenancy cometh in Lieu of the Seigniory. Perk. S. 96. cites 5 E. 4. 3.

8. *So* ſhall it be of *Land recovered in Value by Vouchee* mutatis mutandis. Perk. S. 96.

9. A *Leaſe* was made *for 21 Years, if the Leſſee lived ſo long, and continued in the Leſſor's Service.* The *Leſſor dies.* It was holden by three Juſtices, that the Leaſe continues, for that there is *no Laches in the Leſſee*, that he did not ſerve, and it is by the Act of God that he cannot ſerve any longer; But Walmſley ſtrongly e contra, that it is a Limitation to the Eſtate. The Reporter adds a Quære. Cro. E. 643. pl. 45. Mich. 40 & 41 Eliz. C. B. Wrenford v. Gyles.

10. Eſtate given to A. may be *defeated* in toto by *Condition* or Limitation, but the ſame Eſtate, or any Part of it, cannot be determined as to A. and *given* in Part or in toto to B. for this is repugnant to the Rules of Law; As if A. makes Leaſe for Life, upon Condition that if he does not pay 20 l. that B. ſhall have the Land, this *future Limitation* is void; Per Walmſley J. 1 Rep. 86. b. Paſch. 42 Eliz. C. B. in Corbet's Caſe.

11. A. enfeoffs B. on *Condition that B. and his Heirs* ſhould *pay a Rent to J. S.* (a Stranger) *and his Heirs.* This is a good Condition, though it is not properly a Rent, but a *Sum in Groſs*, becauſe it iſſues not out of the Land; and if it be not paid, A. may re-enter, and on ſuch Re-entry the Rent is gone for ever, and ſo was only as a Penalty. Litt. S. 345.

12. If *Leſſee for Years grants a Rent* to another, this ſhall be but a Chattel; Per Coke and Doderidge; but Doderidge ſaid, it ſeemed it ſhould be a Chattel with this Limitation, viz. if the Grantee ſo long live; but Coke Ch. J. e contra, that it ſhould be a Rent during the Term abſolutely, but if it had been expreſly limited to be during his Life, then it would be ſo, quod fuit conceſſum per Crooke and Doderidge. Roll Rep. 249. Mich. 13 Jac. B. R.

13. Limitation of the *Truſt of a Remainder in Poſſibility* of a *Chattel Real* to the *Heir of the Perſon limiting*, is a void Limitation. Chan. Caſes 8 Hill. 13 & 14 Car. 2. Goring v. Bickerſtaff.

14. *Baron poſſeſſed* of a Term for Years, on Marriage aſſigns the Term in Truſt for himſelf for Life, *Remainder for the Children of the Body of the Wife*; Baron dies leaving a Son; The Wife marries again, and dies, leaving a Son by the ſecond Husband; Per Somers C. The Truſt for the Benefit of the Children of the Wife muſt be *intended the Children of that Marriage*, and not as a Portion for any Child of her by any other Husband. 2 Vern. 362. Trin. 1699. Daſforn v. Goodman and Bolt.

15. Future Intereſts, ſpringing Truſts, or Truſts Executory, Remainders that are to ariſe or emerge upon Contingency, are quite out of the Reaſon and Rule of Perpetuities, eſpecially if they be not of long and remote Conſideration, but *ſuch as by a natural and eaſy Interpretation will ſpeedily wear out*, and ſo Things come to the right Channel again. Parl. Caſes 139. Arg. cites it as held by Ld. C. Nottingham in the D. of Norfolk's Caſe

16. A Marriage Settlement was, that *if the Heirs of Penelope, the Wife, ſhould within three Months after the Death of the Survivor of the ſaid Richard (the Huſband) and Penelope dying without Iſſue, pay to the Heirs or Aſſigns of the ſaid Richard the Sum of* 4000 *l. then the Remainder to Richard ſhould ceaſe, and the Premiſſes ſhould remain to the Uſe of the right Heirs of the ſaid Penelope for ever.* Ma. and Suſan, as Heirs of Penelope,

nelope, pay the 4000 l. and exhibited that Bill in Chancery to compel the Truſtees to convey the Eſtate to them upon ſuch Payment; and though Richard Carew and Penelope his Wife had levied a Fine, to the End to extinguiſh and bar all ſuch Eſtate, Right, Title &c. as the ſaid Penelope then had, or her Iſſue or Heirs might have or claim to the ſame by any Condition &c. on Payment of 4000 l or otherwiſe &c. and for ſettling the ſame on the ſaid Richard Carew and his Heirs &c. yet upon an Appeal from a Decree in Chancery (where the Bill was diſmiſſed) into the Houſe of Lords, the Decree there was reverſed, and it was held that there was *not any Difference between a Contingency to happen during Life or Lives, or within one Year afterwards*, and that the true Rule is to fix Limits and Boundaries to ſuch Limitations, when ſo made, as that they prove inconvenient, and not otherwiſe; that the *Fine could not bar the Benefit of this Proviſo*; for that the ſame never was, nor ever could be in Penelope, who levied the Fine. Parl. Caſes 137. Sir Evan Floyd and Mary his Wife & al' v. Sir Richard Carew &c.

(I) What ſhall be a Determination of the Eſtate upon an Act or Limitation.

1. IF a Man leaſes Land for Years if he and J. S. a Stranger ſo long live, or if two Strangers ſo long live, by the Death of any of them the Eſtate is ended, becauſe the Limitation is collateral to the Eſtate; for the Life of a Man is collateral to a Chattle, and therefore this Limitation is all one as if the Limitation, had been, if they both together ſo long Live. 5 Rep. *Brudnell's Caſe*. 9. b. reſolved H. 13 Ja. B. R. b. agreed.

If the Leaſe had been to J. S J. N. and J. D if they * [naming them as J. S. J. N. and J. D.] ſo long live, and after one of them dies, it was held by Mountague and Brown, that the Leaſe was determined by the Death of one.

* S. P. in totidem Verbis, per Hutton and Harvey. Hetl 76. Hill. 3 Car. C. B. Wilkinſon's Caſe. —— 2 Vent. 74. Mich. 1 W & M. in C. B. Brudenell's Caſe cited per Cur. —— S. C. cited by Doderidge J. 3 Bulſt. 131, 132. —— 2 Brownl. 292. cites S. C. & S. P. adjudged.

But if the Words had been general, viz. if the Leſſee ſo long live, without naming them, then perhaps it might be more doubtful; Per two Juſtices. Dal. 2. pl. 2. Mich. 1 E. 6.

2. If two Jointenants for Life are, and one leaſes for Years, if he and his Companion ſo long live, and after dies, this ſhall determine by his Death, becauſe the Limitation is collateral to the Eſtate, though the Eſtate had not been determined by his Death by the Limitation of the Law without this expreſs Limitation. H. 13 Ja. B. R. adjudged between *Daniel and Waddington*.

3 Bulſt. 130. S. C. adjudged per tot. Cur. —— Cro. J. 377. pl. 5. S. C. adjudged. —— Roll • Rep. 309. pl. 20. S C. adjudged per tot. Cur. —— S. C. cited per Cur. 2 Vent. 74.

3. If a Feme be Copyholder for Life during her Widowhood, according to the Cuſtom of the Manor, and ſhe takes J. S. to Baron ſhe being Neice to a former Wife of J. S. upon which J. S. is queſtioned for an inceſtuous Marriage, and put to Penance by the High Commiſſion Court, and bound not to keep her Company, and after J. S. dies, this Marriage does not determine her Eſtate though ſhe was not divorced a Vinculo Matrimonii, though there was Cauſe for it. Hobart's Rep. 254. cites P. 16 Ja. upon Evidence. *Renington's Caſe*. Per Cur.

Hob. 181. pl. 218. cites S. C. but there it is ſtated that ſhe claimed as Widow of J. S. whoſe former Wife was her Aunt; and reſolved that ſhe was intitled to her Widow's Eſtate. —— Noy 29. Rennington v. Cole, S. C. adjudged. —— S. C. cited Vaugh. 249. and 322.

Br Conditions, pl. 209. cites 21 E. 3. 11. S. C. — Br. Aſſ. pl. 230 cites 21 Aſſ. 18. — Br Contract, &c. pl. 12. cites 21 E. 3 11. — Br. Conditions, pl. 106. cites 21 Aſſ 18.

4 In Aſſiſe, the Caſe was, that *A.* was ſeiſed in Fee, and *covenanted with B to give him 8 l. to remain with B. three Years to learn the Miſtery of Talery*, and *enfeoffed* the ſaid *B. of Land in Fee till 8 l. were paid*, and made a *ſimple Deed of Feoffment, but the Livery was conditional* as above to pay the 8 l. and *A. died within three Weeks after the Livery*, and the Heir of A. ouſted the Plaintiff and he brought Aſſiſe, viz. B. brought Aſſiſe, and becauſe the Money was not paid, it was awarded that the Plaintiff ſhould recover, and yet now the Plaintiff cannot teach nor inſtruct A. in the Miſtery of Talery, For there was no Default in B. the Plaintiff. Br. Entre Cong. pl. 29. cites 21 E. 3. 11, 12. and 21. Aſſ. 18. concordat.

Br. Abbe, pl. 13. cites S. C.

5. If a *Leaſe* is made *to an Abbot for his Life*, and *he is tranſlated* to another Houſe, the Succeſſor ſhall have the Land during the Natural Life of the Leſſee; Per Cur. Br. Leaſes, pl. 29. cites 5 H. 7. 25.

6. Leaſe by Patron, Parſon, and Ordinary, for 24 Years, rending Rent during the Term, *Proviſo* ſemper, that if *the Leſſee die*, or if the ſaid *Rent be in arrear* &c. *or* if the ſaid Houſes of the ſaid Rectory be *not well repaired*, that then it ſhould be *lawful* for the ſaid Parſon *to reenter* &c. and retain till Arrears levied &c. and till ſo much levied as would ſatisfy to put the Premiſſes in Repair. Leſſee dies, Houſes in good Repair, and no Rent in arrear. The Leaſe is not determined *by his Death*, but his Executor ſhall hold for the Reſidue of the Term. Bendl. 17 M. 28 H. 8.

7. Leaſe is made *to A. and B. for Years*, with a *Proviſo* in the End of the Indenture, *that if the Leſſees die within the Term, that the Term ſhall ceaſe.* A. and B. make *Partition*, or A. *aliens his Part and dies*; The Leſſor cannot enter into the Part of A. but the Grantee or the Executors of A. if no Alienation be made, ſhall have his Part during the Life of B. and no Occupancy ſhall be in ſuch Caſe, and it is not like where a Leaſe is made to two *for Life*, if they make Partition, and one dies, his Part ſhall revert to the Leſſor. D. 67. a. pl. 18. Mich. 3 E. 6. Farington's Caſe.

4 Le. 101. pl. 207. S C. in totidem Verbis.

8. An Abbot leaſed Land to A. B. and C. *for 80 Years*, and in the End of the Leaſe was a Clauſe, that *if they died within the Term*, then the *Leſſor might enter*. The Poſſeſſion of the Abbey came to the King, who granted the Reverſion to J. S. who made a *new Leaſe to J. D.* for 21 Years to *begin after the Expiration, Determination, or Surrender* of the ſaid former Leaſe. The three Leſſees died within the Term; Per omnes Juſticiarios, J. D. cannot enter before J. S. hath entered, for it is in the *Election of J. S.* if he will take Advantage of the *Condition* and defeat the Leaſe, but that ought to be by Entry, and none can make ſuch Entry but the Leſſor himſelf, or by his Expreſs Direction &c. 3 Le. 269. pl. 363. Paſch. 33 Eliz. C. B. Anon.

9. But there is a *Diverſity between a Limitation* (as during the Lives of B. and C. as above) *and a Condition*, As if a Man demiſes for 100 Years, if B. and C. ſhall ſo long live; if one of them dies, the Leaſe is determined, becauſe it was conditional, and not determinable by Limitation of Eſtate, and the Life of a Man is colleteral as to the Leaſe, which is only a Chattel; Agreed. 5 Rep. 9. b. Trin. 34 Eliz. B. R. in Brudenell's Caſe.

10. And another *Diverſity* was taken and agreed *between a Limitation of an Eſtate of Franktenement during Lives, and collateral Determinations*, As during ſuch Time as B. and C. ſhall be of the Inner Temple, or ſhall be commorant in Norfolk, or ſhall be Juſtices of Peace &c.

For

For in thoſe Caſes the Failure of one determines the Eſtate. 5 Rep. 9. b. Trin. 34 Eliz. B. R. in Brudenell's Caſe.

11. If a *Leaſe* is made *to A. during the Lives of B. and C.* there if one dies his Eſtate ſhall Survive; *But* if a Leaſe is made *to A. during the Life of B. and C. without ſaying during their Lives*, and the Life of the Survivor of them, there if one of them dies the Eſtate is not determined; Reſolved per tot. Cur. 5 Rep. 9. Trin. 34 Eliz. B. R. Brundenell's Caſe.

Ibid. ſays it was ſo reſolved by all the Juſtices in Mich. Term at St. Alban's, 5 & 6 Eliz.

Becauſe A. has Franktenement by way of Limitation of Eſtate during the Lives of two Men, and by Conſtruction of Law during the Life of the Survivor of them. —— S. C. cited 13 Rep. 66. and affirmed by the whole Court to be good Law.

12. Leaſe to a Widow for 40 Years *Sub hac Conditione ſi tam diu vixerit vidua & inhabitaret ſuper Præmiſſa*; She dies within the Term being a Widow; Adjudged the Term not determined by her Death, but goes to her Executors. Mo. 400. pl. 525. Paſch. 37 Eliz. B. R. Sawyer v. Hardy.

Goldsb. 179. S. C. the Words there are Sub Conditione (quod) ſi tam diu &c.

and Popham and Clench held, that if the Word (Si) had been omitted it would have been a Condition, or if the Words (Sub Conditione quod) had been omitted it would have been a Limitation, but the Words being inſenſible it is neither, and ſo the Term continues. Goldsb. 179. S. C.

13. A. leaſes to B. for 21 Years *if B. ſo long live, and continue in his Service. A. dies*; Per Cur. the Leaſe is not determined, becauſe it was the Act of God; Noy 70. Warnford v. Giles.

Cro. E. 643. pl. 45. Mich. 41 Eliz. Wrenford v. Gyles,

S. C. held accordingly by three Juſtices, but Glanvil ſtrongly e contra, becauſe it is a Limitation to the Eſtate that it ſhall not continue longer; Quære.

14. *So* an Annuity *pro concilio* &c. to the Grantee *for his Life* is not determined by the *Death of the Grantor.* Noy 70. Warnford v. Gyles.

15. If an *Abbot makes a Leaſe for* 40 *Years, if he ſo long be Abbot* if he after be *depoſed or die* the Leaſe is determined; So it is if a Leaſe be made by a *Husband, if he ſo long continues Husband* of ſuch a Woman; Per Gawdy J. Goldsb. 179. pl. 112. Hill. 43 Eliz. in Caſe of Sayer v. Hardy.

16. If a Limitation be *both in the Coniunctive and Disjunctive*, As a Leaſe to the Husband and Wife for 21 *Years, if the Husband and Wife, or any Child between them ſo long live*, and the Wife, dies; yet the Eſtate continues, for the Disjuctive refers the to whole. Co. Litt. 225. a.

The Leaſe continues ſo long as any of them live, for ſo was the Intent of the Parties.

Cro. E. 270. cites it as adjudged in Truepenny's Caſe, alias, Baldwin v. Coke. —— 2 Brownl. 292. cites S. P. adjudged in Truepenny's Caſe. —— S. C. cited by Doderidge J. as adjudged accordingly. 3 Bulſt. 131.

17. If Land be *given to A. and his Heirs, ſo long as B. has Iſſue Male &c.* B. dies, his Wife *privement enſeint with a Son*, who is *after born*, yet the Eſtate of A. is determined. Noy 132. Anon.

18. A. leaſes to B. for *ſix Years, if C. ſo long live*; if *C.* be *dead before the Leaſe*, the Leaſe is abſolute. 9 Rep. 61. a. Trin. 10. Jac. Bradſhaw's Caſe.

19. Leaſe for 21 Years, *if Leſſee ſo long live*; Leſſor and Leſſee *join in Grant* by Deed of the Term *to C.* Leſſee dies within the Term. C. ſhall enjoy the Land during the Reſidue of the Term, abſolately. 10 Rep. 49. Mich. 10 Jac. in Lampet's Caſe.

20. If I make a *Leaſe for Years, reſerving a Rent, during my Life, and my Wife's* Life. If I die, the Rent is gone, becauſe ſhe is a Stranger; ſhe ſhall never have the Rent, becauſe ſhe has no Intereſt in the Land. If one of them die nothing can ſurvive to the other, and a Limitation muſt

muſt be taken ſtrictly; otherwiſe it is by way of Grant; that ſhall be taken ſtrongly againſt the Grantor. Brownl. 39. Anon.

Noy 86. S. C. Crabb v. Tooker.

21. Father covenants to provide Meat, Drink &c. for his Son, Wife and Children, during their Lives, and *if they diſagree*, then that they ſhould have ſuch Land &c. and live elſewhere. The Son dies. The *Power to diſagree* does not ſurvive any more than Deviſe that Feoffees ſhall Sell, and one dies. Lat. 152. Trin. 2 Car. Harman v. Whitchlow.

Show. 288. Jones v. Bean, S. C. adjudged. ——Carth. 213. Jones v. Bew, S.C. adjudged a good Grant to the Survivor, becauſe of the long and conſtant Uſage of granting it ſo. —— 4 Mod. 16. S. C. adjudged accordingly for the ſame Reaſon.

22. *Office was granted to two.* One dies. The Office does not ſurvive, but determines; As if two *Sheriffs* are, and one dies, the other cannot Act; But if the Grant be *to two, and the Survivor* of them, it is otherwiſe. 2 Salk. 465. pl. 1. Mich. 3 W. & M. in B. R. Jones v. Pugh.

23. A. by Will deviſed to *M.* his Neice, *and the Heirs Male of her Body upon Condition* and provided that *ſhe intermarry with, and have Iſſue Male by one ſurnamed Searle*, and *in Default* of both Conditions he deviſed *to N. in the ſame Manner*, and *in Default* thereof he deviſed *to B. for* 60 *Years*, if he ſo long live, Remainder *to the Heirs Males of the Body of the ſaid B.* and their Iſſue Male for ever; Adjudged that the Eſtate Tail of M. and N. or either of them, does *not ceaſe by marrying one that is not a Searle*; for the Remainder over is in Default of both Conditions, and in the mean Time it is limited to her and the Heirs Male of her Body, and ſhe *may ſurvive* the firſt Huſband and marry a Searle, and ſo there is a Poſſibility as long as the lives. 1 Salk. 570. Trin. 3 Ann. B. R. Page v. Hayward.

(I. 2) What ſhall be a Determination of the Limitation. Dying without Iſſue &c.

1. A. Granted to B a *Rent-Charge* out of his Lands, *to begin when J. S. died without Iſſue of his Body.* J. S. died, leaving Iſſue, which Iſſue died without Iſſue; Per Dyer Ch. J. The Grant ſhall not take Effect; For J. S. at the Time of his Death had Iſſue, and therefore the Grant ſhall not begin then, and if not then, it ſhall not begin at all. And per Manwood J. if the Words had been (to begin *when J. S. is dead without Iſſue* of his Body) then ſuch Grant ſhould take Effect when J. S. dies without Iſſue; and per Dyer the Difference is between an *Intereſt* and a *Limitation.* 3 Le. 103. pl. 150. Paſch. 26 Eliz. C. B. Anon.

D. 14. b. pl. 72. Trin. 28 H. 8. Bold v. Molineux. S. C.—— And. 1. pl. 1. S. C. adjudged accordingly.

2. Bond for Marriage Money was, *If the Wife died before Michaelmas without Iſſue of her Body then living*, that the Bond ſhould be void; ſhe had Iſſue and died, and the Iſſue died before Michaelmas, reſolv'd the Bond is void; for Tunc refers to the laſt Time, ad proximum antecedens, and not to the Death of the Wife, *(Tunc)* ſignificat tempus extremum. Per Haughton J. 3 Bulſt. 103. Mich. 13 Jac. cites D. 16, 17. Bowles's Caſe.

3. A. on the Marriage of his Daughter makes a *Proviſo, that if his Daughter die without Iſſue within two Years, her Baron ſhould repay 500 l. of her Portion*, ſhe had Iſſue, and after, but within the two Years, ſhe and her Iſſue died; adjudg'd that the Baron ſhall not repay the 500 l. For by the having of Iſſue the Condition was perform'd, cited Sid. 102. in Caſe of Goodyar v. Clerk, as the Caſe of Brett v. Pildredge. 13 Car. 1.

2 Vern Rep. 766. S C. cited in the Caſe of Pinbury v Elkin. and Wms's Rep. 564. in S. C. of Pinbury v. of Bret and Elkin. Per Ld. C. Parker. ——S. C. cited Keb. 248. Per Windham J. as the Caſe Peldram v. Cole.

4. A Settlement was in Conſideration of Marriage, and 1000 l. to the Uſe of *Baron for Life*, Remainder to the *Son* in the uſual Manner *in Tail*, and *if he die without Iſſue Male* then to the Uſe of the *Daughters for 500 Years, to raiſe 1500 l. for their Portions*. The Baron died and *leaves a Son and a Daughter*, and after the *Son dies without Iſſue*. The Daughter brought Ejectment, and Judgment was given for her, notwithſtanding it was inſiſted that this Term was on a Condition precedent which did not happen, and alſo that the Term was void in its Creation. And held that this was ſuch a Dying without Iſſue Male within the Intent of the Settlement as that the Term ſhall ariſe. Lev. 35. Trin. 13 Car. 2. B. R. Goodin v. Clerk.

Sid. 102. pl. 8. Goodiar v Clark. S. C. adjudged.—— The Caſe of Goodier and Clerk. 1 Lev. 23. was cited; and Holt Ch. J. ſaid, That Caſe is ill reported there,

and that the Caſe is thus in his Notes. There was a Leaſe for 500 Years made, for raiſing of Portions for Daughters to begin after the Death of Baron and Feme with ut Iſſue Male; and then by another Deed an Eſtate in Special Tail Male was given to Baron and Feme, and both theſe ſeperate Deeds were made by the ſame Perſon; and there were two principal Queſtions, Firſt, Whether this Term be good in point of Creation; and the Court held it good, and particularly Windham and Twiſden; which he could not agree unto. Powell J. agreed the Caſe of Goodier and Clerk, which he remember'd well, but ſaid he took the Leaſe there to be good in point of Creation; and ſo the Court there held it. Holt's Rep. 624, 625. pl. 2. Trin. 5 Ann. in Caſe of Andrews v. Stroud.

5. A *Leaſe* for 500 Years for raiſing 1500 l. for Daughters Portions was made *to commence after the Death of his Son without Iſſue* The *Son had a Son and died, and then that Son died without Iſſue.* Reſolv'd both in B. R. and Exchequer, That the Leaſe ſhould commence; for Iſſue being *Nomen Collectivum* whenever the Iſſue of the Son fail'd the Term of Commencement did happen. Vent. 229. Mich. 24 Car. 2. B. R. Hale cites this as Clerk's Caſe.

Lev 35. * Gooding v. Clerk. Trin. 13 Car 2. B R. S C. —2 Vern. Rep. 652. S C. cited in Caſe of Holt v. Burley. —— 767. S. C. cited in Caſe of Pinbury v Elkyn. —— Deviſe to A. but if he die without Iſſue then to B A. had Iſſue which died without Iſſue; then A died. This, according to the Intention of Deviſor, is a Dying without Iſſue. Le. 285 pl 387 Lee's Caſe—1 Lev 35 like Judgment on a Settlement. —— Holt Ch J. thought this Leaſe not good in its Creation; but Powell J. contra. Holts's Rep. 624, 625. in Caſe of Andrews v. Stroud.

* Sid. 102. Goodier v. Clark.

6. By Marriage Articles Money was to be laid out in a *Purchaſe of Lands* to be ſettled &c. Proviſo that if the Husband die without Iſſue *the Wife ſhould elect to have Land or Money*, and ſhould have *ſix Months Time* to make her Election; No Purchaſe was made, but the Husband died leaving his Wife *Privement Enſeint* of a Daughter born ſoon after his Death, who died within a Month after. The Wife adminiſtred both to the Husband and Child, and elected to have the Money, and North K. decreed for her. Vern. 298. pl. 293. Hill. 1684. Kettleby v. Atwood.

But Ld. Jeffries decreed for the Heir. Vern. 471. S C —— Per Jeffries C. the Husband had Iſſue at his Death, and ſo could not be ſaid to die without Iſſue. Vern. 472. S. C.

A Settlement to Husband and Wife for Life, and if he dies without Iſſue Male living, or in Ventre ſa Mere at the Time of his Death, a Remainder to Truſtees for 500 Years to raiſe Daughters Portions; the Husband dies, leaving Iſſue Male at the Time of his Death, which Iſſue Male ſoon after died without Iſſue Male; the Wife dies, the Queſtion was, If this Term ſhould riſe up again for the Benefit of the Daughter? The Opinion and Judgment of the Court was, That it ſhould not, it being a Condition precedent, and not a Remainder upon the Determination of the Eſtate Tail. This Judgment was reverſed in the Houſe of Lords, upon the Reaſoning that Mr. Raymond urged, That the Time of his Death related only to the Ventre ſa Mere, and then it was no more than an uſual Limitation; for the Wife was not Enſient. 11 Mod. 88. pl. 8. Trin. 5 Ann. B. R. Andrews v. Strowd. —— Holt's Rep. S. C. is ſtated thus, viz. A. ſeiſed of Lands in Fee convey'd to J. S. and his Heirs, to the Uſe of himſelf and his Wife R. for Life, Remainder to the 1ſt. 2d. 3d. 4th. 5th. &c. Sons in Tail; and for Default of ſuch Iſſue, and in Caſe the ſaid A. ſhould die, or be dead without Iſſue Male of his Body of the ſaid R. to be born, or in Ventre ſa Mere at the Time of his Death, and ſhall leave one or more Daughters of his Body on the Body of the ſaid R. begotten, or in Ventre ſa Mere at the Time; then to the Uſe and Behoof of the ſaid J. S. and his Executors for 500 Years, to raiſe Portions for his ſaid Daughters. They find that there was a Remainder limited to the Adminiſtrator of the Leſſor of the Plaintiff, and that A. had Iſſue two Sons, B. and C. and that B. died in the Life of his Father without Iſſue, then the Father died, then C. died without Iſſue, then R. the Feme dies; W. R. enters and demiſes to the Plaintiff, on whom the Defendant enters as Executor to J. S. et ſi &c. Now the ſole Queſtion was, Whether this Term ſhould now begin? And the Court ſeem'd pretty clear, That this Term was to begin upon Condition precedent, viz. Upon the Death of A. without Iſſue Male living, or in Ventre ſa Mere on the Body of the Wife at the Time of his Death; and that inaſmuch as A. had a Son at the Time of his Death, the Term could not then commence; and the Words do very clearly ſhew, that there was a Contingency that was to happen; otherwiſe that Term could never commence; and though there is a great deal of Equity for the Daughters to recover their Portions, yet theſe Words are ſo clear and expreſs, that there is no Room for a Conſtruction in their Favour. Holt's Rep. 623, 624. pl. 2. Trin. 5 Ann. Andrews v. Stroud.

7. In a Marriage Settlement was a Proviſo, that *if there ſhould be no Iſſue Male, but the Husband ſhould leave Iſſue Female* of the Marriage, then *to pay* to ſuch Iſſue Female 1000 l. at Eighteen. He died and *left Iſſue Male and Female* by the Wife, and the *Iſſue Male died before the Portion to the Iſſue Female became payable.* It was inſiſted that the Intent of the Settlement was, That if the Husband died, and there ſhould be no Iſſue Male of the Marriage living when the Portion became payable, then the 1000 l. was to be paid. But Ld. North diſmiſſed the Bill. Vern. 299. Hill. 1684. Dominick v. Langly.

(I. 3) Continuance.

What ſhall be ſaid a Continuance of Eſtate after it is gone over to another.

1. LESSEE *for Years grants Rent-charge and then ſurrenders*, yet for the Benefit of the Grantee the Term has Continuance, though in Rei veritate it is determined. 8 Rep. 145. b. Trin. 8 Jac. in Davenport's Caſe.

Palm. 111. Waldor v. Barkley, S. C. adjudged. —— Cro Jac. 573. pl. 1. Waldoe v. Bartlet, S. C. reſolved. —— 2 Roll Rep. 178. S. C. adjudged.

2. A. *Copyholder for Life purchaſes the Fee*, which is conveyed *to Truſtees* and their Heirs to the Uſe of A. during the Life of A. Remainder to the Wife of A. for Life; Remainder to A. in Fee. A. conveys the Remainder to his eldeſt Son in Fee. The Copyhold Eſtate for Life ſtill continues in A. and not extinct or altered by the Purchaſe of the Fee, which never was in him, but in the Truſtees only, till A. and the Truſtees conveyed the Remainder in Fee to the Son; ſo that a ſecond Wife of A. ſhall be entitled to her cuſtomary Eſtate. Hob. 181. pl. 218. Howard v. Bartlet.

3. A *Copyhold was granted to A. B. and C. for their Lives ſucceſſive ſicut nominantur.* Afterwards the *Lord demiſed the Lands for* 40 *Years after the Death, Surrender, Forfeiture, or other Determination of the Eſtate of A. B. and C.* Afterwsrds A. and B. die, and then C. takes a Wife and dies, and the *Wife holds in for her Life by* the Cuſtom as *her Frank Bank, and dies.* It was agreed that the Frank Bank is to ſeveral Purpoſes a Continuance of the Eſtate of the Baron; and Twiſden and Windham held that for that Reaſon the Leaſe ſhall not commence till the Death of the Wife, by which the Eſtate of the Baron is determined. Lev. 20. Hill. 12 & 13 Car. 2. B. R. Chantrell v. Randall. 2 Sid. 165. Hill. 1659. B. R. Clarke v. Candle, S. C. adjornatur. — 4 Mod. 253. S. P. Arg.

4. *Cuſtom where the Father dies leaving no Son, but two Daughters, the eldeſt Daughter ſhall have the Eſtate for her Life, and the Wife ſhall have her Life.* Tenant dies without Son, leaves a Wife and two Daughters, Wife enters, eldeſt Daughter dies, Wife dies; Adjudged the *Eſtate of the Wife* was Continuance of the Eſtate of the Baron till her Death, and Judgment for ſecond Daughter; for though ſhe was not eldeſt Daughter at the Death of her Father, yet ſhe was ſo at the Death of her Mother. 1 Lev. 172. Trin. 17 Car. 2. B. R. Newton v. Shafto. Sid. 267. pl. 18. S. C. adjornatur, but ſays that in Hill. 18 & 19 Car. 2. the Court gave Judgment that the eldeſt Daughter ſhall have the Eſtate within the Cuſtom, viz. the eldeſt Daughter at the Time of the Mother's Death, who had the Eſtate by the Cuſtom, and not only Primogenita Filia.

(I. 4) Contingent Eſtate.

See tit. Remainder (H) &c.

1. CONtingencies are only in three Caſes in the Law. 1ſt, When the *Perſon and Eſtate are certain but to veſt upon ſome Collateral Event* which may or may not happen; as where A. made a Leaſe to B. for Life, reſerving Rent during the Life of A. and that after A's Death the Land ſhould remain to B. and his Heirs, this is a Contingency, though uncertain whether A. ſhall ſurvive. 2dly, When the *Perſons are uncertain, and the Eſtate and Time alſo certain*; as if Land be given to the Husband and Wife, and the Heirs of the Body of the Survivor, they have Eſtate for their Lives, but when one dies the Eſtate alters, yet the Survivor is uncertain. 3dly, When the *Perſon and Eſtate alſo are uncertain*; as a Leaſe made for Life, the Remainder to the right Heirs of J. S. this is a contingent Eſtate; Per Coke Ch. J. 2 Bulſt. 130, 131. Mich. 11 Jac. in Caſe of Roberts v. Roberts.

2. A Man cannot make a *Conveyance to begin on a* Contingency, but by a Deviſe it may be made ſo, but not by a Surrender, for that is Conveyance; Per Haughton and Croke J. 2 Bulſt. 274. Mich. 12 Jac.

3. An Eſtate in Contingency *is no Eſtate till* the Contingency happens; Per Curiam. Allen 82. Mich. 24 Car. B. R. in Caſe of Udall v. Udall.

4. Contingent *Remainders* are *not favoured nor raiſed but upon Neceſſity* when a Perſon is not in Eſſe; Arg. Skinn. 208.

(I 5) What Grant by Deed ſhall be Tail or Fee Simple determinable.

1. IN Treſpaſs it was held by ſeveral, that where *Tenant in Tail of a Rent, which was not in Eſſe before, grants in Fee*, the Grantor has not Fee. Br. Eſtates, pl. 20. cites 15 E. 4. 6. 8.

2. *So* where he *ſuffers a Recovery againſt him by Writ of Entry in the Poſt*; Per Littleton, Choke and Neal. But Brian Ch. J. contra; and it ſeems that he has Fee determinable upon the Eſtate Tail. Br. Ibid.

3. *As* where *Lord of a Villein enters upon his Villein who is Tenant in Tail*, he has Fee Simple during the Eſtate Tail, and determinable upon it. And Catesby and Jenney agreed with Brian, 14 E. 4. 6. in this ſame Caſe. Br. Ibid.

4. If *Tenant in Tail grants Rent in Fee* this a Fee Simple determinable by the Death of the Grantor. Br. Eſtates, pl. 53. cites 14 H 8. 5.

5. If a Tenant in Tail *conveys by Leaſe and Releaſe*, an Eſtate in Fee defeaſible paſſes; Per Powell J. at Lent Aſſiſes Devon, 9 Ann.

(I. 6) Veſted. When.

In reſpect of the Limitation.

2 Mod. 210. Arg. in Caſe of Southcot v. Stowell cites S. C. and 1 H. 5. S. and D. 69. b.

1. IF J. S. give Lands by Fine *to A. for Life, Remainder to himſelf in Tail*, Remainder in Fee to B. after the Death of A. In this Caſe B. ſhall *enter*, for the Remainder to J. S. was void; for he who has a Fee reſiant in himſelf cannot reſerve Tail. Br. Eſtates, pl. 66. cites 42 E. 3. 5. and 14 H. 4. 31.

2. A. *covenants* in Conſideration that B. is his Son, he ſhall have for Life, and after B's Death in Conſideration that C. has given him 100l. that he ſhall have Fee; Here the *Conſiderations of raiſing the Uſes are ſeveral*, therefore if B. *refuſes* A. ſhall keep the Land, and C. ſhall not take preſently; Arg. Cart. 144. Mich. 18 Car. 2. C. B. cites this Caſe as put by Sir Roger Manwood in the Rector of Chedington's Caſe.

3. *Feoffment* to the Uſe of A. *for Life, Remainder to B. in Fee*; A. refuſes; B. ſhall *take* now, but if it had been by Way of *Covenant to ſtand ſeiſed*, B. ſhall not take till after the Death of A. but it reſts in the Covenantor, becauſe he has not departed with the Poſſeſſion, and therefore ſhall have the Uſe in the mean Time. 2 Lev. 77. Hill. 24 & 25 Car. 2. B. R. in Caſe of Pybus v. Mitford.

(I. 7) Ceſſer, or Deveſted. How. And in what Caſes.

1. IN a *Deviſe in Fee* it may be that an Eſtate in Fee ſhall *ceaſe* in one and be transferred to another. Cro. E. 205. pl. 39. Mich. 32 & 33 Eliz. B. R. in Caſe of Wellock v. Hammond.

2. Franktenement cannot be *deveſted* by a *verbal* Waiver or Diſagreement in Pais, or by Acceptance of other Thing en Pais; as Dower &c. Reſolved. 3 Rep. 26. a. b. Mich. 33 & 34 Eliz. B. R. Butler v. Baker.

But by verbal Waiver of the one Eſtate, and Entry into the other, it may be. Ibid. 26. b.

3. As an *Act in Pais* may amount to an *Agreement*, ſo an Act in Pais may amount to a *Diſagreement*, but this *is always of one and the ſame Thing*, *As* if there be *Lord and Tenant*, and the *Tenant by Deed infeoffs the Lord and a Stranger*, and makes *Livery to the Stranger in Name of both*; in this Caſe if the *Lord* by Parol diſagree to the Eſtate, this avails nothing; and of the other Part, if he *enters into the Land generally*, and takes the Profits, this Act will amount to an Agreement to the Feoffment; but if he *enters* into the Land, *and diſtrains for his Seigniory*, this Act amounts to a Diſagreement of the Feoffment, and ſhall devеit the Franktenement out of him; and with this agrees 10 E. 4. 12. by all the Juſtices. 3 Rep. 26. b. in Caſe of Butler v. Baker.

4. *And yet* in ſome Caſes a Claim by Parol *will direct an Entry to be an Agreement to one Eſtate and a Diſagreement to another*, *As* if Lands are *given to the Baron and Feme in Tail*, and after the Statute of 32 H. 8. 28. the *Baron aliens* the Land *to the Uſe of him and his Heirs*, and *after deviſes it to his Feme for Life*, and dies; the *Feme enters*, *claiming* by Parol *the Eſtate for Life*, this is a good Diſagreement to the Eſtate of Inheritance, and a good Agreement to the Eſtate for Life; and with this agrees 18 Eliz. D. 351. b. For there is no Doubt of the Tenancy to the Præcipe, and the Act and Words operate together; *But* if the Feme *before her Entry* agrees by Parol to the one Eſtate, and diſagrees to the other, this avails nothing. 3 Rep. 26. b. in Caſe of Butler v. Baker.

5. An Eſtate of Inheritance in Land cannot be made to *ceaſe* by any Conveyance without ſome other Act doing; Per Walmſley. Cro. E. 379. pl. 30. Hill. 37 Eliz. C. B. Chomley v. Humble.

But by Act of Parliament an Eſtate may be made to ceaſe and revive A Rent-charge created de novo may ceaſe and revive, but not Rent in Eſſe. Jenk. 199. pl. 16.

6. A Freehold veſted by Livery may well be deveſted without other Act done, but *by its not being preſented* at the next Court according to the Cuſtom *of the Manor* within which it lies, the Cuſtom being ſo, and adjudged a reaſonable Cuſtom. 5 Rep. 84. b. Trin. 41 Eliz. C. B. Perriman's Caſe.

Till Preſentment it is not a perfect Feoffment, but Opus Inchoatum only.

Ibid. —— Cro. E. 668. pl. 25. Parman v. Bowyer, S. C. and adjudged accordingly. —— 2 And. 125. pl. 71. Pereman v. Bower, S. C. adjudged that the Feoffment was void by the ſaid Cuſtom.

7. A Feoffment *Cauſa Matrimonii prælocuti* is defeated by *marrying elſewhere*. Cro. E. 669. pl. 25. Paſch. 41 Eliz. B. R. in Caſe of Parman v. Bowyer.

8. If *A. makes a Feoffment in Fee to J. S. to the Uſe of A. and the Heirs of his Body*; In this Caſe for the Benefit of the Iſſue the *Stat. 27 H. 8. of Uſes* deveſts the Eſtate deveſted in J. S. by the Common Law, and executes the ſame in A. by Force of the Statute, and yet the ſame is out of the Words of the Statute. 13 Rep. 56. pl. 23. Mich. 7 Jac. in the Court of Wards. Sammes's Caſe.

9. Tenant in Tail *covenants to ſtand ſeiſed to Uſe of A and his Heirs*, or of A. for Life with Remainder, it deveſts the Eſtate Tail; otherwiſe if the *new Uſe be to take Effect after his Death*; Per Holt Ch. J. in delivering the Opinion of the Court. 2 Salk. 620. Trin. 1 Ann. B. R. in Caſe of Machil v. Clark.

(I. 8) Veſted.

In what Caſes it ſhall be deveſted by a Poſthumous or other Heir.

Fitzh. Mortdanceſtor, pl. 55. cites 12 H. 3. It. Suff.

1. A. had Iſſue two Sons. The *eldeſt Son* went *beyond Sea*. The Father dies. The *ſecond Son in a Writ of Mortdanceſtor recovers the Eſtate* (for it ſeems the then being beyond Sea was then looked upon as an Incapacity) and yet it was there held, that *upon Return of the Elder* Brother the Land ſhould be deveſted out of the Younger Brother and reveſt in the Elder; Arg. 10 Mod. 360. cites Fitzh. Mortdanceſtor 47. 55.

2. *Tenant in Tail dies without Iſſue his Wife enſient* with a Son; the Donor may enter; but upon the *Birth* of the Son the Eſtate Tail is ſet up again; Arg. 10 Mod. 414. cites 7 Rep. 8. b. Bedford's Caſe.

3. If a Man has a *Seigniory by Deſcent*, and dies without Iſſue born, and his Brother enters, and after a *Tenancy eſcheats*, and after a Son is born, in this Caſe the Son ſhall enter upon the Uncle; for though the Tenancy firſt veſted in the Uncle, and never was in the Father, yet becauſe the *Original Cauſe*, viz. the Seigniory was in the Father, therefore the Son ſhall enter upon the Uncle. 1 Rep 98. b. cites 16 E. 3. Br. tit. Age 51.

4. A. had Iſſue a Son and a Daughter, and deviſed Land to B. for Life, Remainder *Propinquioribus de Sanguine Puerorum prædicti A.* The Remainder veſts in the Heir of each of the Children of A. which they have at the Death of B. ſo that if the Daughter at that Time has Iſſue, and the Son has not, the Iſſue of the Daughter ſhall have the Remainder of the Whole, and though the Son afterwards has Iſſue born, yet ſuch *after-born Iſſue of the Son* ſhall take nothing; for it was veſted in the Iſſue of the Daughter before, and he ſhall retain it; But it *is otherwiſe in Caſe of Deſcent*, as upon a Deſcent to the Daughter, and after a Son is born, the Son ſhall ouſt the Daughter; So the Diverſity is between a *Deſcent* and a *Remainder*. Br. Done &c. pl. 21. cites 30 Aſſ. 47.

5. If a *Leaſe* be made *to A for Life, Remainder to the right Heirs of J. and N.* and after *J. has Iſſue and dies*, and then *A. dies*, and the *Heir of J. enters*, and after *N. dies* the Heir of N. ſhall have nothing, becauſe he was not Heir when the Remainder fell; Per Finchden. Br. Done &c. pl. 21. cites 30 Aſſ. 47.

6. If there be a *Brother and Siſter*, and a *Leaſe for Life* is made, *Remainder to the right Heirs of the Brother*, and then the *Brother dies*, and the *Leſſee for Life dies*, and the *Siſter enters*, and afterwards the *Wife of* the

the Brother is delivered of a Son, yet the Son ſhall not have the Land but the Siſter, who is his Aunt, ſhall retain it, becauſe it was veſted in her before; for in whomſoever ſuch Remainder or Purchaſe veſts it ſhall continue; Per Fiſh. Br. Done &c. pl. 21. cites 30 Aſſ. 47.

7. Land was given *to B. and to J. and A. his Feme, and to the Heirs of the Bodies of J. and A.* who *had Iſſue*, and after *J. died*, and the *Donor releaſed to B. and A. in Fee*, J. and A. having Iſſue of their Bodies, and after *B. aliened his Moiety*, and *A. aliened* that which to her belonged to another who ouſted the Alienee of B. and he brought Aſſiſe, and recover'd the Moiety, becauſe now *the Iſſue is dead without Iſſue*, and though A. may enter for the Alienation of B. the Tenant for Life, to her Diſinheritance, by Reaſon of the Tail which remains in A. yet when the Iſſue died without Iſſue, *then came the Fee Simple to be executed in them*, and then may *the Alienee re-enter upon A. in the Moiety*; for the *Alienation of B.* the Tenant for Life *is good as to the Fee Simple, which came to them jointly*. Br. Jointenants, pl. 45. cites 45 Aſſ. 7.

8. If *Tenant in Tail dies without Iſſue*, and the *Donor enters*, and after the *Feme of the Tenant in Tail, who was enſeint is delivered of a Son*, he may enter; for this was Tail veſted. Br. Deviſe, pl. 5. cites 9 H. 6. 23. Per Fulthorp

9. If a *Daughter be Heir*, and the *Mother is raviſhed and conſents to the Raviſhment*, *the Daughter enters*, a *Son is born*, yet the Daughter ſhall retain the Land of *Fee Simple*. It ſeems to be *contrary of Land tailed*, and the Reaſon is becauſe it is by *Statute Law*, contrary upon the *Common Law*, and *Conſent for Doubt or Fear binds not*; for it muſt be free Conſent; quod Curia conceſſit. Br. Done &c. pl. 28. cites 5 E. 4. 6. Fitzh. Aſſiſe, pl. 27. cites 5 E. 4. 5. [but it ſhould be 5. b. 6. a. pl. 24] — S. C. cited

1 Rep. 95. a. for it veſts in the Daughter by Purchaſe. — Ibid. 98. b. cites S. C. and for the ſame Reaſon — Long 5to E. 4. 60. 61. S. P. held accordingly. — Br. Entre Cong. pl. 94. cites 5 E. 4. 58. S. C. & S. P. — Paſch. 9 H. 7. 25. a. S. P. agreed per Brian and tot. Cur.

10. If a Man *deviſe Land to a Man and his Heirs*, and he *has Iſſue a Daughter, and dies, his Feme privement enſeint with a Son*; the Daughter ſhall retain for ever; Per Billing; quod fuit conceſſum. Br. Deviſe, pl. 23. cites 5 E. 4. 6. Br. Eſtates, pl. 43. cites S. C.

11. If a Man makes a *Feoffment* of Lands *upon Condition*, that if the Feoffor or his Heirs *pay* 10 *l.* that *he may re-enter*, and dies leaving a Daughter, who pays the Money and enters, and then a Son is born, yet the Daughter ſhall retain the Lands; for *Qui ſentit onus ſentire debet Commodum*. Hob. 3. in Caſe of Young v. Radford. So if the Daughter enters for Condition broken, a Son born after ſhall not have the Land; For he had no Right at the Time of Entry; Per Wood. Br. Entre Cong. pl. 92 cites 9 H. 7. 24.

12. Where Father and Son are, and the *Son purchaſes* Land *and dies without Iſſue*, *the Uncle enters*, and two Years *after this the Father has Iſſue another Son by the ſame Wife*, who was Mother to the firſt Son, the youngeſt Son may enter and ouſt the Uncle, and this is ſo *in Deſcents*, Contra in *Remainders*, Purchaſes, and ſuch like. Br. Deſcent, pl. 58. cites Dr. and Stud. lib. 1.

14. *So* where *a Daughter is Heir, and has a Villein by Deſcent who purchaſes*, and ſhe enters into the Purchaſe; A *Son* is born, he *ſhall not have the Purchaſe, and yet he ſhall have the Villein*, for this was the Thing which deſcended to the Daughter as Heir, but ſo was not the Purchaſe; Note the Diverſity. Br. Diſcent, pl. 58. cites Dr. and Stud. lib. 1.

15. If

15. If a Man makes a *Feoffment* in Fee *to the Uſe of him and his Wife in Tail*, and to the Uſe *of the Baron in Fee*, and *has Iſſue a Daughter, and dies, his Wife privement enſeint with a Son*, by which the Reverſion in Fee deſcends to the Daughter; the Wife before the Birth of the Son *levies a Fine*, or ſuffers a Common Recovery; in this Caſe, though the Daughter enters or not enters, or though the Daughter hath joined in the Fine, or was vouched in the Recovery, or by any other Act hath diſabled herſelf to take Benefit of the ſaid Act, yet the Son born after ſhall take Benefit of this Act; for by no Act that the Daughter can do ſhe can bar the Son of the Eſtate Tail. Nota per the Reporter. 3 Rep. 61. b. Mich. 37 Eliz. C. B. in Lincoln College's Caſe.

16. *But* if a Daughter enters *by Virtue of the Stat. of* 6 *R.* 2. 6. *of Rape*, in this Caſe if the Daughter enters ſhe ſhall retain it for ever againſt the Son born after; but though the Daughter enters by Force of the Statute of 11 H. 7. yet the Son born after ſhall enter upon her, and the Reaſon of this Diverſity is, that the Daughter by the 6 R. 2. has the Land merely as a Perquiſite in Fee Simple, and by expreſs Words of the Act ſhe ſhall enter and ſhall hold the Land; for the Statute ſays, Intrabit &c. & tenebit de jure Hæreditario. 3 Rep. 61. b. Mich. 36 & 37 Eliz. C. B. in Lincoln College's Caſe.

Br. Entre Cong. pl. 92. cites 9 H. 7. 24. per Wood, S. P.

17. *And* this is like to the Caſe of 9 H. 7. 25. b. If a *Remainder* be *limited to the right Heirs of J. S.* and he dies having a Daughter, the *Daughter ſhall have it as a Purchaſor*, and ſhall retain the Land againſt the Son born after; *but when* the Daughter enters *by Force* of the Act *of* 11 *H.* 7. ſhe is in of an Eſtate Tail *per Formam Doni*, and ſo *in Nature of a Deſcent*, and not merely as a Purchaſor, and this by expreſs Words of the Act of 11 H. 7. which are, That the Perſon to whom the Land belongs after the Deceaſe of ſuch Wife, ſhall enter into the Tenements, and ſhall poſſeſs and enjoy them according to ſuch Title and Intereſt as they would have if ſuch Wife had been dead, and no Diſcontinuance, Warranty, or Recovery had; ſo that the Daughter in this Caſe claims not the Land merely as a Perquiſite, as ſhe does upon the Statute of 6 R. 2. but by Force of this Act of 11 H. 7. and claims according to her Title as if the Wife had been dead, and no Act againſt the Statute done, and this is per Formam Doni, and per Formam Doni the Son born after is to be preferred before the Daughter. 3 Rep. 61. b. 62. a. Mich. 37 Eliz. C. B. in Lincoln College's Caſe.

(I. 9) What is Eſtate executed. By ſome After-Act.

4 Le. 212. pl. 343 Paſch. 17 Eliz. C. B. Anon. S. C. in the ſame Words.

1. A Tenant for Life, and B. Leſſee for Years, to begin after the Death of Tenant for Life. B. dies Inteſtate, Adminiſtration is granted to C. *Tenant for Life*, and *Adminiſtrator of Leſſee for Years join in purchaſe of the Fee*; Per Cur. the Fee is executed for one Moiety; For the Remainder for Years was *no Impediment* to the Execution of it. 4 Le. 37. pl. 102. 6 Eliz. C. B. Anon.

2. *Leaſe for Life, Remainder in Tail, Remainder to the right Heirs of Tenant for Life*; He in Remainder in Tail *dies* without Iſſue in the Life of Tenant for Life; Now the Fee is executed to the Freehold, and the Heir ſhall not have a Scire Facias where ſuch Conveyance is made by Fine; Per Manwood. 2 Le. 6. pl. 7. 16 Eliz. C. B. in Cranmer's Caſe.

3. *M. levies a Fine to the Uſe of his Wife for Life*, Remainder *to his Son in Tail*, Remainder *to the right Heirs of the ſaid M.* If the Wife and Son die without Iſſue, M. ſhall have the Fee-ſimple intirely, as it ſeems, in Poſſeſſion; but it was adjudged, that if *M. in his Life-time (after the Uſes created)* had *made a Leaſe for Years, and afterwards had died and then the Wife* had *died, and then the Son* had *died without Iſſue, the Leaſe not ended*, the Leaſe is good, and ſhall continue &c. 2 And. 202. cites it as adjudged Paſch. 31 Eliz. B. R. in Midford's Caſe.

And 288. pl. 297 Milford v. Fenwick, S. C. adjudged that the Leaſe was good, becauſe the Fee-ſimple remained in the Leſſor and was as Reverſion. —— Mo 284. pl. 437. Fenwick v. Mitforth, S. C. adjudged in B. R. accordingly on Conference and Reſolution of all the Juſtices of England; For they held the Limitation of the Uſe to the Right Heirs to be void and ſhall be taken to be the ancient Uſe, and the Conuſor had not ſeparated it from his Perſon, but four Juſtices held e Contra. —— Le. 182. pl. 256. Fenwick v. Mitford, S. C. held accordingly.

(I. 10) In Fee-ſimple in General; And what it is.

1. FEODUM idem *eſt* quod Hæreditas & *ſimplex* idem eſt quod legitimum vel purum, & ſic Feodum ſimplex idem eſt quod Hæreditas legitima, vel Hæreditas pura. Litt. S. 1.

Et eſt quod quis tenet ex quacunque cauſa ſive ſit tenementum, ſive Redditus &c. Co. Litt 1. b. The Word Simple properly excludes both Condition and Limitations, that defeat or abridge the Fee. Co. Litt. 1. b.

2. Fees or Inheritances *are either Simple* or Abſolute, As *to one and his Heirs for ever. Conditional*, As where the Eſtate is *defeaſible by not performing the Condition.* Or *qualified* or baſe, As where A. infeoffs J. S. of Land to have &c. *to him and his Heirs ſo long as B. has Heirs of his Body*, and in both theſe laſt Caſes all the Eſtate in the Land is in the Feoffee. 10 Rep. 97. b. a Note of Ld. Coke in Seymor's Caſe.

A Fee-ſimple determinable upon a Contingent is a Fee-ſimple to all Intents but not ſo durable as abſolute Fee-ſimples, and all Fee-ſimples are unequally durable; for one will eſcheat ſooner than another by the Failure of Heirs; An Eſtate of Fee ſimple will determine in a Baſtard with his Life if he want Iſſue; An Eſtate to a Man and his Heirs, as long as J. S. hath any Heir, which is no abſolute Fee ſimple, is doubtleſs as durable as the Eſtate in Fee which J. S. hath to him and his Heirs, which is an abſolute Fee-ſimple; Per Vaughan Ch. J. Vaugh. 273. in Caſe of Gardner v. Sheldon.

3. A Man may have a Fee-ſimple *in 3 kinds of Hereditaments*, viz. in *Real*, as Lands or Tenements; *Perſonal*, an Annuity granted to a Man and his Heirs; *Mixt*, when the King creates an *Earl of ſuch a County* or other Place to hold that Dignity to him and his Heirs, this Dignity is Perſonal, and alſo concerns Lands and Tenements. Co. Litt. 1. b. 2. a.

(K) In Fee.

By what Words.

1. IF a Man gives Land to another and his Heir, this is a Fee in the Donee, for the Word Heir is Nomen Collectivum, and extends to the Heir in Infinitum. H. 37 Eliz. B. R. per Popham and Fenner, in Caſe of * *Clerk v. Dayes.*

* Mo. 593. pl. 803. S. C. but not exactly S. P. — Cro. E. 313, 314 pl. 5. S C and agreed by all the Juſtices that Heir is Nomen Collectivum; but the Point there is a Deviſe to one and the Heir of his Body, which they held an Eſtate Tail. — S. P in Caſe of a Deviſe agreed by all the Juſtices. Ow. 148. in Caſe of Lilly v. Taylor — S P. held per Williams J. and not denied by any, and for the ſame Reaſon. Godb. 155. pl. 207. Mich. 6. Jac. Anon.

So to a Man and his Heirs Males by Deed is a Fee. Mo. 424. Abraham v. Twigg. — But where an Eſtate Tail is limited to A. and then to B. and then to C. Remainder in Fee to A. with a Power of Revocation only of the Remainder to B. and to limit new Uſes of that Eſtate, and upon a Revocation thereof new Uſes are limited to A. and his Heirs Male, without ſaying of his Body begotten, it was Adjudged an Eſtate Tail to B. For to conſtrue it a Fee would deſtroy the Remainder to C. which A. could not do. Carth. 292. Mich. 5 W. & M. in B. R. Gilmore v. Harris. —; Lev. 214 S. C. adjudged.

2. The ſame Law would be of a Deviſe in ſuch manner as was held by them.

3. The Lord Mountjoy ſeiſed of the Manor of Canford in Fee did by Deed indented and inrolled *bargain and ſell* the ſame to Brown in Fee, in which Indenture this Clauſe was contained, Provided always, and the ſaid Brown did *covenant, grant, and agree to and with* the ſaid Lord Mountjoy, his Heirs and Aſſigns, that the Lord Mountjoy, his Heirs and Aſſigns, *might dig for Ore in the Lands* (which were great Waſts) Parcel of the ſaid Manor, *and to dig Turf alſo for the making of Allom*; Reſolved that this did amount to a Grant of an Intereſt and Inheritance to the Lord Mountjoy to dig &c. Co. Litt. 164. b.

(K. 2) In Fee.

Without the Word Heirs. In what Caſes.

1 IF a Man *buys Land*, and the Vendor *executes an Eſtate* to the Vendee habend' ſibi in perpetuum, without the Word (Heirs) where the Intent of the Bargain is to paſs the Fee-ſimple, and the Vendor upon requeſt refuſes to make other Aſſurance, there a Writ of Subpœna lies, and accordingly Audley Chancellor held clearly in time of H. 8. that if a Man ſold his Land *before the Statute of Uſes*, this ſhall change the Uſe of the Fee-ſimple, and ſo of a *Sale by Indenture by the Statute* 27 *H.* 8. without the Words (Heirs); Quod nota bene. Br. Conſcience &c. pl. 25. cites 32 H. 8.

2. *Bargain*

2. *Bargain and Sale* of Land to A. without the Word (Heirs) will be a Fee-ſimple; But *otherwiſe* it is *in a Gift of the Poſſeſſion*. Arg. Mo. 519. cites 27 H. 8. fo.

S. P. if it be for Money or other Recompence. Br. Contract, pl. 1. cites 27 H. 8. 5. and Brooke ſays, that he heard Audley Chancellor clear in the ſame Opinion.—Br. Eſtates, pl. 1. cites S. C. — S. P. Ibid. pl. 78. cites M. 4 E. 3.

3. If a Man *leaſes a Manor for Life*, and after *grants a certain Rent to take out of the ſaid Manor by the Hands of the Leſſee and his Aſſigns, and others, into whoſe Hands ſoever the ſaid Manor ſhall come*, this is a good Grant in Fee, and ſhall continue after the Death of the Leſſee of the Manor. 26 Aſſ. 38. fol. 126. b. in a Nota.

4. By *Laſt Wills* and Teſtaments in the following Caſes, a Fee will paſs without the Word (Heirs.) 2dly, By a *Fine Sur Conuſance de Droit come ceo* &c. in reſpect of the height of the Fine, and thereby is implied that there was a Precedent Gift in Fee. 3dly, By certain Releaſes, and that three Manner of Ways. 1ſt. *When an Eſtate of Inheritance paſſeth and continueth*, As if there be three Coparceners or Jointenants, and one of them releaſes to the other two, or to one of them generally, without this Word (Heirs), they have a Fee-Simple. 2dly, When an Eſtate of Inheritance paſſeth and *continueth not, but is extinguiſhed*, As where the Lord releaſes to the Tenant of the Land generally all his Right &c. Hereby the Seigniory, Rent &c. are extinguiſhed for ever without this Word (Heirs). 3dly, When a *bare Rent* is releaſed, As when the Diſſeiſee releaſes to the Diſſeiſor all his Right, he need not ſpeak of his Heirs. 4thly, By a *Recovery*, A. ſeiſed of Land ſuffereth B to recover the Land againſt him by a Common Recovery, where the Judgment is, Quod prædictus B. recuparet verſus prædict' A. Tenementa prædicta cum Pertin' yet B. recovers the Fee-Simple without this Word (Heirs), for regularly every Recoveror recovereth a Fee-Simple. 5thly, By *Creation of Nobility by Writ*, For when a Man is called to the Houſe of Lords by Writ, he is a Baron, and hath an Inheritance therein without the Word (Heirs), yet may the King limit the general State of Inheritance created by the Law and Cuſtom of the Realm to the Heirs Males, or General of his Body by the Writ, as he did to Bromflete, who in 27 H. 6. was called to Parliament by the Name of the Lord Veſcie &c. with the Limitation in the Writ to him and the Heirs Males of his Body, but if he be created *by Patent* he muſt of Neceſſity have the Words (his Heirs), or the Heirs Males of his Body, or the Heirs of his Body, otherwiſe he has no Inheritance. Co. Litt. 9. b.

5. Sometimes by *Feoffment* a Fee-ſimple ſhall paſs without theſe Words (his Heirs). As 1ſt, If the Father infeoff the Son to have and to hold to him and his Heirs, and the Son infeoffs the Father *as fully as* the Father infeoffed him, by this the Father hath a Fee-ſimple Quia Verba relata hoc maxime operantur per referentiam ut ineſſe videntur. 2dly, In *reſpect of the Conſideration* &c. and at this Day an Eſtate of Inheritance in *Tail*, As if a Man had given Land to a Man with his Daughter in * *Frank-Marriage* generally, a Fee-ſimple had paſſed without theſe Words (his Heirs), for there is no Conſideration ſo much reſpected in Law as that of Marriage in reſpect of Alliance and Poſterity. 3dly, If a Feoffment or Grant be made by Deed to a *Mayor* and Comminalty, or any other Corporation aggregate of many Perſons capable, they have a Fee-ſimple without the Word Succeſſors, becauſe in Judgment of Law *they never die*. 4thly, In Caſe of a *ſole Corporation* &c. As if a Feoffment in Fee be made of Land to B. to have and *to hold* to him † *in libera Eleemoſyna*, and ſo if a Man give Lands *to the King* by Deed inrolled &c. for in Judgment of Law the King

If A. ſell Land to B. for Money without ſaying to have to the Vendee and his Heirs, yet by the Bargain with the Conſideration a Fee ſimple Paſſes, for it is not in Effect but Contract, which ſeems to be Law now, when the Bargain

at this Day is by Deed inrolled. And. 35. pl. 87 Bryan v. Baldwin. — Arg. 10 Mod 47. S.P. *Br. Eſtate, pl. 4. cites 20 H 6 15. †Br. Eſtate, pl. 4 cites 20 H. 6. 15.

King never dies. 5thly, In *Grants* ſometimes an Inheritance ſhall paſs without this Word (Heirs), As if a *Partition* be made between Coparceners of Lands in Fee-ſimple, and for *Owelty* of Partition, the one grants a Rent to the other generally, the Grantee ſhall have a Fee-ſimple, without this Word (Heirs), becauſe the Grantor has a Fee-ſimple in Conſideration whereof he granted the Rent. 6thly, By the *Foreſt Law*, if an *Aſſart* be granted by the King at a Juſtice-Seat (which may be done without Charter) to another, Habendum & *tenendum ſibi in perpetuum*, he has a Fee-ſimple without this Word (Heirs). Co. Litt. 9. b. 10. a.

6. In paſſing of Eſtates of Inheritance in *Exchanges*, *Releaſes* or *Confirmations*, *that enure by way of Enlargement* of Eſtates, *Warranties*, *Bargain and Sells by Deed indented and inrolled*, and the like, this Word (Heirs) is alſo neceſſary; For they do tantamount to a Feoffment or Grant, or ſtand upon the ſame Reaſon that a Feoffment or Grant does, for like Reaſon doth make like Law. Ubi eadem ratio ibi idem Jus. Co. Litt. 10. a. (z).

See Roll (U) pl. 7. Seagood v. Hone.

7. A *Surrender of Copyhold* to the Uſe of J. S. *for ever* does not enable the Lord to grant a Fee. Godb. 137. pl. 162. 29 Eliz B. R. Allen v. Paſhall.

8. A. makes a *Feoffment in Fee*, *rendring Rent to A.* The Heirs of A. may diſtrain and avow, and ſo may the Aſſignees of A. Arg. Owen 9. Hill. 33 Eliz. C. B. in Richmond's Caſe.

Mod. 217. Ingram v. Tothill. S. P. —— Nor will it be ſupplied by the Word Succeſſors in the Caſe of a Grant to a Man, but in the Caſe of a Grant to a Corporation it is the proper Word. Co. Litt. 8. b.

9. Theſe Words, *(his Heirs)*, only make an Inheritance in all Feoffments and Grants C. L. and thoſe Words ſhall not be *ſupplied* by any Reference to or *Recital* of an Indenture, whereby it was covenanted to convey to the Grantee and his Heirs, nor will the Words in the Grant, viz. *Pro' Eaſiamento dict' le Grantee & Hæredum ſuorum and that in Default &c. it ſhall be lawful for the Grantee and his Heirs*, will not *ſupply the Defect* of the Words (his Heirs) in the Grant. Le. 2. pl. 4. Paſch. 25 Eliz. B. R. Paget v. Aſhton.

Fol. 832.

(L) [In Fee.]

By what Words what ſhall be ſaid a Fee by Implication.

In reſpect of the Perſon or Thing to whom it is given without expreſs Limitation.

* Br. Grants pl. 115. cites 11 H. 4. 84. that it is good only for the Life of the Abbot for want of the Word Succeſſors; Quære of ſuch Grant to Dean and Chapter, or to a Mayor or Comminalty, for they are capable and never die, but Covent is not capable.——Fitzh. Feoffments, pl. 42. cites S. C. & S. P. per Hank.——Roll Rep. 370. Doderidge J. cites S. C.——A Grant to Abbot and Covent does not give a Fee; For the Covent cannot take, 11 H. 7. a. pl. 36.——Br. Eſtates, pl. 90. cites S. C. accordingly.

1. IF Land be given to an Abbot and Convent without ſpeaking of the Succeſſors, this is a Fee. * 11 H. 4. 84. b. Cur. Contra Co. Litt. 94. b.

2. If Land be given to a Sole Corporation as Biſhop Parſon, Vicar or ſuch like, he has not Fee if it be not given to him, and his Succeſſors. Co. Litt. 94. b.

A Grant Epiſcopo Elienſi extends to every Biſhop of Ely for the Time being, and differs from a Grant of the Biſhop of Ely in his Natural Capacity, for in ſuch Caſe it will only enure to the then Biſhop for his Life Gibb. 308. Per Raymond Ch. J. Dr. Bentley v Biſhop of Ely.——And the Court was unanimously of the ſame Opinion; for the Appotionment being General muſt be applied to him in his Political Capacity, which never dying in Suppoſition of Law, the Appotionment muſt have the ſame Duration. Ibid. 312.

3. But if Land be given to a Corporation aggregate they have a Fee without naming of Succeſſors, becauſe this Body to whom the Grant is made never dies as Dean and Chapter or ſuch like. Co. Litt. 94. b.

But of Corporations aggregate of many there is a Diverſity when the Head and Body both are capable, as in the Caſe of Dean and Chapter, and when one is only capable, as in the Caſe of Abbot or Prior and Covent. Co. Litt. 94. b.

4. If Grant be made to the Church of ſuch a Place it ſhall be a Fee in the Parſon and his Succeſſors. 11 H. 4 84 b.

Fitzh. Feoffments, pl. 42. cites S. C. S. C. & S. P. by Thirn.——Br Eſtates, pl. 49 cites S. C.

5. If Land be given to a Sole Corporation, as to a Biſhop, Parſon, Vicar or ſuch like in Frankalmoigne without naming the Succeſſors, yet a Fee paſſes by it, becauſe it had been ſo allowed in ſuch ancient Grants. Co. Litt. 94. b.

6. If Land be given to an Abbot in Frankalmoign, it is a Fee without the Word Succeſſors. * 2 H. 6. 36.

* In this Year there are only 16 Pages, and no ſuch Point there, but ſeems miſprinted (2) for 20 H. 6. 36. b. per Newton.

7. If the Father infeoffs the Son in Fee, and after the Son ſays to the Father, "As fully as you have given this to me, vouchſafe to take it back to you"; upon which the Father enters into the Land, it ſeems no Eſtate in Fee ſhall paſs by it to the Father for want of the Word Heirs. Contra 39 Aſſ. pl. 12 adjudged. But Quære.

Fitzh. Feoffment, pl. 88. cites S. C.

8. If Eſtate in Remainder be limited to the right Heirs of J. S. it is a Fee, though he does not ſay & Hæredibus ſuis. 20 H. 6. 36. b.

Co. Litt. 10. a. S P. For being plurally limited it includes a Fee-Simple, and yet it reſteth but in one by Purchaſe.

9. Land given *to a Mayor and Comminalty* is a Fee-Simple, and the Reaſon is, Becauſe they are perpetual, and if the Eſtate is not limited they ſhall take according to their Continuance. Per Doderidge J. Poph. 164. cites 11 H. 4. 11 H. 7. and 27 H. 8.

Br Eſtates, pl. 90. cites 11 H. 7 12. ——Roll Rep. 370. S. P. by Doderidge J. cites * 10 H. 7. 12. * This ſeems miſprinted for 11.

10. If *Parſon, Patron, and Ordinary grant an Annuity in Fee*, and *do not ſay for* the Parſon and *his Succeſſors*, there his Succeſſor ſhall not be charged, for it charges only the Parſon, and not the Glebe nor the Land. Per Frowick Ch. J. Br Grants, pl. 56. cites 21 H. 7. 1.

11. *But* contrary *where a Man is ſeiſed in Fee* of Land *grants a Rent-charge out of the Land in Fee*, this is ſufficient without ſaying, That it is granted for him and his Heirs, for theſe are Things Perſonal, otherwiſe where it charges the Land, for the Land is real and durable, but the Perſon of a Man is Mortal. Br. Grants, pl. 56. cites 2 H. 4. 13. and 21 H. 7. 1.

Jenk. 209. pl. 41. S. P. —Co. Litt. 9. b. ad finem. S. P. if it be by Deed inroll'd.

13. A *Gift to the King* enures to his Succeſſors; For in reſpect of this politick Capacity he cannot die; and the Word (King) includes all his Succeſſion. 6 Rep. 27. a. Trin. 43 Eliz.

Co. Litt. 273 b. S. P.

14. If *two Jointenants* are in Fee and the *one releaſes to the other all his Right*, and *does not ſay to Have and to Hold to him and his Heirs*, yet this Releaſe gives Fee-Simple. Co. Reading on the Statute of Fines 7. Lect. 5. cites 19 H. 6.

Co Litt. 273. b. e contra.

15. But if *two Coparceners* are, and the one releaſes to the other all her Right, an Eſtate of Fee-Simple ſhall not paſs by this Releaſe. Ibid.

And 45. pl. 114. Eſtoft's Caſe, Hill. 10 Eliz. S. P. adjudged accordingly, tho' there are no Words of Enlargement.

16. If *Baron and Feme and a third Perſon are Jointenants in Fee*, and the *third Perſon releaſes to the Baron* all his Right, *without ſaying To Have and to Hold to him and his Heirs*, yet the Baron has Fee-Simple, and the Feme ſhall take Nothing by this Releaſe, as has been adjudg'd, and yet it ſhall enure by Mitter l'Eſtate. Ibid. cites Eſcot's Caſe. —— Bendl. 195 pl. 232 Eſcoft's Caſe, S. C. adjudged that the Baron ſhall have the Moiety which the third Perſon had, and the Feme has nothing thereof, and the Baron has Fee-ſimple therein though the third Perſon did not releaſe to him and his Heirs. —— D. 263. a. b. pl. 34. S. P. and ſeems to be S. C. but ſtates it, that it was a Purchaſe made to the Baron and Feme, and to the Heirs of the Baron and the third Perſon; held accordingly; But if the Releaſe had been to the Feme there ought to have been the Words (her Heirs), becauſe ſhe had only an Eſtate for Life in jointure with her Husband. —— In this Caſe it enures by way of Mitter l'Eſtate, and not by the way of Enlargement of the Eſtate, becauſe he had a Fee-ſimple before, and ſo needs no Words of Inheritance. Co. Litt. 273. b.

Fol. 833.

(M) [Eſtate in Fee by Deed.]

By what Words.

[Heirs.]

* Br. Eſtates pl. 18 cites S. C. and 22 H 6. 17. —— Br. Eſtates, pl. 4 cites the Same Caſes and S P. accordingly; but it was ſaid by ſome that in a Deviſe thoſe Words make a Fee Simple, though otherwiſe in a Deed or Feoffment; for the one ſhall be taken by Intendment, but not the other. —— Fitz 1. Feoffment, pl 8 cites S. C. and 20 H. 6. 35. —— Br. Eſtates, pl 73. cites 22 H. 6. 15. —— Co Litt 8. b. S. P. —— S P. by Anderſon Ch. J. 1 Rep. 85. a —— But it is ſaid if Land be given to one Man et Hæredibus, omitting ſuis, that notwithſtanding a Fee Simple paſſes. Co Litt. 8. b.

1. IF Eſtate be made to two & Hæredibus without ſaying ſuis it is not any Fee, but only for Life, for the Uncertainty whether he intends the Heirs of both or one of them, or of a Stranger. * 19 H. 6. 73. b. 20 H. 1. [6] 35. b.

* The Warranty neither makes nor limits the Eſtate. Br. Eſtates, pl. cites S. C. and 22 H. 6. 17. —— Fitzh. Feoffments, pl. 8 cites S. C. —— S P. Br. Grants, pl. 169. cites 22 H. 6. 15. —— Br. N. C. pl. 156. cites 22 E. 4. 16. per Gebney. —— Br. Eſtates. pl. 4. cites 20 H. 6. 35. —— S. P. by Anderſon Ch. J. 1 Rep. 85 a. that his Intent ought to be declared by Words certain and conſonant to the Law.

2. The ſame Law ſhall be though a Clauſe of Warranty be contained in the Deed to them & Hæredibus ſuis, for the Warranty cannot enlarge the Eſtate, nor does it ſufficiently ſhew the Intent of the Grant. * 19 H. 6. 74. 20 H. 6. 35. b.

3. If

3. **If a Man** gives in Tail, reſerving Rent to him and his Heirs, **this is an Eſtate in Fee in the Rent.** 7 H. 6. 4. Br. Eſtates, pl. 16. cites 7 H. 6. 4. S. P. in Gaſcoigne's Caſe.

4. **But** otherwiſe **it is if Rent be reſerved** to him and his Heirs upon Leaſe for Life, **for there this is but for the Life of Leſſee.** 7 H. 6. 3. b. Br. Eſtates, pl. 16. cites 7 H. 6. 3. S. P. in Gaſcoigne's Caſe.

5. If the *King be ſeiſed in Fee*, and *grants* the Land *to J. N. ſo long as it ought to be in his Hands*, he ſhall not ouſt the * Grantee, for he has Fee Simple; Per Gaſcoine quære inde. Br. Eſtates, pl. 12. cites 8 H. 4. 17. * The large Edition is (Grantor) and ſo miſa-printed.

6. If a Man gives Lands *to a Man and his Heir in the ſingular Number* he has but an Eſtate for Life; for his Heir cannot take a Fee Simple by Deſcent, becauſe he is but one, and therefore in that Caſe his Heir ſhall take nothing. Co. Litt. 8. b.

7. Alſo obſervable is this Conjunctive (Et) for if a Man give Lands to one, to have and to hold *to him Or his Heirs*, he has but an Eſtate for Life for the Uncertainty. Co. Litt 8. b.

8. If the Limitation be, that after the Death of the Father the Lands ſhall go to the Eldeſt Son and to the Heirs of the Father, the Son has a Fee Simple. Co. Litt 220. b.

9. In *Frankalmoigne*, *Exchange*, *Frank-Marriage* or *Deviſe by Will*, the Word (Heirs) is not neceſſary; But Eſtates of Inheritance, which are otherwiſe conveyed, require the Word Heirs. Jenk. 196. pl. 2.

(M. 2) In Fee by Deed notwithſtanding Words of Diminution.

1. A. Gives Land to B. and his Heirs, *ſo long as J. S has Heirs of his Body* the Donee has Fee. 2 And. 138. cites 13 H. 7 11. 21 H. 6. f. 37. 11 Aſſ. P. 8. and there it is ſaid if Land be given to B. and his Heirs *ſo long as J. S. or his Heirs may enjoy the Manor of D.* thoſe Words (ſo long) are utterly vain and idle, and do not abridge the Eſtate.

2. If Land be given to B. and his Heirs *during the Life of J. S.* or *for Years*, thoſe Words (for Life) or (for Years) are vain Words it *Livery* be made; for then B. has Fee. 2 And. 138. cites 11 H. 8. Br. Title Eſtates, 11 Aſſ. 21. 39. 39 E. 3. f. 25. among which ſome hold that it is not Fee, but if it be Fee, the Words (for Life) and (for Years) are vain Words and do not limit the Eſtate.

3. A. enfeoffs B. to the Uſe of J. S. in Tail, and after *to the Uſe of the Heirs Male of J. S.* This is a Fee. 2 And. 137, 138. cites it as agreed in Ld. Berkley's Caſe, and 9 H. 6. 23. 25. But where a Settlement was to the Uſe of A. for Life, Remainder to B. and the Heirs Male of his Body, with Power of Revocation as to the Eſtate of B. only, there being another Remaindet in Tail, and A reciting the Settlement to be to B. and his Heirs Male, omitting (of his Body) revokes and limits new Uſes to B and his Heirs Male, with Proviſo for Payment of 1500 l. by B. to A's Executors &c. but the Date of the firſt Deed and Parties are recited right; Adjudged a good Revocation and Appointment of a new Eſtate Tail by his directing the ſaid Eſtate in the ſaid Deed to be to the Uſe of B. and his Heirs Male, which ſaid Eſtate was an Eſtate Tail. 3 Lev. 213. Trin. 1 Jac. 2. C. B. Gilmore v. Harris. —— Affirmed in B. R. Skinn. 324. S. C.

A. If

4. If Feoffment be made *to one and his Heirs*, donec et *quouſque J. S. ſhall pay to the Feoffee or his Heirs* 1000 *l.* J. S. *before any Payment* made, *dies*, the Feoffee and his Heirs ſhall retain the Land abſolute for ever; Per omnes in Prandiis apud Hoſpitium Juſticiariorum in Fleet-ſtreet. D. 300. b. pl. 39. Paſch. 1 Eliz.

5. A Man may have an Eſtate in Fee *determinable*, but *not by the Act* and Conſent *of the Parties without any Entry for Condition broke* or Title defeaſible; As if a Villein be Tenant in Tail, and the Lord enters on the Land &c. the Lord and his Heirs ſhall enjoy the Land ſo long as the Villein has Iſſue, and then his Eſtate determines; ſo he that recovers Rent againſt Tenant in Tail, which he holds in Tail; or that Tenant in Tail of Land be attaint of Treaſon the King has Fee of the Eſtate Tail, determinable on Death without Iſſue, and has no greater Eſtate; but theſe laſt mentioned Eſtates are not made by the firſt Creation of the Eſtates, but *by Matter happening after by other Means*, as appears by them. 2 And. 139. Hill 41 Eliz.

N. B. Roll (N) is carried to tit. Deviſe (L a) and (O) is carried to tit. Deviſe (M. a)

(O. 2) Fee or Franktenement. In whom.

1. NOTE, that if Man a makes a *Leaſe for eight Years upon Condition*, that *if* the *Leſſor does not pay* 20 *l. within two Years next enſuing* that the *Leſſee have Fee*; the Termor cannot be impleaded by Præcipe quod reddat, before that the Leſſor hath failed of Payment, for he hath only a Term, and no Freehold before. Br. Feoffment de terre, pl. 71. cites 12 E. 2.

2. Where a *Vicar holds Lands annexed to his Vicarage* the Franktenement of it is in the Parſon. Br. Eſtates, pl. 68. P. 12 E. 3. and Fitzh. Brief 256.

3. *But Writ of Intruſion was brought againſt a Vicar* without the Parſon, and well, he prayed Aid of the Patron and Ordinary, and had it, and *ſo it ſeems that the Vicar has Franktenement* as the Parſon has, and ſo it appears elſewhere. Br. Eſtates, pl. 68. cites 4 E. 3. 8. Fitzh. Brief 704.

4. In Aſſiſe it was found by Verdict that A. *Defendant infeoffed B. in Fee*, and made *Defeaſanee* by Indenture, that *if B. held without Interruption by* 15 *Years that the Deed ſhall loſe its Force*, and *if not that it ſtand in Force*, and that after the *Feoffor granted the Reverſion to the Plaintiff in Fee* upon Condition, that if he came back from beyond Sea, that he ſhall re-give in Tail, and that the *firſt Feoffee attorned*, and after the ſecond Feoffee inteoffed the Plaintiff, and the Opinion of the Court was againſt the Plaintiff; the Reaſon ſeems to be, inaſmuch as *B. had Fee-ſimple till he had enjoyed by* 15 *Years without Interruption*, and then the Grant and Attornment is not good, For *the Fee-ſimple was not reveſted in the firſt Feoffor*. Br. Conditions, pl. 123. cites 45 Aſſ. 4 10.

5. Where *one has a Right of Nomination to a Maſterſhip of a College*, the Fee or Franktenement or Reverſion is not, or ever was, in him who makes the Collation, but reſts in the Houſe; Quod nota. Br. Waſte, pl. 17. cites 21 H. 6. 2.

And the ſame Law where a Man gives in Tail, the Remainder to the right Heirs of the Donor, the Fee is not out of him. Ibid.

6. A Man made a *Feoffment before the Statute of* Executing *of Uſes to* the Uſe of *himſelf for Life*, the *Remainder to W. in Tail*, the *Remainder to the right Heirs of the Feoffor*; The *Feoffor died*; and *W. died without Iſſue* the right Heir of the Feoffor within Age; he ſhall be in Ward, for the Fee deſcended; For the Uſe of the Fee-ſimple was never out of the Feoffor. Br. Garde, pl. 93. cites pl. 32 H. 8.

——Contra where a Man makes a Feoffment in Fee upon Condition

Condition to re-enfeoff him, and the Feoffee gives to the Feoffor for Life, the Remainder over in Tail, the Remainder to the right Heirs of the Feoffor; For there the Fee and the Uſe of it was out of the Feoffor, and therefore in ſuch Caſe he has a Remainder, and not a Reverſion. Ibid.

7. *Leaſe for Life on Condition to have Fee*, the Fee is not in Abeyance, but in the Feoffee till the Condition performed; True it is, that Littleton doubts of it in Caſe of a Leaſe for Years, that the Remainder may be limited on Condition Precedent, and the Fee ſhall continue in the firſt Feoffor till the Condition performed; Arg. Litt. R. 225. cites Pl. C. [23. a. &c. Trin. 3 E. 6.] Colthirſt v. Bejuſhin.

8. Some ſay that *Parſon* or *Prebendary* have not the Fee-ſimple in themſelves alone. F. N. B. 60. (K)

9. J. S. deviſed *to A. till B. his* Son and *Heir ſhall be* 22, and *if B. die before without Heir of his Body*, then the Land *to remain over*; The Fee-ſimple deſceends and remains to B. the Heir of the Teſtator, unleſs he dies before 22. 3 Le. 65. pl. 96. Mich. 19. Eliz. C. B. Hinde Lyon.

2 Le. 11. S. C. — D. 124. pl. 38. (bis) S. C. —— If the Deviſe was to B. his Son and Heir till A. is 22, and after A. is 22 to A. and his Heirs, and if A. dies before 22 &c. the Fee is veſted in A. and B. had only an Eſtate for Years till A. be 22. 2 Mod. 289. Hill. 29 & 30 Car. 2. B. R. Taylor v. Biddolph. —— S. P. that the Heir ſhall have the Fee in the Interim. 1. Le. 101. pl. 130. Paſch. 30 Eliz. B. R. Gates v. Hollywell.

10. If a *Monk* or *Perſon attainted* be a Diſſeiſor, the Freehold is in him, and not in the Queen, until Office found; Agreed; Arg. Goldsb. 29. pl. 4. Mich. 28 & 29 Eliz.

11. If A. makes *Feoffment to the Uſe of himſelf for* 40 *Years*, and limits no other Eſtates, the Fee is in the Feoffees. D. 111. b. pl. 46. Marg. ſays it was ſo held by Popham and Anderſon, Mich. 34 & 35 Eliz. in Cur. Ward. in the Argument of the Earl of Bedford's Caſe.

12. A. levies a *Fine*, and declares the *Uſes to B. in Fee, if A. does not pay* B. 10 s. at ſuch a Time; It was held by the three Chief Judges that the Fee is in B. till the Money is paid. Roll R. 114. pl. 57. Mich. 12 Jac. in Cam. Stellata. Day v. Hungatt.

13. A. makes a *Feoffment in Fee to the Uſe of himſelf for Life*; The Fee-Simple remains in the Feoffees, for otherwiſe he ſhall not have Eſtate for Life according to his Intention; But if the Uſe be limited to *himſelf in Tail* it is otherwiſe, for both Eſtates may ſtand together in him; Per Noy at the Moote in the Hall. D. 111. Marg. pl. 46. cites Mich. 19 Jac.

14. *Feoffment of* 20 *Acres* to the Uſe of J. S. for Life, *Remander of* 10 *Acres in Fee* to J. D. The Fee of the 10 Acres is in the Feoffor *till Election*; Arg. Litt. R. 255, 256. Paſch. 5 Car.

15. *Remainder to A. or B. which ſhall firſt have Iſſue*; In the mean Time the Fee is in the Feoffor; Arg. Litt. R. 256. Paſch. 5 Car. C. B.

16. *Feoffment of Tenant in Tail*, the Fee paſſes to the Feoffee deſcendible from him to his Iſſue, and whereof the Wife of Feoffee ſhall have Dower, and the Meaning of Littleton S. 650. is, that Feoffee has Eſtate only for Life of Tenant in Tail, but in the mean Time the Fee paſſes as in Caſe of *Exchange* cites 9 E. 4. 22. 8 H. 6. 23. and in Caſe of the Grant of a *Reverſion*. 24 E. 3. 28. 13 H. 7. 10. 21 H. 7. 41. &c. Cro. C. 429. pl. 19. Mich. 11 Car. in Cam. Scacc. in Caſe of Stone v. Newman.

17. There are many *Commons by Cuſtom*, the Inheritance of which is *in No-body*, and yet the Lands are charged with them; Per Scroggs Ch. J. and ſaid, he would fain know where this Inheritance of a Co-

pyhold Common is, and admitted that it was Cuſtomary. 2 Show. 78. pl. 62. Trin. 31 Car. 2. B. R. Hinkes v. Clarke.

18. A. ſeiſed in Fee gives *Power to his Executors to ſell his Lands* &c. and to pay the Money or Surplus to his Heirs; till that Power is executed the old Fee deſcends to the Heir; and when it is executed then ariſes a Truſt in the Money in Lieu of that in the Land which is now Sold, and turned into Money; Per Pratt Ch. J. 9. Mod. 190. in Caſe of Roper v. Radcliff.

(O. 3) Fee. In whom. Or New Fee gain'd. By what Act.

1. IF *Tenant in Tail recovers Advowſon by Writ of Right of Advowſon*, yet he *ſhall hold it in Tail*; and yet Tenant in Tail cannot have Writ of Right, but Quare Impedit. Br. Judgment, pl. 137. cites Fitzh. Briet 713. [Mich. 4 E. 3. 48.]

2. In Aſſiſe it was ſaid, that if *Termor loſes in Præcipe quod reddat*, and *after reverſes the Judgment by Error in Proceſs*, by this he has gain'd the Franktenement, Quære, For this ſeems to be only by Concluſion againſt the Defendant in Writ of Error. Br. Eſtates, pl. 56. cites 16 Aſſ. 16.

3. Where the *Tenant ſays, That the King granted to him for Life the Reverſion to the King, and prays Aid of the King*, he ſhall have it; For otherwiſe it is Error; For *there if the Tenant had Fee-Simple before, the King by this had gain'd the Reverſion and the Fee*; Contra where one pleads it who is not Tenant; Note the Diverſity. Br. Error, pl. 41. cites 8 H. 4. 14.

4 In Action of *Waſte againſt Tenant of the Fee-Simple* who *pleads No Waſte done*, and it is *found for him* by which the Plaintiff is barr'd, yet *this Judgment the Plaintiff has gain'd the Land by Concluſion*, viz. the Fee-Simple. And in Quid Juris Clamat, if the Tenant claims the Fee which is found againſt him, the Plaintiff may enter, and yet the Judgment is not that the Plaintiff ſhall recover the Land. Br. Judgment, pl. 132. cites 36 H. 6. 29.

5. In Treſpaſs it was ſaid by Huſſey Ch J. that where *Termor for Years holds over his Term*, there an Eſtate in Fee-Simple is conſeſs'd in him by Matter in Law, and it is doubtful to the Lay Gents if he be ſeiſed in Fee or not, and the Law intends him to be in in Fee-Simple, becauſe he holds in by Tort; but it is doubtful if he be Diſſeiſor or not; It ſeems to me that he is not, for Treſpaſs does not lie againſt him before regreſs of the Leſſor, as Treſpaſs does not lie againſt Diſſeiſor before regreſs, but the Leſſee continues by the firſt Entry, and therefore it ſeems this is the Reaſon that Writ of Entry ad Terminum qui præteriit lies againſt ſuch Termor who holds over his Term, For it is Præcipe quod reddat, which does not lie but againſt Tenant of the Franktenement. Br. Eſtates, pl. 46. cites 22 E 4. 38.

6. If *Baron ſeiſed in Jure Uxoris makes a Feoffment upon Condition and re-enters* by the Condition, he is ſeiſed in Jure Uxoris again. Br. Feoffment, al' Uſes, pl. 23. cites 5 H. 7. 5. Per Brian.

7. *Tenant in Tail diſcontinued in Fee and re-took an Eſtate in Fee*, and after *made Feoffment upon Condition* and *died*; the *Heir enter'd for the Condition broken*; he is ſeiſed in Tail by *Remitter* by the beſt Opinion, by

by Reaſon of his Nonage. Contra if he had been of full Age, For then he ſhould be ſeiſed in Fee by the Re-entry. Br. Eſtates, pl. 58. cites 8 H. 7. 7.

8. If the *Baron makes Leaſe for Life of his Wife's Land* he deveſteth his own Eſtate which he hath in her Right, and the Inheritance of his Wife, and at the ſame Time veſteth a new Reverſion in Fee in himſelf. Co. Litt. 297. b.

9. *Leſſee for Years makes a Leaſe for Years.* The Leaſe for Years determines. He ſhall not be in of his old Eſtate. Per Bridgman. Ch. J. Cart. 66. Paſch. 18 Car. 2. C. B.

10. *But* if Leſſee for Years makes a *Leaſe at Will*, and Leſſee at will is ouſted, Leſſee for Years may maintain *Ejectment*, which is in Nature of an Action of Treſpaſs. Per Bridgman Ch. J. Cart. 66. cites 9 H. 7. Otherwiſe if Leſſee for Years makes a Leaſe for Years, and Leſſee is ouſted. Ibid.

(O. 4) Fee or Freehold; In whom.

In Conſideration of Law.

1. A *Parſon of a Church* may take Fealty, but not Homage, & ex hoc Declaratur, that he has not Fee-Simple to all Intents. Br. Encumbent, pl. 19. cites Temp. E. 1.

2. See Tit. Brief in Fitzh. * 255. in which the *Franktenement is between a Parſon and Vicar*, and *Vicar who was impleaded ſhall have Aid of the Patron and Ordinary*, Ibid. 704. Br. Encumbent, pl. 16. cites 4 E. 3. 8.

* This is miſprinted, but the Caſe is at pl. 704.

3. *Biſhop*, *Dean* and *Prebendary* have Fee, but Contra of a *Parſon*; For there the Fee is in *Abeyance*. Br. Confirmation, pl. 17. cites 5 E. 4. 105.

Parſon of a Church has not properly the Fee-Simple, as a Biſhop &c. has. Br. Aid del Roy, pl. 91. cites 43 Aſſ. 13.

(Q) Eſtate Tail or Fee.

N. B. Roll (P) is carried to tit. Deviſe (N. a)

By what Words.

[*By Deed.*]

1. **If a Gift be** to A. habend' to him and his Heirs of his Wife begotten, **this is an Eſtate Tail in A. 18 E. 1. Libro Parliamentorum** 26. **between** *John de Sancto Johanne and William de Valentia* **adjudged by Admittance.**

2. **So if Gift be** to one and the Heirs of the Body of Jane S. begotten, **this is an Eſtate Tail and not a Fee. 1 Rep.** 140. **b.** *Chudleigh's Caſe.*

And. 309. pl. 318. Dillon v. Frain S. C. —— Poph 70. S. C. —— Co. Litt. 26. b. ſays, that ſince Littleton wrote ſuch Eſtate has been adjudged an Eſtate Tail, and that the Word (begotten) ſhall be neceſſarily intended begotten by the Donee.

8. In

3. In Aſſiſe Iſſue was taken whether Land was entailed or nor, and the Tenant ſhewed Deed, which will'd, Sciant Præſentes quod ego R. de J. dedi &c. *Richardo Filio meo totam Terram meam* &c. *habend'* &c. *libere & quiete de me & Hæredibus ſuis ſi Hæredes de Carne ſua habuerit, & ſi nullos* de Carne ſua habuerit *revertat dicta Terra ad me vel Hæred' meos* ſine omni contradictione &c. Reddend' &c. & ego & Hæred' mei debemus *Warrantizare* dictam Terram *eidem Rich. & Hæred' ſuis ſi quos de Carne ſua habuerit* contra omnes Homines &c. And per Belk. this Word *(Si)* in the Deed makes the Decree to have Fee-Simple if he has Heirs of his Body, as he has in Fact, therefore he has Fee-Simple; But per Perſey he has not but a Tail; for the Reverſion is reſerved to the Donor, and the Clauſe of Warranty is purſuant, and after it was adjudged a Tail, by which the Plaintiff recovered Seiſin of the Land, and Damages. Br. Tail and Dones &c. pl. 21. cites 37 Aſſ. 15.

4. Eſtate Tail may be limited *to continue for three Deſcents*; Per Daniel and Walmſley. Cro. J. 62 cites 39 Aſſ.

Br Tail and Dones, pl 21. cites 37 Aſſ. pl. 45. S P.

5. If Land be given to a Feme & *uni Hæredi de Corpore ſuo & uni Hæredi ipſius Hæredis*, and ſo over, this is neither Tail nor Fee. 2 And. 138. cites 39 Aſſ. 33. agreed.

Littleton holds, if a Man gives Land to a Man & Exitibus

6. A Gift to a Man & *Sanguini ſuo* is a Fee-Simple; But Gift to a Man & *Semini ſuo* is a Fee Tail, and this in Antient Grants; but Brooke ſays, Quære at this Day if the Word Heirs are wanting. Br. Tail and Dones, pl. 21. cites 37 Aſſ. pl. 45.

de Corpore ſuo legitime Procreatis, or Semini ſuo, he has but an Eſtate for Life, for that there are wanting Words of Inheritance. Co Litt. 20. b. —— If a Man give Lands and Tenements to a Man & *Exitibus vel prolibus de Corpore ſuo*, to a Man and to his Seed, or to the Iſſue and Children of his Body, he has but an Eſtate for Life; for though the Stat. provides, that Voluntas Donatoris ſecundum Formam in Chartâ Doni ſui manifeſte expreſſam de cætero obſervetur, yet that Will and Intent muſt agree with the Rules of the Law. Co. Litt. 20. b. —— In making an Eſtate Tail upon a Deed there ought to be the Word Heirs; becauſe it it is not otherwiſe a Fee conditional before Weſtm. 2 at Common Law, and therefore Shelly's Caſe and Co. Litt ſhews that Prolibus, or Sanguini, or Semini, ſhall not make Eſtate Tail, becauſe it was not Fee conditional at Common Law; Per Richardſon Ch. J. indelivering the Opinion of the Court. Litt. Rep. 346. Mich. 6 Car. C. B.

7. A Grant was made by A. *to the Uſe of himſelf and M. his Wife for Life, without Impeachment of Waſte, and of the right Heirs of the ſaid A. and his Aſſigns after his and M's Deceaſe; And if it happen that the ſaid A. dies without Iſſue of his Body begotten, then the ſaid Lands to remain to C. his Brother, and the right Heirs of his Body begotten, and their Heirs and Aſſigns.* The Juſtices held that a good Eſtate Tail was limited to C. in Uſe after the Death of A. and M. 3 Le. 5. pl. 13. 1 Eliz. C. B. Canon's Caſe.

Perk. S 168. S. P. —— But if it be added that if he dies

8. If a Man in the Premiſſes *gives Land to another and the Heirs of his Body Habendum to him and his Heirs for ever*; It has been held that he has Eſtate Tail and a Fee-Simple expectant. Co. Litt. 21. a. (c.)

without Heirs of his Body, or the like, that the Land ſhall revert to the Donor, then the Habendum ſhall, by the Authority of divers Books, be conſtrued upon the whole Deed to be a Limitation or Declaration what Heirs are meant in the Premiſſes to inherit, and that in ſuch Caſe the Reverſion is in the Donor. Co. Litt. 21. a. —— 5 Mod. 268. Arg. cites S. C.

2 Roll Rep. 23. S. P. cited by Doderidge J. as held accordingly

9. If a Man makes a *Charter of Feoffment of an Acre* of Land *to A. and his Heirs, and another Deed of the ſame* Acre *to A. and the Heirs of his Body, and delivers Seiſin according to the Form and Effect of both Deeds*, in this Caſe he cannot take a Fee-Simple only, as ſome hold, for that Livery was made according to the Deed in Tail, as well as to the Charter in Fee, neither can the Livery enure only to the Deed of Eſtate Tail with a Fee-Simple expectant, for that Livery was made as well

well upon the Deed in Fee-Simple as the Deed in Tail. Therefore others hold that in that Caſe it ſhall *enure by Moieties*, that is, to have an *Eſtate Tail in the one Moiety with the Fee-Simple expectant, and a Fee-Simple in the other Moiety*; and ſo the Livery ſhall work immediately upon both Deeds. Co Litt. 21. a.

10. If an *Alien is made Denizen*, and Land is given *to him and his Heirs, Remainder over*, this is a good Eſtate Tail to him, becauſe he can have no other Heir but Lineal, he cannot have Collateral; Arg. 3 Bulſt. 195.

If Land be given to a Baſtard and his Heirs, and if he die without Iſſue Remainder over, this is void, for it is a Limitation upon a Fee to defeat and defraud the Lord of his Eſcheat; Per Holt Ch. J. 11 Mod. 58. —S. C. & P. Per Holt, that ſuch Limitation is void, and yet the Land cannot deſcend on any other but the Iſſue of the Baſtard. Wms's Rep. 78. in Caſe of Idle v. Cook.

11. A *Copyhold* was *ſurrendered* to A. for Life, Remainder *to B. and his Wife for Life, and their Heirs and Aſſigns*, and for Default of ſuch Iſſue *Remainder over*; It was held an Eſtate in Fee by all the Court, except Gould J. who held it a Fee Tail. 11 Mod. 57. Paſch. 4 Ann. B. R. Idle v. Cook.

And per Holt Ch. J. the Word Aſſigns ſhews that it was intended an Aſſignable Eſtate, which is contrary to an Eſtate Tail, for that is reſtrained by the Statute. Ibid. —— Wms's Rep. 79. S. C. & S. P. per Holt. —— It was objected that the Word (Aſſigns) imports a Fee-Simple, becauſe an Eſtate Tail is not aſſignable, and that the ſubſequent Word ſhall not controul the expreſs Limitation; to which Gould anſwered, that the Expreſſion of (Aſſigns) does not anſwer the Senſe of the Limitation, for a Man's Aſſigns are included in himſelf, and implied in the Limitation to the Surrenderees before, and that the ſame Word (Aſſigns) is to be found in Cannon's Caſe. 3 Lev. 5. and yet that was adjudged but an Eſtate Tail; But Holt Ch. J. in Anſwer to this ſaid that the Word (Aſſigns) is void, as being implied and included in the Donee himſelf, & Expreſſio eorum quæ &c. ſaid that this Rule muſt be intended where the Sentence is one intire Sentence, but ſtill thoſe Words which as to that Sentence are Surpluſage and void, may notwithſtanding influence the ſubſequent Sentence. Wms's Rep. 72. 80 in S. C. —— 2 Salk. 620. 622 pl. 3. S. C. agreed accordingly by three Juſtices; but Gould J. contra.

12. A Grant *to A. and his Heirs lawfully begotten* is a Fee, but *to A. and his Heirs of him* is a Tail; Per Holt Ch. J. and Gould J. But Powell J. ſaid, that he could ſee no Difference, and he thought they had gone too far already in Matters of Intent, which made the Law ſo uncertain. 11 Mod. 57, 58. pl. 34. Paſch. 4 Ann. B. R. in Caſe of Idle v. Cook.

13. The Court conceived, that if a *Rent de novo* be *granted in Tail without any Remainder over*, and the *Tenant in Tail ſuffers a Recovery* thereof; this Recovery, though it will turn the Eſtate Tail into a Fee, yet the ſame will paſs but *a determinable Fee*, which muſt end on the Death of the Tenant in Tail without Iſſue; for the Grantor never agreed to charge the Land any further with the Rent, and it would be a Wrong to the Tertenant to burden his Eſtate with the Rent for any longer Time. 3 Wms's Rep. 230. Hill. 1733. in Caſe of Chaplin v. Chaplin cites 2 Lutw. 1255.

(R) Eſtate Tail. By what Words.

[*By Deed*]

1. IF a Man makes a Feoffment to the Uſe of J. S. and his Iſſue Male of his Body, this is not any Eſtate Tail for Default of the Word Heirs. Mich. 16. B. between *Nevil and Nevil* per Cur. though it be by Way of Uſe.

S. C. cited Arg. Raym. 284. —— Brownl. 152, 153.

2. As S. C.

Brownl. 152, 153. S C. that by Deed an Implication cannot be intended unleſs there are apt Words, but otherwiſe in a Will; for this is only a Gift

2. As if a Man makes Feoffment in Fee to the Uſe of one in Tail, the Remainder to J. S. and J. D. and the Heirs Male of their Bodies, and for Default of ſuch Iſſue of either of them, to the Uſe of the Survivor of them having Iſſue Male, and to the Iſſue Male of ſuch Iſſue Male, and for want of ſuch Iſſue Male of their Bodies, the Remainder to another; by this Gift J. S. and J. D. have ſeveral Inheritances, and no croſs Remainder in Tail is raiſed by the Words after for Want of the Word Heirs; for by Way of Uſe an Eſtate Tail cannot be raiſed without the Word Heirs. Mich. 16 Ja. B. R. adjudged in a Formedon upon a ſpecial Verdict between *Nevel and Nevel.*

to a Man and his Iſſue, and is only to both J. S. and J. D. for Life, and ſeveral Inheritances.

Br. Tail and Done &c pl. 11. cites S C. and ſays it ſtands in dub.

3. A Man *ſeiſed in Fee leaſed for Life, reſerving the Reverſion to him and his Heirs of his Body*, and after the Death of the Tenant for Life he entered, and died, and his Iſſue brought Formedon upon this Matter; and the Opinion was, that this Reſervation cannot make a Tail. Br. Eſtates, pl. 14 cites 14 H. 4. 31. and the like Matter 42 E. 3. 5.

4. If Land be *given to Grandfather and to the Heirs begotten of the Body of the Father* (where there are Grandfather, Father and Son) this is a good Tail. Br. Tail and Dones &c. pl. 10. cites 12 H. 4. 1, 2. per Horton.

5. *And* if Land be given *to J. N. and to his Heirs of the Body of his Feme begotten*, which *Feme is dead at the Time of the Gift*, yet this is a good Tail. Ibid. Per Thirne and Norton.

6. *And* if Lord be given *to Baron and to his Heirs which he ſhall beget of the Body of his Feme*, this is ſpecial Tail, and the ſecond Feme ſhall not be endowed. Ibid.

Though no Eſtate be limited to the Donee yet the adding the Words, If A dies without Iſſue then

7. *But* it Land be given in Deed to J. S. *Et ſi contingat ipſum obire ſine Hærede de Corpore ſuo, quod tunc revertat* to the Donor and his Heirs, without any Habendum in the Deed, and *Livery of Seiſin* is made according to the Deed, as ought to be intended, in this Caſe the Donee has an Eſtate in Tail, notwithſtanding that it was not given to him and his Heirs, for the Statute of Weſtminſter is Quod Voluntas Donatoris &c. Perk. S. 173.

to B. this makes an Eſtate Tail; Per Powell J. Wms's Rep. 57. in Caſe of Bampfield v. Popham, cites Perk. S. 173. —— But it is ſaid in a Note that of this Ld. Keeper doubted, and refers to Vaugh. 259 and the Caſe of Fiſher v. Wigg contra. But his Lordſhip held that where by Deed an Eſtate is given in the Premiſſes to one and his Heirs, and if he dies without Iſſue &c. the Words are ſufficient to reſtrain the former Words, and turn the Fee into an Entail, but will not of themſelves create an Eſtate Tail. Wms's Rep. 57. at the Bottom. —— In Caſe of Idle v. Cook it was objected, that an Eſtate Tail might ariſe by Implication, and this Caſe being cited to prove it Holt Ch. J. ſaid, that he agreed this Caſe to be Law; for the *Words are expreſs*, which in the principal Caſe they are not; But that no Limitation of an Eſtate by Implication ſhall controul a precedent Limitation that is expreſs. Wms's Rep. 78. and he ſaid that this was agreed Cro. C. 367. and Jo. 342. Seagood v. Hone.

Lev 211. S C. Cotton's Caſe.— Savil 227. S. C.

8. Land was given by A. and others *to C. for his Life, Remainder to B.* (who was Heir apparent to C.) *& Primogenito Filio & Hæred' Maſcul' of the ſaid B.* to be begotten, *& ſic de Primogenito Filio & Hærede Maſculo ipſius B.* de Corpore ſuo Procreand' *in Primogenit' Filium & Hæred' Maſcul'* de Corpore ſuo Procreand' *et pro defectu* talis exitus remanere inde *to D.* the ſaid Son of the aforeſaid A. *et Primogenito Filio ipſius D.* with Remainders over in like Manner as are limited to B. &c. and then limits a *Remainder to the Heirs Male of the Body of the ſaid D. and A. the Father, to be begotten*; It was agreed per Cur. that D. had Eſtate Tail in Remainder after the Death of his Father in the one Moiety, and the Father had Eſtate Tail in the other *Moiety*, and that a Fine with Proclamations might bar his Moiety; and adjudged accordingly, and the Court

Court held that the Words *Primogenito Filio in Primogenitum Filium &c.* were *void* Words. And. 264 pl. 271. Trin. 32 Eliz. Smye v. Chown, alias, Cotton's Caſe.

9. If Land be given to *a Man and a Woman unmarried, and the Heirs of their two Bodies*; for the apparent Poſſibility to marry they have an Eſtate Tail in them preſently. Co. Litt. 20. b.

10. Lands given *to the Huſband of A. and the Wife of B.* and to the *Heirs of their Bodies*, they have preſently an Eſtate Tail in reſpect of *Poſſibility*. Co. Litt. 20 b. S. P. Br. Tail and Dones &c. pl. 16. cites 15 H. 7. 10.

—— S. P. Br. Eſtates, pl. 22. cites 15 H. 7. 10. Per Fineux Ch. J. and Rede J.

11. If a *Feme Sole* do *enfeoff a married Man* Cauſa Matrimonii prælocuti, it is good for the Poſſibility. Co. Litt. 20. b.

12. If Lands be given to *the Huſband and the Wife*, and *to the Heirs of the Body of the Survivor*, the Gift is good, and the Survivor ſhall have an Eſtate in Tail general; but the Eſtate Tail veſteth not till he be a Survivor, and hereby it appears, that a Gift made to a Man and to *the Heirs* of his Body, is as good as to *his* Heirs of his Body. Co. Litt. 26. a.

13. If the *King* by his Letters Patents *gives Lands* or Tenements *to a Man and his Heirs Males* the Grant is void; For that the King is deceived in his Grant, inaſmuch as there can be no ſuch Inheritance of Lands or Tenements as the King intended to Grant. Co. Litt. 27. a.

14. *But* if the King for Reward of Service grants Armories or *Arms* to a Man and to his Heirs Males, without ſaying (of the Body) this is good. Co. Litt. 27. a.

15. A. ſeiſed in Fee makes a *Feoffment* in Fee *to the Uſe of himſelf for Life*, Remainder *to his Son B. and his Heirs*, and *for Default of ſuch Iſſue* Remainder *to the right Heirs of A.* and the Queſtion was, Whether B. had an Eſtate Tail or Fee? And it was adjudged in C. B. that B. had but an Eſtate Tail; And after Argument at Bar, Holt Ch. J. was of the ſame Opinion; For the Intent is apparent, and the Words which conveyed the Eſtate in Fee, are qualified by the ſubſequent Words, and converted into an Eſtate Tail. Ld. Raym. Rep. 101. Mich. 8 W. 3. C. B. Lee v. Brace.

16. After a Limitation in a Marriage Settlement to the firſt and other Sons of that Marriage in Tail Male ſucceſſively follow'd a *Remainder to the Daughter and Daughters* of that Marriage, *and the Heirs of their Bodies, till they ſhall* out of the Rents, Iſſues and Profits *have raiſed* 3000 *l.* and after ſuch Sum raiſed *then to the Heirs of the Body of J. D.* Remainder over. Per Cowper C. this is but in Nature of a Security for the 3000 l. that the Daughters having *ſuffered a Recovery*, and ſo barr'd the Eſtate Tail, and Remainders at Law, yet after the 3000 l. raiſed, they are *but as Truſtees for thoſe in Remainder.* Ch. Prec. 435. pl. 284. Trin. 1716. Stanhope v. Thacker.

17. Limitation to A. for Life without Impeachment of Waſte in Marriage Articles, then *to the Uſe of the Heirs Male of the Body of A. to be begotten, and to the Heirs Male of the Body of ſuch Heirs Male.* The firſt Words (Heirs Male) are only a Deſcription of the Perſons who are to take, viz. the firſt and other Sons, and the Subſequent Words denote what Eſtate they were to take, viz. to the Heirs Male of their Bodies. MS. Tab. Feb. 5th. 1719. Trevor v. Trevor.

10 Mod. 436 S. C. decreed in Chancery, and affirm'd in the Houſe of Lords. —— Equ. Abr. 387. to 392 S. C. decreed and affirm'd accordingly. —— 9 Mod. 161. to 167 S C in the Houſe of Lords and affirm'd. —— Wms's Rep. 622. to 634. pl. 182. S. C. decreed in Chancery, and affirm'd in the Houſe of Lords, ſays that it was greatly debated in the Houſe of Lords by Ld. Chancellor and Ld Nottingham for the Decree, and Lords Trevor and Harcourt againſt it, but that at Length it was affirm'd without any Diviſion.

18. A. by Articles on Marriage with M. covenanted *to ſettle Lands to* the Uſe of *himſelf for Life*, Sans Waſte Remainder *to Truſtees &c. to preſerve &c.* Remainder *to M. for a Jointure*, Remainder *to the firſt &c. Son* of the Marriage, Remainder *to the Heirs Male of his Body by M.* Remainder *to the Heirs Male of his Body by any other Wife*, Remainder *to the Heirs of his Body by M.* Remainder *to the right Heirs of A.* Provided, that *if A. ſhould die without Iſſue Male by M. and there ſhould be a Daughter, ſuch Daughter ſhould have* 3000 *l. to be ſecured on ſome Part of the Eſtate.* There was Iſſue E. a Daughter, but no Son. M. died. A. married S. and having before ſuffered a Common Recovery, and ſettled the Premiſſes on S. and the firſt &c. Son of that Marriage in Tail Male, and *in the Deed of Settlement on his ſecond Marriage took Notice of the* 3000 *l. Portion to be ſecured for E. his Daughter of the firſt Marriage*, and by the ſame Deed conveyed Part of the Premiſſes to Truſtees for 99 Years to raiſe the ſame, and 100 l. Maintenance in the mean Time; and this was declared to be in Satisfaction of all Monies ſhe was intitled to by the firſt Marriage Articles. It was reſolved in the Exchequer that E. was barred by this Recovery, and that *though a Limitation by Articles to the Heirs Male of the Marriage after an Expreſs Eſtate for Life to the Husband, ſhall be taken to mean a Remainder to the firſt &c Son*, yet *it does not follow that ſuch a Limitation to the Heirs of the Body muſt be equivalent to a Remainder limited to Daughters*, eſpecially where they were poſtponed to the Limitation to the Heirs Male of the Body of A. by any other Wife, and where an Expreſs Pecuniary Proviſion was made for Daughters by the firſt Wife. 2 Wms's Rep. 535. Trin. 1729. Powell v. Price.

(S) Tail.

Of what Things an Eſtate Tail may be.

Perſonal Eſtate not to be entailed.

1. AN Eſtate Tail cannot be of a Term. 10 Rep. 87. *Lovies's Caſe.* MS. Tab. Dec. 3d 1736. Stratton v. Pain.

Pl C. 2 b. Manxell's Caſe —— Co. Litt. 20. a. S. P.

2. Grant of a Thing which does not concern Lands or Tenements, nor exerciſeable in Lands or Tenements, cannot be entailed within the Statute De Donis Conditionalibus. 7 Rep. 33. b. *Nevil's Caſe.*

7 Rep. 35. a. S. P. in a Nota.—— Co. Litt. 20 a.

3. An Annuity cannot be entailed within the Statute, becauſe it is Perſonal. 7 Rep. 33. b. *Nevil's Caſe.* Com. *Manxell's Caſe* 2. b. S. P. For it charges my Perſon only, and concerns no Land, nor ſavours of the Realty.

Fol. 838.

If the King creates a Baronet to him his

4. A Dignity as Earl, Baron &c. may be entailed within the Statute, for though it be inherent to the Blood, yet for the moſt * Part they are made of ſome Place, ſcilicet, County or Honour, City or Vill, and ſo concerns Land, and he ſhall pay Relief. 7 Rep. 33. b. *Nevil's Caſe* reſolved by all the Juſtices.

Heirs Males of his Body iſſuing, but does not ſay of any Place, he has not an Eſtate Tail but a Fee ſimple conditional, which ſhall be Forfeited for Felony; But if he creates him of a Place he has

Eſtate

Eſtate Tail within the Statute of W. 2. 12 Rep 81. Paſch. 9 Jac. Reſolved by the two Ch. Juſtices, and Ch. Baron, and the Attorney and Solicitor-General.——Co. Litt. 20. a. S. P.

5. An Eſtate Tail may be of Offices concerning Franktenement.

6. As an Eſtate Tail may of the Office of Serjeanty in the Church of Nichol, for the Office is ariſing out of the Soil. 18 E. 3. 27. 7 Rep. 33. b. *Nevil's Caſe.* Co Litt. 20. a S. P. of of Keeper of the Church of Lincoln, and that a Formedon was brought on that Gift of the Office by the Iſſue in Tail.

7. The Office of Steward, Receiver, or Bailiff of a Manor, may be entailed within the Statute, becauſe it concerns Land. 7 Rep. 33. b. *Nevil's Caſe.*

8. No Eſtate Tail may be of a Copyhold by the Statute De Donis only, for the Inconvenience, that then it ſhould not be docked by Fine or Recovery. 3 Rep. *Haydons Caſe.* 8. b. Curia. 9 Rep. 105 adjudged between *Thornton and Lucas.* Mich. 15 Ja. B. R. agreed per Cur. upon Evidence at Bar between *Lee and Brown.* Dubitatur H. 6 Ja. B. between *Raynes and Powell*, Mich. 2 Car. B. between *Royden and Nelſon*, upon ſpecial Verdict in Action of Treſpaſs adjudged by three Judges, againſt the Opinion of Yelverton, upon Argument by the Court, which Intratur Tr. 18 Ja. Rot. 1951. Co. Litt. 60.

9. But if the Cuſtom of a Manor warrants Eſtate Tail of Copyholds, and Remainders have been limited over by the Cuſtom and enjoyed accordingly, then the Cuſtom co-operating with the Statute will make this an Eſtate Tail within the Statute, 3 Rep. 8. b. *Haydon's Caſe.* Mich. 15 Ja. B. R. between *Lee and Brown*, upon Evidence at the Bar the Cuſtom ſeemed ſo to incline, and in their Directions to the Jury admitted it; For they directed the Jury to enquire if there was any ſuch Cuſtom creates it ſo; For as the Cuſtom created it, ſo it may be docked by Cuſtom. Tr. 29 El. between *Hill and Upcheir*, cites Co. Litt. 60. b.

10. H. poſſeſſed of a *Term deviſed* it *to M. his Wife, and E. his Son, for their Lives, and after to H. and his Son, and the Heirs Males of his Body.* The Wife and E. entred and died. *H. ſold his Intereſt* of the Term *and had Iſſue J. and died*; It was the Opinion of the Juſtices that J. had no Right to the Leaſe, and Walmſley ſaid that *J. cannot claim as Heir Male*, for that it is not good to convey the Intereſt of a Term to him. Referred out of Chancery to Anderſon and Walmſley. Cro. E. 143. pl. 11. Trin. 31 Eliz. Higgins v. Mills. S. C. cited 4 Inſt. 87. cap. 8 —— S C. cited in a Nota of the Reporter as reſolved, 10 Rep. 87 b.

11. The Word *(Tenements)* is the only Word which the Statute of Weſtm. 2. that created Eſtates tail uſes, and it *includes* not only *all corporate Inheritances*, which are or may be holden, but alſo all *Inheritances iſſuing out of* any of *thoſe* Inheritances, or concerning or annexed to, *or exerciſable within the ſame, though* they lie *not in Tenure*, therefore all theſe, without Queſtion, may be intailed; As *Rents, Eſtovers, Commons*, or other *Profits* whatſoever granted *out of Land*, or *Uſes, Offices, Dignities, which concern Lands, or certain Places* may be entailed within the ſaid Statute, becauſe *all theſe ſavour of the Realty.* Co. Litt. 19. b. 20. a.

12. But if the Grant be of an Inheritance meerly Perſonal, or to be exerciſed about Chattels, and is not iſſuing out of Land, or concerning any Land, or ſome certain Place, ſuch Inheritances cannot be intailed, becauſe they ſavour nothing of the Realty. Co. Litt. 20. a.

14. The Writ of Aſſiſe was De libero Tenemento, and made his Plaint of the Fourth Part of the Office of *Serjeant of the Common Place*, and the Writ adjudged good, and ſeeing that a Man hath a Freehold

Liberum Tenementum in it, by Conſequent it may be intailed. Co. Litt. 20. a.

* 7 Rep 33 b Mich. 2 Jac. S. P. cites 5 E. 4. 3. a.

14. The *Office of* * *Marſhal of England* was entailed. Co. Litt. 20. a. and in Marg. cites 5 E. 4. 3. 10 E. 4. 16.

15. The Office of one of the *Chamberlains of the Exchequer*, was intailed. Co. Litt. 20. a.

7 Rep. 33. b. in Nevil's Caſe, S. P. cites 1 H. 7. 28. b.

16. The Office of a *Forreſterſhip* was intailed. Co. Litt. 20. a. cites 1 H. 7. 28.

* Br Charters de terre, &c. pl. 53. cites S. C.

17. *Charters* intailed. Co. Litt. 20. a. cites * 4 H. 7. 10. † 9 E. 4. 56. b.

† This is miſprinted, and ſhould be 9 E. 4. 52. b.

This is miſprinted, and it ſeems it ſhould be 188. a. pl. 8. Sir Ralph Rowlet's Caſe.

18. The like Law is of a *Writ of Error*. 3 Eliz. Dyer * 88.

If a Man makes a Gift in Tail with Warranty, this Warranty is alſo intailed, therefore a Releaſe made by Tenant in Tail of the Warranty ſhall not bar the Iſſue, no more than his Releaſe ſhall bar the Iſſue to bring an Attaint upon a Falſe Verdict, or a Writ of Error upon an erroneous Judgment given againſt the Father, nor his Gift can bar the Iſſue of the Deed that creates the Eſtate Tail, nor of any other Deed neceſſary for Defence of the Title. Co. Litt. 392. b.

19. If a Gift in Tail be made with *Warranty*, and the Donee releaſes the Warranty, this ſhall not bind the Iſſue in Tail, for to all theſe Caſes, and the like, this Statute does extend. Co. Litt. 20. a.

20. But if J. grant to a Man, and the Heirs of his Body, to be *Keeper of my Hounds*, or *Maſter of my Horſe*, or to be my *Faulconer* or ſuch like, with a Fee therefore, yet theſe cannot be intailed within the ſaid Statute, for that they be not iſſuing out of Tenements, nor annexed to, or exerciſible within, or concerning Lands or Tenements of Freehold or Inheritance, but concerning Chattels, and favour nothing of the Realty. Co. Litt. 20. a.

An Annuity intailed was thought not good. Toth. 69. Hill. 15 Car. Wiard v. Moſs.

21. And ſo it is if I by my Deed, for me and my Heirs, grant an *Annuity* to a Man, and the Heirs of his Body, for that this only charges my Perſon, and concerns no Land, nor favours of the Realty. Co. Litt. 20. a.

22. In all theſe Caſes he has *a Fee conditional, as they were before the Statute*, and the Grantee by his Grant or releaſe may bar his Heir, as he might have done at the Common Law, for that in theſe Caſes he is not reſtrained by the ſaid Statute. Co. Litt. 20. a.

23. An *Uſe* was intailed. Co. Litt. 20. cites 19 H. 8. 3.

24. *Nomination to a Beneſice* intailed. Co. Litt. 20. a. cites 1 H. 5. 1.

25. A *Truſt of a Term in Groſs* can be no more entailed than the *Term* itſelf, but if he that makes the Intail has the Term *in Point of Intereſt, and* at the ſame Time the *Truſt of the Inheritance*, he may entail the Truſt of the Term to wait upon the Inheritance, and this is every Day allowed in Chancery, and of which B. R. would take Notice. Vent. 194. Paſch. 24 Car. 2. B. R. Sir Ralph Bovey's Caſe.

26. A *Sum of Money* cannot be intailed. 2 Vent. 349. Paſch 32 Car. 2. In Canc. Broadhurſt v. Richardſon.

27. *Eſtate*

27. *Eſtate Pur Auter Vie* may be limited in Fee or in Tail, and ſhall deſcend; Per Lords Commiſſioners. 2 Vern. 184. pl. 167. Mich. 1690. Finch v. Tucker. 2 Vern. 225. contra, that it cannot, or if it be, it may be barred by Deed, Surrender or any other Conveyance, and is not within the Statute De Donis; Per Lords Commiſſioners. Baker v. Bailey.

(T) [Tail.] By what Words.

[*By Deed.*]

1. **If a Man gives Land** to one & Hæredibus de Corpore ſuo exeuntibus, **the** Remainder to another & Hæredibus in Forma Prædicta, **this is a good Tail in Remainder, becauſe that the Words** In Forma prædicta. **refers to the Eſtate before.** 20 H. 6. 36. Co. Litt 20. b in Principio, S. P.—If a Man lets Lands to A. for Life, the Remainder to B. in Tail, the Remainder to C. in forma prædicta, this Remainder is void for Uncertainty. Co Litt 20. b.

But if the Remainder had been thus, viz. the Remainder in eadem Forma, this had been a good Eſtate Tail, becauſe Idem ſemper Proximo Antecedenti refertur. Co. Litt. 20. b.

2. So **if the Remainder had been limited to him** & Hæredibus ſuis prædictis. 20 H. 6. 36.

3. **If Gift be made** to one and his Heirs, habend' to him and his Heirs, if Donee or his Heirs of his Body have Iſſue of their Bodies, **and** if they ſhall die without Iſſue, **that the** Land ſhall revert **to the Donor, this is an Eſtate Tail in the Donee, and not a Fee.** 35 Aſſ. 14. Br. Tail & Dones &c. pl. 20. cites S. C.—— Co. Litt. 21. a S. P. For the Habendum ſhall be conſtrued upon the whole Deed to be a Limitation, or a Declaration what Heirs were meant in the Premiſſes to inherit, and in that Caſe the Reverſion is in the Donor —— S. C. cited and admitted 5 Mod. 268. Arg. ——If J. grant Lands to A. and his Heirs, viz the Heirs of his Body, it is an Eſtate Tail; per Hobart Ch. J. Hob 172. cites 21 H. 6. 7. and 13 H. 7. 24. ——S. P. per Cur. obiter. and ſaid that it is a neceſſary Implication. 2 Salk. 621. Paſch 4 Ann. B. R.—— But Brownl. 45. has a Nota, that if Land be granted to one and his Heirs in the Premiſſes, Habendum to him and the Heirs of his Body, he ſhall have the Land in Tail, and the Feeſimple after the Eſtate in Tail, and when the Eſtate is certain in the Premiſſes the Habendum ſhall not control it.

4. **If a Man gives** to one and his Heirs Habend' to him and his Heirs, if Donee has Iſſue **of his Body begotten,** and if he dies without Heirs of his Body **that the Land** ſhall revert **to the Donor, this is a Tail in Donee.** 35 Aſſ. 14 **adjudged.**

5. **If a Man gives to another and his Heirs,** Habend' **to him and his Heirs** if he ſhall have Heirs de Carne ſua, **and if he ſhall** not **have any Heirs de Carne, then the** Land ſhall revert **to the Donor and his Heirs, with** a Clauſe of Warranty to the Donee and his Heirs de Carne ſua, **this is a Tail though the firſt Words purport a Fee, for his Intent appears by all the Deed conjoined together that he intended a Tail.** 37 Aſſ. 15. **adjudged.** Br. Eſtates, pl 16. cites S. C. — Br. Tail, pl. 21. cites S. C — Le. 212. ad finem, cites 5 H. 5. 6. S. P adjudged a good Tail ——S. C. cited Bridgm. 2.——S. C. and the Caſe of 37 Aſſ. 15. cited by Beamond, Cro. E. 526.——Cro. J. 476, 477 cites ſame Caſes, that a Gift to one and his Heirs Si Hæredem de Corpore ſuo habuerit is an Eſtate Tail only, becauſe it is one and the ſame Sentence; But when the Limitation is firſt Abſolute, and after the Limitation in the Habendum is to him and the Heirs of his Body, and does not limit the Eſtate over to any other, that ſtands well with the firſt, and both ſhall ſtand.——5 Mod. 269. cites S. C. but cites it as 27 Aſſ. 15.——S. P. per Richardſon Ch. J. Litt. Rep. 246. cites 37 E. 3. Aſſiſe pl. 15. and 34 Aſſ. 14.——S. P. per Cur. Obiter, 2 Salk. 621. Paſch. 4. Ann. B. R.

6. If

5 Mod. 269. cites S. C.

6. If Feoffment be made to A. and his Heirs, with Warranty to him and his Heirs, and if it happen that he die without Heir of his Body, that then it ſhall remain to B. in Fee, this is an Eſtate Tail in A. For the Limitation of the Remainder explains what Heirs of A. are intended. M. 5 Ja. B. per Cur. adjudg'd between *Watt and Waſtfield*

Vent. 228. Arg. cites 39 Aſſ. 20. S. P. adjudged.

7. Land was given *to the Husband and Wife, & uni Hæredi de Corpore ſuo legitime procreat' & uni Hæredi ipſius Hæredis tantum*, was held a good Eſtate Tail. Le. 212, 213. cites 39 E. 3. 20.

2 And. 138. Anderſon cited 39 Aſſ. 33. to be agreed that a Gift to a Man and his Wife, & uni Hæredi de Corpore ſuo, & uni Hæredi ipſius Hæredis, and ſo over, is neither Tail nor Fee.

8. Gift *to two Men and a Woman, and to the Heirs of their Bodies*, this was ruled to be only an Eſtate for Life; Per Coke Ch. J. 3 Bulſt. 108. cites 44 E. 3. Fitzh. tit. Tail, pl. 13.

9. *So to a Man and two Women, and the Heirs of their Bodies*; Per Coke, Ch. J. 3 Bulſt. 108. cites 44 E. 3. Fitzh. tit. Tail, pl. 13.

S C cited per Holt Ch. J. Wms's Rep. 78. in Caſe of Idle v. Cook.

10. Formedon, the Deed was *dedi & conceſſi to R. S. and K. his Wife, and their Heirs, and to the other Heirs of the aforeſaid R. if the Heirs of the ſaid R. and K. iſſuing die without Heirs*, and was adjudged a good Tail; For where the *Percloſe ſtands with the Premiſſes*, as here, then it is well, for he does not cut off all Heirs here, but declares what Heirs ſhall inherit. Br. Eſtates, pl. 62. cites 5 H. 5. 6.

11. *But where the Percloſe is repugnant to the Premiſſes*, as Gift *in Fee habendum for Life*, then the Percloſe is not good, but the Fee ſtands, and the Will of the Donor is to be obſerved. Br. Ibid.

12. If a Man *gives* Land *to A. B. for Term de auter vie*, the *Remainder to the Heirs of his Body begotten*, yet he has not but for Term de auter vie during the Life of Ceſty que vie; Per Lodington; but it is ſaid, that it is not Law. Br. Eſtates, pl. 76. cites 7 H. 5. 2.

13. Gift *to a Man and his Heirs Females of his Body* is a good Tail Br. Deviſe, pl. 5. cites 9 H 6. 23.

14. Deviſe to A. for Term of his Life, and after his Deceaſe *to the Men Children of his Body*, and if the ſaid A. die without any Man-child of his Body, then the Land ſhall remain to another, this is Eſtate to the Heirs Male of his Body. And. 43. 110. Hill 6 Eliz. Anon.

2 Lev. 223. S C. adjudged accordingly for the Plaintiff; Levins of Counſel for the Plaintiff ſays, that Error was brought in Cam Scacc.

15. A. makes a Conveyance to the Uſe *of himſelf for Life*, the Remainder *to the firſt Son and the Heirs Male of his Body*, Remainder *to the ſecond Son and the Heirs Male of his Body*, Remainder *to every other Heir Male of the Body of the ſaid A. and the Heirs Male of the Body of ſuch Heir Male* as they ſhall be in Priority of Birth, and Seniority of Age. The *firſt and ſecond Son die without Iſſue*; The Queſtion was, whether A. be become Tenant in Tail? Reſolved, that he is but Tenant for Life. Freem. Rep. 462. pl. 630. Trin. 1678. Liſle v. Gray.

where on the firſt Argument they inclined to affirm the Judgment, but before any thing more was done the Writ abated by Death; And that afterwards a new Ejectment was brought, but Quid inde venit Neſcio.——2 Show 6. S. C. the Court (abſente Twiſden) inclined to be of Opinion that it was but a Tenancy for Life; Adjornatur———Raym. 278 S. C. argued by Pollexfen for the Plaintiff in Error in Cam. Scacc. Sed adjornatur. Ibid. 302. S C. argued; Sed adjornatur.—Ibid. 315. S. C. argued, but no Judgment———Pollexf. 582. to 592 S. C. argued, but ſays this Judgment was affirmed by the Opinion of the greater Part of the Judges and Barons.——2 Jo 114. S. C. reports that it was adjudged in the Exchequer that it was an Eſtate Tail executed, and ſo a Judgment given in B R. was reverſed.———Wms's Rep. 90. in the Caſe of Legate v. Shewell Tracy J. ſaid that it appeared by the Record of this Caſe that the Judgment of B. R. was affirmed in the Exchequer Chamber, though the Reports differ in the Matter.

(T. 2) By what Words, by Deed.

By (Heir) in the Singular Number.

1. IN Aſſiſe the Tenant made Bar as Heir in Tail, and the Deed was, that the Donor gave the ſame Land *to J. S. and Alice his Wife, and to one Heir of his Body lawfully begotten, and to one Heir of the ſaid Heir only*; and the Tenant was Son of the Baron and Feme Donees, and the Opinion of all the Juſtices was, that it was a good Tail. Br. Eſtates, pl. 38. cites 39 Aſſ. 20. Br. Tail, pl. 23. cites S. C.

2. Limitation of Eſtate *to A. and ſuch Heir of her Body as ſhall be living at her Death*, with a *Remander over*, for want of ſuch Iſſue is an Eſtate Tail. 2 Vern. Rep. 324. pl. 304. Mich. 1695. Richards v. Lady Bergavenny.

(T. 3) Tail.

By the Word Iſſue.

1. A. According to the Cuſtom of a Manor *ſurrendered to the Uſe of B. and C. Son of B.* and of the longeſt Liver of them, *and for want of Iſſue of* [the Body of] *C.* lawfully begotten, *Remainder to* the youngeſt Son of J. S. C. had only an Eſtate for Life, and no Eſtate Tail by *Implication*, it being by Conveyance, though (as the Book is) it might be perhaps an Eſtate Tail by Will. Vaugh. 261. cites Cro. C. 336. [366. pl. 4. Trin. 10 Car. B. R.] Seagood v. Hone. Jo. 342. pl. 1. S. C. reſolved that it does not give Eſtate Tail by Implication o C. he having an expreſs Eſtate before the youngeſt Son of J. S.

2. If a Gift be *to A. and his Heirs if he have Iſſue of his Body, and if he die without Heirs of his Body* the Remainder to himſelf and his Heirs, this is an Eſtate Tail; for here is an Inheritance created, and it is manifeſt he meant Heirs of his Body, & Voluntas Donatoris in Charta Doni ſui manifeſte expreſſa de cætero obſervetur, and this is a neceſſary Implication; (ſo if a * Gift be *to A. & Hæredibus ſuis ſi Hæredes de Carne ſua habuerit & ſi nullos Hæredes de Carne ſua habuerit*, Remainder to the Donor, is an Eſtate Tail. Per Holt Ch. J. though not given to him and his Heirs. Quære). 2 Salk. 621. pl. 3. Paſch. 4 Ann. B. R. in the 2d Reſolution in Caſe of Idle v. Coke. * S. P. tho' there was a Warranty to A. and his Heirs, Si quos de Carne ſua habuerit, for it ought to be adjudged upon the whole Deed, and he Reſervation of the whole Reverſion and the Warranty explains the Tail. Br. Eſtates, pl. 61, cites 37 Aſſ. 15.

(T. 4) Tail. By what Words; By Deed. To the Uſe of.

Cro. C 230. pl. 11. S. C. held accordingly.— Ibid 244. pl. 6. Hill.

1. LANDS given to Baron and Feme *Habend' to Baron and Feme* to the *Uſe of* Baron and Feme *and the Heirs of their Bodies begotten* reſolved an Eſtate Tail. Jo. 253. pl. 3. Hill. 7 Car. B. R. Jenkins v. Young.

7 Car. B. R. Meredith v Jones, S. P on Error out of Wales, and Judgment affirmed; For they conceived this Limitation to the Uſe of the Grantees, and their Heirs to be a Limitation of the Land itſelf, it being all to one Perſon, and is as if it had been ſaid to them and the Heirs of their Bodies.

Cro. C. 231. pl. 11. S. C. & S P. held accordingly. —— Ibid. 245. pl. 6. in Caſe of Meredith v. Jones, S. P. by three

2. But Lands given to J. S. for Life to the Uſe of D. and his Heirs J. S. has but an Eſtate for Life; and when this determines the Uſe derived out of it is gone alſo. But when the *Uſe is to the ſame Party* it is only Limitation of the Eſtate; And to give Land *to A. and the Heirs of his Body*, or *to A. to the Uſe of himſelf and the Heirs of his Body* is all one; and in both Caſes it is Eſtate Tail; and ſo a Judgment in Wales was affirmed. Jo. 253. pl. 3. Hill. 7 Car. B. R. Jenkins v. Young.

Juſtices; For true it is as in D. 286 2 & 3 Eliz when the Eſtate is limited to one or two to the Uſe of others and their Heirs, the firſt Eſtate is not enlarged by this Implication, and the Uſe cannot paſs a greater Eſtate. But in the principal Caſe here when the Grant and Habendum convey the Eſtate and the Limitation of the Uſe is to the ſame Perſon, this ſhews the Intent of the Parties and is a good Limitation of the Eſtate; for it is not an Uſe divided from the Eſtate, as where it is limited to a Stranger, but the Uſe and Eſtate go together, and ſo it is all one as if the Limitation had been to them and the Heirs of their Bodies.

3. *But* when the Limitation is *to two Habend' to them to the Uſe of the Heirs of the Bodies*, this is no Limitation of the Uſe, nor is the Uſe to be executed by the Statute; but *it is a Limitation of the Eſtate to them and the Heirs of their Bodies, Remainder to the other and the Heirs of the other*, that the Deed may be conſtrued according to the Intent of him that made it; Per 3 Juſtices. Cro. C. 231. pl. 11. Mich. 7 Car. B. R. in Caſe of Jenkins v. Young.

(T. 5) Tail. Without the Word (Body) or (Of).

But Br. Eſtates, pl 89. cites Trin. 12 H 4. and Fitzh Brief, 488

1. LAND is *given to Baron and Feme & Hæredibus de illis exeuntibus*, and no Tail per Judicium, becauſe it is not de Corporibus. Br. Eſtates, pl. 86. cites Itinere Derby 3 E. 3.

contra, that Land was given to J. S. and the Heirs which he ſhould happen to have of his Wife, and that this was awarded a good Tail. ——Br. Tail & Dones &c. pl. 43. cites S. C.

2. In

2. In Maintenance of the Gift in a Formedon, Deed was ſhewn Sciant Præſentes &c. dedi *R. B. & K. Uxori ejus & Hæred' eorum et aliis Hæred' ipſius R. ſi dicti Hæred' de dicto R. & K. exeuntes obierint ſine Hæred' de ſe*; And by Judgment of the Court thoſe *laſt Words* make the firſt Words an Eſtate Tail; For the Statute is, That the Will of the Donor ſhall be obſerv'd in all Things, and *it is not repugnant to the Premiſſes* of the Deed (Hæred' eorum) *but an Explanation what Heirs ſhall inherit*, and therefore the Plaintiff recover'd by Judgment. Br. Tail & Dones &c. pl. 12. cites 5 H. 5. 6.

3. If Land be *given to one for Life*, the *Remainder to the Heirs Males of J. N. and to the Heirs Males of their Bodies* by Gift or Deviſe, yet this is no Tail, becauſe this Word (*Body of J. N*) is wanting in the firſt Remainder, And therefore the *Words ſubſequent* will not ſerve to make it a Tail. Br. Tail & Dones &c. pl. 3. cites 9 H. 6. 23. Per Paſton.

4. It was agreed, that if Land be *given to a Man and his Heirs* Males or *Females*, he has Fee-Simple, though he ſays further, and the Heirs of the Body of his Heir begotten. Br. Deviſe, pl. 5. cites 9 H. 6. 23.

5. Note per Cur. that if a Man deviſes Land *to one and his Heirs Males* by his Teſtament he has Eſtate Tail Ratione favoris Voluntatis, and *otherwiſe* it is *upon a Gift or Feoffment, without expreſſing the Body.* Br. Deviſe, pl. 1. cites 27 H. 8. 27.

6. It is a certain Rule in Law that in every Eſtate Tail within the Statute of W. 2. *it muſt be limited* either by expreſs Words or Words equipollent *of what Body* the Heir inheritable ſhall iſſue. Co. Litt. 27. b. And if it be not expreſs'd it cannot be taken to be within the Equity of the ſaid Statute, ſo that if the Gift be to one and his Heirs Females or Males, the Donee has Fee-Simple. Litt. S. 31.

Cited per Holt Ch. J. Wms's Rep. 77. in Caſe of Idle v. Coke.

7. A. made a *Feoffment to the Uſe of himſelf and his Heirs of his Body, and for want of ſuch Iſſue to G. D. and his Heirs Males lawfully begotten, and for want of ſuch Iſſue to the right Heirs of A. the Feoffor.* A. died without Iſſue; G. D. deviſed a Rent out of the Land, and afterwards died, having Iſſue; It was the Opinion of the Juſtices (abſente Popham) that it was an *Eſtate in Fee in G. D.* although it was by way of Uſe, and that it could not be Tail, becauſe there was no Body from whom the Heir Male ſhould come. Cro. E. 478. pl. 7. Trin. 38 Eliz. B. R. Abraham v. Twigg.

Mo. 424. pl. 592. S. C. all the Juſtices agreed, that it was a Fee-Simple, and not an Entail for want of the Words Heirs of the Body mentioned in the Limitation of the Uſe; And it is not like to a Will of Land.——S. C. cited Litt. Rep. 286, 287.——7 Rep. (41). 40. b. cites S C. adjudged, that G. had a Fee-Simple, becauſe it was not limited of what Body the Heirs Males ſhould be begotten; but his Intent was, that Singuli Hæredes ſui Maſculi ſhould inherit, which Intent ſtands not with the Rule of the Law, and *though the Remainder is limited over, which it cannot be upon a Fee-Simple, yet this cannot, contrary to the Rule of the Law, make Words of Fee-Simple to be converted into an Eſtate Tail.*——S. C. cited by Richardſon Ch. J. Litt Rep. 347. thus, viz. A Gift in Tail to the Uſe of A. the Donor and his Heirs Males is a Fee-Simple, but if it had been to the Uſe of A. and the Heirs Males of A. it would be Eſtate Tail by reaſon of the Word (De).——Wms's Rep. 79. Holt Ch. J. cites S. C. as a ſtrong Caſe, and not to be anſwered, and that it was adjudged a Fee-Simple for want of proper Words to deſcribe of what Body the Iſſue ſhould be. That there is a Difference between a Limitation in the Genitive, and one in the Ablative Caſe, as is held in Bereford's Caſe; For the Word (De) is made uſe of in the Stat. of Weſtm. 2. And if an Eſtate be limited to one and the Heirs Male of his Body, it muſt be tranſlated De Corpore ſuo; So if it be ſaid of any one that he was born of ſuch a Father, that, in Latin, would be Genitus de tali Patre, and cites 1 Inſt. 20 b. and that in Abraham and Trigg's Caſe the Limitation was in the Gentive, Caſe, viz. "And of his Heirs Males."—— 2 Salk. 622. in pl. 3. S. C. cited per Curiam.

8. Theſe Words (*of his Body*) are not ſo ſtrictly requir'd but that they *may be expreſs'd by Words tantamount*; For the Example put by the Statute of W. 2. hath not thoſe Words De Corpore, but the Words (Hæredibus), viz. Cum aliquis dat Terram ſuam alicui viro & ejus Uxori

But (De) or (Ex) are abſolutely neceſſary to make Eſtate

Tail, Per Powis J Wms's. Rep. 73. cites 5 H. 5. C. and 3 E. 3. 743.

Uxori & Hæredibus de ipſis Viro & Muliere procreatis. Co. Litt. 20. b.

9. A. by Leaſe and Releaſe conveys *to the Uſe of himſelf for Life* without Impeachment of Waſte, then to the Uſe *of the Heirs of the Releaſor lawfully begotten*, and to be begotten, *and for want of ſuch Iſſue &c.* is a good Limitation to create an Eſtate Tail in the Releaſor and the Heirs of his Body. Ch. Rep. 207. 13 Car. 1. fol. 571. Shelley v. Earsfield.

S. C cited per Powis J who ſaid, that though it be not mentioned in the Book whether any Opinion was given, [which ſeems a Miſtake, it being there as abridged Here] yet he ſaid, that by the Note which he had of that Caſe, it was then held to be a Fee-ſimple. Wms's Rep. 74. in Caſe of Idle v. Cook.

10. A. ſurrendred a Copyhold to the Uſe of *B. and his Wife, and their Heirs lawfully begotten*, who were admitted accordingly, the Remainder *to C. in Fee.* Newdigate conceiv'd this to be a Fee-Simple, and not Eſtate Tail, becauſe it *is not mention'd of what Body*, but in a Will or an Act of Parliament it would be otherwiſe; and Warburton J. to the ſame Intent. But Glyn Ch. J. ſaid that the other Point in the Caſe was ſo apparent that he would not deliver any Opinion as to this; And the Defendant (who claim'd it as Fee) had Judgment. 2 Sid. 41. 73, 74. Paſch. 1658. Harrington v. Smith.

Tne Words (Heirs Males) give a Fee, though by Feoffment to Uſes, and and its being by way of Uſe does not differ it from other Gifts by Deed, and ſhall not have any other Conſtructions. Cro. E. 478. Abraham v. Twigg. —— Mo. 424. S. C.

11. In a Gift in Tail it muſt be *limited of what Body* the Iſſue is to come, ſo as it may appear by expreſs Words or ſomething tantamount or equivalent, and therefore a Gift *to H. and his Heirs Male*, or to H. and his Heirs Female is not an Eſtate Tail, becauſe it is not ſaid nor does it appear of whoſe Body they are to iſſue. At Common Law this would not have been a Fee conditional, and the *Statute De Donis* does not create Eſtates Tail, but preſerves them. A *Fee at Common Law* was either abſolute or reſtrained. Thoſe *reſtrain'd* Fees were either reſtrain'd as to Duration, as a Gift to A. and his Heirs *while ſuch a Houſe ſtood* &c. which was a *baſe Fee*, or reſtrained as to what particular Heirs, or of whoſe Bodies iſſuing ſhould inherit, which was a *Fee Conditional*, and is by the Statute turned into an Eſtate Tail. Therefore this is a Fee-Simple at Common Law, and is ſo at this Day; For there are Words to create an Eſtate of Inheritance, but none to reſtrain that to Iſſue or Heirs of the Body of the Party. 2 Salk. 621. pl. 3. Paſch. 4 Ann. B. R. the 2d Reſolution in Caſe of Idle v. Coke.

12. *So* is an Eſtate *to Husband and Wife & Hæredibus de ipſis procreatis* for (*De ipſis*) tantamount. 2 Salk. 621. pl. 3. Paſch. 4 Ann. B. R. Idle v. Coke.

But in a Will it gives Eſtate Tail. For the Law ſupplies the Words (of his Body) Co. Litt. 27. a. —— —— Hob. 32. in Caſe of Counden v. Clerk.

13 An Eſtate to one and his *Heirs Males*, without ſaying (of his Body) is *not an Eſtate compris'd within the Stat. W.* 2. De Donis, and before the Statute there were no Eſtates Tail; But ſuch Eſtates were Fee-Simple Conditional Poſt prolem ſuſcitatam. L. P. R. 599.

(T. 6) Tail.

Without the Word (Begotten.)

1. IF *Procreandis* or *quos procreaverit* be uſed inſtead of Procreatis, yet the Eſtate Tail is good, and as Procreatis ſhall extend to the Iſſues begotten afterwards, ſo Procreandis ſhall to the Iſſue begotten before. Co. Litt. 20. b. S. P. 2 Vern. 545. Paſch. 1706. in Caſe of Deviſe, Cook v. Cook. — S. P. in Caſe of a Settlement. 10 Mod. 397. Paſch. 4 Geo. 1. in Canc. Slingsby v. .... —— Chan. Prec. 490. Paſch. 1718. (ſeems to be S. C. by the Name of) Hewet v. Ireland. —— G. Eq. R. 145. S. C. —— Wms's Rep. 426. S. C.

2. If Land be given to a Man, and *to his Heirs Male or Female of his Body*, he has an Eſtate in General Tail in him. Co. Litt. 25. b.

3. *A. enfeoffs* B. and C. *in Truſt for himſelf and Wife for Life and* the Life of the *longeſt Liver*, then to the Uſe of the *Heirs of the Body of A. on the Body of his ſaid Wife*. The Wife had but Eſtate for Life; A. had Eſtate Tail, and it is all one as if it had been Hæredibus A de Corpore ſuo ſuper Corpus &c. Hob. 24. pl. 112. Trin. 12 Jac. Skeat v. Oxenbridge.

4. A. ſeiſed in Fee enfeoffs B. habendum to B. and the Heirs of his Body, *to the Uſe of him and his Heirs and Aſſigns*, this is Eſtate Tail. Mo. 848. pl. 1152. Hill. 13 Jac. Carier v. Franklin. Roll Rep. 332. pl. 40. Cooper v. Franklin S. C argued and adjourned. —— Ibid. 384. pl. 6. S. C. adjudged. —— 3 Bulſt. 184. S. C. adjudged. —— Cro. J. 400. pl. 9. S. C. the Court inclined that it was Eſtate Tail; ſed adjornatur.

5. A Gift *to A. and the Heirs Male of his Body* is an Eſtate Tail. 2 Salk. 621. pl. 3. Paſch. 4 Ann. B. R. in the ſecond Reſolution in Caſe of Idle v. Coke.

(T. 7) Tail.

By what Words by Deed.

Words firſt limiting an Eſtate for Life.

1. FINE of Lands *to A. B. to the Uſe of C. and his Wife for their Lives*, and the Life of longeſt Liver; Remainder after the Deceaſe to the Uſe of the *Executors of C. for ſix Months*, and then to the Uſe of *E. and F. his Wife in Tail*; and for Default of ſuch Iſſue &c. or any Wife of C. at the Time of his Deceaſe be enſeint then, *after ſuch Iſſue had, and after 500 l. paid to G.* or tendered and refuſed within the Space of ſix Months next after the Birth of the Iſſue of the ſaid C. that then the Uſe of the ſaid Lands, immediately after the Deceaſe of C. and his Wife, and after the ſix Months ended, ſhall be to C. and the Heirs of his Body; and for Default of ſuch Iſſue to the right Heirs of C.— C. buries his Wife and marries another, Quære what Intereſt C. has in the Lands before Iſſue had by the ſecond Wife, and before the ſix Months

paſſed? It ſeemed to Plowden and Dyer, that before the Performance of the Contingent he has no longer Eſtate than he has before. D. 314. a. pl. 96. Trin. 14 Eliz.

S.C. cited per Pollexfen Arg. who ſaid that this being *in the ſingular Number* could not veſt an Eſtate Tail in the Conuſor for the ſame Reaſon as in **Archer's Caſe**; but it ſeems if it had been *in the plural Number* it had been otherwiſe. Pollexf 588. 29 Car. 2. B. R. in Caſe of Liſle v. Grey.

2. A. conveyed Land by Fine to the Uſe of *himſelf for Life, Remainder to his firſt Son and the Heirs Male of his Body* begotten &c. and to *his ſixth Son, Remainder to the right Heir Male of the ſaid A. to be begotten after the ſixth Son and of his Heirs Males*; this was held upon Evidence to be only a *Contingent* Eſtate, and not an Eſtate Tail in A. becauſe it was limited to particular Perſons. Palm. 359. Mich. 20 Jac. B. R. Waker v. Snow.

1 Salk. 254. pl. 4. S.C. held accordingly.

3. Lands were conveyed to A. for Life, Remainder to Truſtees for 99 Years, Remainder to the Heirs of the Body of A. this is an Eſtate Tail executed. Ld. Raym. Rep. 326. Hill. 9 W. 3. Bates v. Bates.

4. A. by Marriage Settlement after the Limitations to his Sons in Tail Male limited the *Remainder to B his Brother for Life, and after his Deceaſe to the Heirs Male of his Body hereafter to be begotten.* Lord Chancellor held, that B. took Eſtate in Tail, and that the Words (hereafter to be begotten) do not confine it to the Iſſue born after, as Procreatis & Procreandis Co. Litt. 20. and 24 E. 3. 15. and this he ſaid was to prevent the great Confuſion which would otherwiſe be in Deſcents by letting in the Younger before the Elder &c. Select Chan. Caſes in Lord Talbot's Time 31, 32. Paſch. 1734. Hebbethwaite v. Cartwright.

See ant. 257. acc.

(T. 8) Tail. By Words firſt limiting a Fee.

1. NOTE if a Man deviſes Land *to J. in Fee, and if he dies without Heir that it ſhall remain to N. in Fee*, this is a void Remainder, becauſe it depends upon Fee Simple; Per Englefieild J. to which it was not anſwered. Brook ſays tamen quære; but it is uſual to deviſe to a Corporation to make an Obit &c. and that if they do not make it, that it ſhall remain to another Corporation in Fee Simple, and this admitted pro bono &c. Br. Deviſe, pl. 2. cites 19 H. 8. 8.

2. Feoffment *to the firſt Son who ſhall have Iſſue and to his Heirs, and for Default of ſuch Iſſue Remainder* over, is an Eſtate Tail. 5 Mod. 269. cites Litt. Rep. 344 [Mich. 6 Car. C. B.] Beck's Caſe.

3. Gift *to A. and his Heirs ſaving the Reverſion* is Eſtate Tail; Per Richardſon Ch. J. Litt. Rep. 346. Mich. 6 Car. C. B. in Beck's Caſe.

For Conveyances by *Way of Uſe* (as this is) *have always been conſtrued like Wills* with reſpect to the Intention of the Party, and is not tied up to the ſtrict Forms of Conveyancing at Common Law; Per Cur. Carth. 343. S.C. and ſays that it was adjudged ſo upon this very Deed in B R. between Cook and Roberts. ——— 12 Mod. 101. Lee v. Brace, S.C. and Holt Ch. J. ſaid, that the Words "for Default of Iſſue" ſhew what Heirs he intended as much as if he had ſaid to one and his Heirs, viz. to the Heirs of his Body. ——— 3 Salk. 337. pl 3. S.C. and per Holt Ch. J. the Rule of Law is only that an Eſtate of Inheritance cannot paſs without Words of Inheritance; but there is no Rule of Law that Words of Inheritance may not be qualified or abridged by ſubſequent Words,

4. Feoffment in Fee to A. and B. *to the Uſe* of Feoffor for Life, then to *the Uſe of D. and his Heirs* for ever, *and for Default of Iſſue of the ſaid D.* to the Uſe of right Heirs of Feoffor is an Eſtate Tail. 5 Mod. 269. Mich. 8 W. 3. Leigh v. Brace.

Words, and therefore D. has only Eſtate Tail, though it is by Deed, it being in one Sentence; for though the firſt Words of the Sentence, viz. to D. and his Heirs make a Fee Simple, yet the ſubſequent Words, viz. "and for Want of Iſſue of him" make an Eſtate Tail by qualifying and abridging the firſt Words; and in creating Entails Voluntas Donatoris eſt obſervanda.

(T. 9) What Words will make Eſtate Tail in a Deed which will not in a Will.

1. DEVISE *to B. and his Heirs Males* gives an Eſtate Tail in the Land without the Word Body in Favour of the Will; Contrary upon a Gift or Feoffment. Br. Eſtates, pl. 2. cites 27 H. 8. 27.

3. If J. S. *has Iſſue a Daughter who has Iſſue a Son*, and A. gives Land *to J. S. and his Heirs Males of his Body*; this is no Entail, becauſe the Son muſt *derive by a Son*; But otherwiſe it is in Wills; Per Doderidge J. Lat. 42. cites 28 H. 8. Deviſe 18. Br. Deviſe 32.

(T. 10) What a Term for Years or a Fee Tail &c.

1. DEmiſe to J. S. and his Wife, and *to the Heirs of their two Bodies for 13 Years*; Per Clench J. (who only was in Court) it is but a Leaſe for Years, though Livery was made ſecundum Formam Chartæ, and ſaid it was no Livery but only giving Poſſeſſion, but would it moved again when the other Juſtices came. Godb. 42. pl. 48. Mich. 28 & 29 Eliz. B. R. Anon.

2. Demiſe *for 40 Years to B. and his Heirs*, and make Livery, it is but a Leaſe for Years; Per Clench. J. Godb. 32. pl. 48. Mich. 28 & 29 Eliz. B. Anon.

3. A. had two Sons B. and C. and by his Will *deviſed his Lands to B. and the Heirs Males of his Body for 500 Years; Provided if B. or any Iſſue Male of his Body ſhould leaſe the ſame for more than 21 Years* &c. *then all the Premiſſes for Default of ſuch Iſſue Male of the Body of B. or ſo much as ſhould be ſo leaſed* &c. *immediately upon every or any ſuch Alienation*, Gift, or Grant, *ſhall remain* and come *to C. and to the Heirs Males of his Body lawfully begotten.* All the Juſtices agreed that this was an Eſtate Tail, and the Limitation for Years void; For it was the apparent Intention of the Teſtator that it ſhould be ſo for his Heirs Males; And if it ſhould be a Term, then by the Deſcent of the Franktenement to B. as ſoon the Deviſor died, the Term would be merged in the ſame Inſtant in which it commenced. Mo. 772. pl. 1067. Trin. 2 Jac. C. B. Lovice v. Goddard.

Cro. J. 61, 62. pl. 7. S. C. three Juſtices held that C. had not any Remainder, but two Juſtices held e contra; but adjudged according to the Opinion of the three.—— Mo. 774. S. C. ſays that this Judgment was afterwards reverſed by all the Juſtices in B. R. Mich 3 Jac in Error brought there. ——Sel Chan. Caſes 30. in the Duke of Norfolk's Caſe, Ld. Chan. Nottingham mentions it as an Error of Ld. Coke in Leon. Lovie's Caſe, where he ſays that if a Term be deviſed to one and the Heirs Males of his Body it ſhall go to him or his Executors no longer than he has Heirs Males of his Body, but Ld Nottingham ſays it was reſolved otherwiſe in Caſe of **Levingthorp v. Ashby.**, 11 Car. B. R. Roll's Abridgement tit. Deviſe 611. for theſe Words are not a Limitation of the Time but an abſolute Diſpoſition of the Term. ——— And ſee ſame Opinion of Ld. Cokes denied by Ld. Keeper Finch in Caſe of **Burgis v. Burgis** in Canc. Paſch. 26 Car. 2. but it ſeems not rightly printed.

(T. 11)

(T. 11.) Eſtate Tail.

By Deed.

By Concomitant Clauſes.

Lutw. 814. to 825. S. C. it was argued that by this Power the Eſtate Tail is preſerved and a Jointure may be made without docking it, and that this Anſwer is given to the ſame Objection in the Caſe of King v. Melling by Hale Ch. J. adjudged accordingly.

1. A *Power to make a Jointure* does not neceſſarily exclude an Eſtate Tail, or an Intent to give it; becauſe Tenant in Tail without diſcontinuing or barring the Tail cannot make a Jointure, and ſo this Power has its Uſe. 2 Salk. 679. pl. 6. Hill. 1 Ann. B. R. Broughton v. Langley.

9 Mod. 161. to 167. S. C. in the Houſe of Lords and the Decree affirmed after long Debate. —10 Mod. 436 S. C. decreed in Chancery, and affirmed in Dom. Proc. ——Equ. Abr. 387. to 392. S. C. decreed in Canc. and affirmed in the Houſe of Lords.

2. By the Limitation *of an Eſtate to J. S. for Life without Impeachment of Waſte*, and to the Heirs Male of his Body by his intended Wife, and to the Heirs Male of ſuch Heirs Male; Ld. C. Parker ſaid it could not be doubted but the Intention was J. S. ſhould have an Eſtate for Life only, and the Privilege of Waſte would be to no Purpoſe if he was to have an Eſtate Tail, which would of Courſe have made him diſpuniſhable for Waſte. Paſch. 1720. Wms's Rep. 631. Trevor v. Trevor.

(T. 12) Eſtate Tail.

In whom.

In reſpect of the Limitation.

1. LAND was *given to Baron and Feme, and to the Heirs which the Baron ſhould beget of the Body of the Feme*; this was adjudged ſpecial Tail *in both*, and the Heir ſhall make himſelf Heir to both. Br. Tail and Dones &c. pl. 14. cites 21 E. 3. 43.

Roll Rep. 177. S. C. accordingly.

2. A. covenants to ſtand ſeiſed to the *Uſe of B. and his Wife for their Lives*, and *after their Deaths* to the Uſe *of their firſt Iſſue Male and the Heirs Male of ſuch Iſſue*, and ſo to the ſecond, third, fourth &c. and for Default of ſuch Iſſue, to the Uſe *of the Heirs of the Body of B. and his Wife*; Remainder *to B. and the Heirs Male of his Body*; Remainder to the Uſe *of the Heirs of the Body of B. and his Wife*; Reſolved, that till Iſſue had, B. and his Wife were ſeiſed of an Eſtate Tail executed *ſub Modo*, viz. till the Birth of the Iſſue Male, and then by Operation of Law the Eſtates are divided, viz. B. and his Wife become Tenants for their Lives, Remainder to the Iſſue Male in Tail, the Remainder to the Heirs Male of B. and his Wife, the Remainder over &c. For the Eſtate for their Lives is not abſolutely *merged*, but with this implied Limitation,

tion, till they have Iſſue Male. 11 Rep. 80. Paſch. 13 Jac. Lewis Bowles's Caſe.

3. Father in Conſideration of Money and Marriage of his Son covenants to convey Land *to the Uſe of Baron and his Wife, and the Heirs of the Body of the Wife*, to be begotten, and to his right Heirs; The Marriage is had, but the Father dying before the Conveyance the Baron conveyed it accordingly. Adjudged an Eſtate Tail in the Wife, and but an Eſtate for Life in the Baron, and yet an Alienation by Baron and Feme by Fine is not a Forfeiture within the Statute of 11 H. 7. becauſe of the Baron's joining, and ſo not within the Purview. Cro. J. 474. pl. 7. Paſch. 16 Jac. B. R. Kirkman v. Thompſon.

(U) Eſtate Tail.

N. B. The reſt of the Pleas of Roll (U) are carried to Deviſe (O. a)

By what Words a Tail may be made by Implication.

[1] 5. IF mention **be made** in a Deed of the Heirs of the Body of J. and after limits an Eſtate to him and the Heirs of J. aforeſaid, **this is a good Tail.** 42 E. 3. 5. b.

[2.] 7. **If** a Copyhold be ſurrendered to the Uſe of A. and B. his Son, and the Survivor of them, **and** for Default of Iſſue of the Body of B. **begotten, the Land** ſhall remain over to J. S. **In this Caſe B. has but an Eſtate for Life, this being by Act executed, and** not by Will, **becauſe there** wants the Word (Heirs.) **Tr. 10 Car. B. R. adjudged per Cur. upon a Demurrer between** *Seagood and Hone.* **Intratur Mich. 8 Car. Rot.** 195.

Cro. C. 366, 367. pl. 4. S. C. adjudged, that it being an Eſtate for Life by expreſs Limitation it ſhall not be an higher Eſtate to him by Implication, though perhaps it might be further enlarged by Implication in a Deviſe. —— Jo. 342. pl. 1. S. C. adjudged.

3. No Eſtate Tail even in a Deed can be raiſed by *Implication.* 2 Vern. 451. cites it as adjudged. Vaugh. 259. [Hill. 20 & 21 Car. 2. C. B.] in Caſe of Gardner v. Sheldon.

4. Settlement to A. and the Heirs Male of his Body, *with Power of Revocation*; A. recites the Settlement to be to him and his Heirs Male, (*omitting* "*of his Body*") and revokes and limits by the new Deed, to him and his Heirs Male, (omitting "of his Body") and ſubjects the new Eſtate to a Charge of 1000 l. it is an Eſtate Tail. 3 Lev. 213. Trin. 1 Jac. 2. C. B. Gilmore v. Harris.

(U. 2) Tail altered.

1. COvenant to ſtand ſeiſed to *the Uſe of himſelf in Tail*, this alters his Eſtate, becauſe there is Conſideration of Nature to advance his Iſſue, and without Alteration of Eſtate in the Father the Iſſues cannot take; Arg. Mo. 310. pl. 455. Trin. 32 Eliz. in Engleſield's Caſe.

Yelv. 51. S. C. agreed by all the Juſtices, that though as to himſelf ſuch Covenant is an Alteration of his Eſtate, yet as to all Strangers he remains Tenant in Tail. —— Mo. 683. pl. 940. S. C. held that the Covenant to ſtand ſeiſed makes no Alteration of Eſtate in the Tenant in Tail. —— Brownl 193. S C. & S. P. agreed per Cur —— Mo. 32. pl. 105. Trin. 3 Eliz. Anon. S P. held by all the Juſtices. —— Dal 35. pl. 28 S.P. —— Cro. E. 279. pl 8. Paſch. 31 Eliz. Blithman v. Blithman S P.—— And. 291. pl. 299 S C. —— 2 Rep. 52. a. cites S. C. —— Mo. 345. cites S. C. —— S C. cited and agreed per Cur Cro. E. 471. pl. 24

2. A. Tenant in Tail, Remainder in Tail to B. Remainder in Fee to A. A. *covenants to ſtand ſeiſed* to the Uſe of himſelf and his Heirs till Marriage, and after Marriage *to the Uſe of himſelf *for Life, Remainder to his Wife for Life*, with divers *Remainders in Tail.* Adjudged by the Covenant to ſtand ſeiſed, during his Life there is no Alteration of the Eſtate in the Tenant in Tail. Mo. 683. pl. 940. Trin. 44 Eliz. Freſhwater v. Rois.

* Though it may be ſaid that by ſuch Limitation he has made himſelf Tenant for Life, and ſo the Eſtate Tail is altered during his Life, yet it has no Effect thereon, but is abſolutely void as to that, it *being only made to ſupport the Remainders*; Per Holt Ch. J. in delivering the Opinion of the Court, 11 Mod 20. Trin. 1 Ann. B. R. Machil v. Clerk.

Cro E. 895. pl 15. Trin. 44 Eliz. in the Court of Wards, Bedingfield's Caſe, S C. & S. P. reſolved.

3. If Tenant in Tail covenants to ſtand ſeiſed *to the Uſe of himſelf for Life, Remainder to his Son*, and after he levies a *Fine to other Uſes* to A. theſe laſt Uſes are good againſt the Son; for when he had limited the Uſe for his Life, that was all that he might lawfully do, and it was no Alteration of the Eſtate of the Covenantor; for his Wife ſhall be *indowed*; Agreed by all the Juſtices. Noy 46. Higham v. Bedingfield.

—— S. P agreed by three Juſtices. Cro. E. 471. pl. 24. Hill. 38 Eliz. B. R. in Stapleton's Caſe. —— So if he ſuffers a *Recovery* to other Uſes, ſuch other Uſes were adjudged good. Farr. 18. Machil v. Clerk. —— 2 Salk. 619 S.C. —— 11 Mod. 19. S. C.

The Covenant does not alter the Eſtate Tail, and ſo the Recovery is good, becauſe by this Covenant *theſe Uſes do not take Effect during the Life of Tenant in Tail*, which they muſt do if they make any Alteration of the Eſtate Tail, or at leaſt there muſt be *a Poſſibility of their taking Effect during his Life.* 11 Mod. 20. S. C.

4. Tenant in Tail *makes Leaſe for Life*; this deveſts the Eſtate out of the Donee, and the Reverſion in Fee out of the Donor, and veſts a *new Fee* in Tenant in Tail. Co. Litt. 297. b.

Jo. 419. pl. 7. S. C. but S. P. does not appear. —— Mo. 847. pl. 1148.

5. Tenant in Tail Remainder in Tail; Tenant in Tail levies a *Fine with Proclamations* and *afterwards ſuffers a Common Recovery*; this Recovery docks the Remainder, notwithſtanding the Tail was barred by the Statute of 4 H. 7. Roll Rep. 223. pl. 31. Trin. 13 Jac. B. R. Herbert v. Binian.

Herbert v. Bingham S.C. but S. P. does not appear. —— Cro. J. 392. pl. 5. S. C. but S. P. does not appear. —— 3 Bulſt. 134. S. C. but S. P. does not appear.

2 Lutw. 1550. cites S C that till Common Recovery is executed, either by Entry or by Habere Facias Seiſinam returned, the firſt Eſtates are not altered. —— 2 Lev. 28. 31. Mich. 25 Car. 2. B R. in Caſe of Hudſon v. Benſon, a Common Recovery was pleaded, but Exception was taken becauſe it was not pleaded that it was executed, without which the Eſtate Tail endures till it be barred by ſuing Execution, but this was over-ruled; for if no Execution be ſued, then is the Recovery to the Uſe of him againſt whom it was ſued ſince no other appears. But the Reporter makes a Quære of this Reaſon, for before Execution how can any Uſe of the Recovery ariſe?

6. Judgment in a *Recovery without Execution* does not alter the Eſtate, but in the Interim, till executed, the Tenant in Tail continues ſeiſed in Tail, and ſo it deſcends to the Iſſue, and the Iſſue, till Execution ſued, ſhall *avoid all Charges* made by Tenant in Tail; but after, when the Recoveror ſues Execution, then the *Charge ſhall be revived.* Jo. 10. pl. 10. Mich. 8 Jac. C. B. Aubrey v. Lord Bridgwater.

7. Tenant

7. Tenant in Tail, *after Feoffment* made by him, may by *Recovery* or *Fine*, or Warranty with Aſſets, *bar his Iſſue*; Per three Juſtices. Jo. 81. Paſch. 1 Car. in Cam. Scacc.

8. Tenant in Tail *makes Feoffment*; Whether any Right *remained in* him was debated between the Judges very ſtrongly, but Judgment was given (by the Majority of one Voice) for the Affirmative. Jo. 69. to 82. Paſch. 1 Car. in Cam. Scacc. Sheffield v. Radcliff. Godb. 360. to 326. pl. 417. S. C adjudged. — Palm. 351.

S. C. argued. —— Hob. 334. to 348. pl. 414. S. C. adjudged. —— Hetl 150. S. C. argued. —— Jenk. 286. pl. 21. S. C.

9. Tenant in Tail *accepts a Fine Sur Conuſance de Droit come ceo*, and then ſuffers a Recovery; this Acceptance of the Fine makes no Alteration of his Eſtate; Per Cur. clearly. Vent. 257. Paſch. 26 Car. 2. B. R. Anon. Per Hale Ch. J. S. P. and ſeems to be S. C. Mod. 117. pl. 17. Green v. Proud.

(X) Bars of Eſtate Tail.

Fol. 840.

1. IF a Recovery be had againſt Tenant in Tail upon Title found against him per Pais ſcilicet Ne dona pas, the Iſſue is barred for ever and has no other Remedy but Attaint. 34 H. 6. 2. b. per Priſot. Br. Fauxifier de Recovery, pl. 4 cites S. C.

2. But if the Recovery be by Default, or by other ſpecial Matter, or the Iſſue does not go to the Title of the Gift, the Heir may falſify every ſuch Point, 34. H. 6. 2. b. per Priſot; but there Moyle ſaid, that Recovery againſt Tenant in Tail ſhall bind the Iſſue. Br. Fauxifier de Recovery, pl. 4. cites S. C.

3. In *Writ of Right* the Juſtices would not give *Judgment final*, becauſe the Tenant was Tenant in Tail, for doubt of barring the Iſſue in Tail, and hence it ſeems that Judgment final in Writ of Right *againſt Tenant in Tail* is a Bar to the Tail. Br. Tail & Dones &c. pl. 30. cites 3 H. 6. 55.

4. *Recovery upon Voucher* againſt Tenant in Tail is a Bar by reaſon of the Recompence in Value. Br. Tail & Dones &c. pl. 32. cites 23. H. 8. A Recovery againſt Tenant in Tail in a Writ of Right without a Voucher is no Bar of any Gift in Tail. Co. Litt. 373. a.

5. A. has two Sons B. and C. by *ſeveral Venters*, and Lands are given to *B. in Tail, Remainder to A. in Tail.* A. dies. B. levies a Fine *with Proclamations* and dies without Iſſue; This is a Bar to C. in Formedon to the Remainder, for though he could not have both the Eſtates executed in him, yet he is inheritable to the Remainder; For if he had made *Feoffment with Warranty* this had been lineal, but otherwiſe it been if the Lands had been given *to A. and the Heirs Male of his Body*, tho' if A. had died and the Son made Feoffment with Warranty, this is collateral, for the Son is not inheritable to the Eſtate in Remainder; But otherwiſe it would be if the Remainder had been *to the Right Heirs of A.* Kelw. 204. (Caſes Rep. by Daliſon. J.). pl. 3. 2 Eliz. Anon.

6. If *Tenant in Tail*, the *Remainder over in Fee ceſſe*, and the *Lord recovers in a Ceſſavit*, this ſhall not bar the Eſtate Tail; For the Iſſue ſhall recover in a Formedon. Co. Litt. 373. a.

7. By

Reſolved that the Iſſue in Tail being Heir and Privy cannot by any Claim ſave the Right of the Eſtate Tail deſcended to him, but the Eſtate Tail after the Proclamations ſhall be barred by the 4 H. 7. 24 and 32 H. 8. 3 Rep. 87. The Caſe of Fines.

7. By 32 *H.* 8. 36. *All Fines after Proclamations &c. ſhall Bar &c.* yet it has been always held, if the Iſſue in Tail be *remitted* and ſeiſed by Force of the Tail before the Bar be compleated, i. e. before the Proclamations are paſſed, the Iſſue is not bound; Arg. 1 Rep. 96. b. Trin. 23 Eliz. in Shelly's Caſe.

1 Rep. 66. b. S. C. by name of Archer's Caſe. —— 1 Rep. 130. b. Arg. in Chudleigh's Caſe. —— In a Caſe of Settlement by Deed adjudged. 1 Rep. 135. b in Chudleigh's Caſe.

8. Deviſe to A. during his *Life*, and after his Death *to the right and next Heirs of A. and to the Heirs of his Body*; This may be barr'd by *Feoffment* of A. 2 And. 37. pl. 24. Trin. 38. Eliz. Baldwin v. Smith.

* By Indenture inrolled in Chancery. 10 Rep. 95. Seymor's Caſe.

9. *Tenant in Tail*, the *Remainder in Tail*; The *Tenant* in Tail *bargains and ſells* the Land * to A. and *afterwards levies a Fine* to A. ſur Conuſance de droit come ceo with Warranty; This Warranty made by the collateral Anceſtor of him in Remainder whoſe Heirs he is ſhall not bar him; for this *Remainder was not diſplaced*; It had been *otherwiſe if* the Fine had been levied by the Tenant in Tail *before the Bargain and Sale*, for it had been a Diſcontinuance; but by the Bargain and Sale made as above the *Bargainee had a Fee determinable upon the Entry of the Iſſue*, and he in Remainder has his Remainder open upon Default of Iſſue of the Tenant in Tail; The Tenant in Tail has *paſſed all his Eſtate*; *By the Bargain and Sale* he has nothing more to paſs but to extinguiſh the Eſtate Tail by way of Releaſe, and to leave the Remainder untouched. Jenk. 51. pl. 97. cites 10 Rep. 95. b. [Mich. 10 Jac.] Seymor's Caſe.

10. If *Diſcontinuee* of Tenant in Tail levies a *Fine with Proclamations*, and five Years paſs, and Tenant dies, his Iſſue ſhall have other five Years, for he is the firſt to whom the Right accrues after the Fine levied, for Tenant in Tail himſelf after his Fine and Proclamations has not any Right; But if Tenant in Tail be diſſeiſed, and after the *Diſſeiſor levies a Fine with Proclamations*, and five Years paſs, and after Tenant in Tail dies, there the Iſſue in Tail is barred; For there, after the Fine levied, the Tenant in Tail had Right himſelf, ſo as the Iſſue in Tail was not the Firſt to whom the Right accru'd after the Fine levied. Godb. 301. pl. 417. Paſch. 21 Jac. in the Exchequer Chamber. Sheffield v. Radcliff.

11. If Tenant in Tail *accepts a Fine with Render to another for Years*, this ſhall bar him, becauſe it works a Diſcontinuance, but otherwiſe where it is *for Life*; Per Hutton J. Winch. 123. Hill 22 Jac. C. B.

12. Feoffment to the Uſe of *A for life*, *Remainder* to the Uſe of *his firſt, ſecond, third, and other Sons in Tail*, *Remainder to* the Uſe of *B. for Life*, *Remainder* to the Uſe of *his firſt, ſecond, third, and other Sons, in Tail*, a Feoffment by A. before any Son born will deſtroy the Remainder to his Sons. See 2 Roll 119. Maereſme (A) cites Mich. 24 Car. B. R. adjudged upon a ſpecial Verdict, Uvedale v. Uvedale.

13. Deviſe that A. and B. and their Heirs and Aſſigns, and the Survivor of them, ſhall ſtand ſeiſed in Truſt to permit C. *to take the Rents &c. during his natural Life*, and after C's Deceaſe *to the Uſe of the Heirs of the Body of the ſaid C.* with Power for Truſtees to make a Jointure on ſuch Wife, C. ſhould Marry; The Uſe was executed in C. and a Recovery by C. will bar. Lutw. 814. Trin. 12 W. 3. Broughton v. Langley.

14. Settlement on Marriage *to A. for* 99 *Years if he live ſo long, Remainder to Truſtees* to preſerve contingent Remainders during A's Life, Remainder to the Wife for Life, *Remainder to the Heirs of the Body of A. by the Wife.* A. and his eldeſt Son with the Heir of the ſurviving Truſtee join in a Fine and Feoffment to B. and his Heirs; The eldeſt Son dyed without Iſſue living A. Per Cowper C. though A. was living he was but bare Tenant for 99 Yeats if &c. and the Eſtate Tail veſted in the Son in Equity, but the legal Eſtate in the Truſtees and their Heirs during the Life of A. and they are Truſtees purely for the Tenant in Tail, and not to oppoſe him for thoſe that are to come after him, ſo that *the Fine and Feoffment by the Truſtees and eldeſt Son* of A. with A. is a good Bar, and the Truſtee not guilty of Breach of Truſt. 2 Vern. 754. pl. 659. Mich. 1717. Elie v. Osborn.

15. When *final Judgment in a Writ of Right* is given againſt Donee in Tail upon Iſſue joined upon the meer Right, it is as ſtrong againſt him as a Fine with Proclamations; And the Court agreed, that after a Year and Day where final Judgment is given the Party is barred, and alſo that ſuch final Judgment ſhall bar the Iſſue in Tail. Godb. 239. pl. 330. Mich. 11 Jac. C. B. Piggot v. Piggot.

16. A *Recovery* will bar an Eſtate Tail *without a Fine.* Ch. Rep. 145. 15 Car. 1. fol. 709. Bales v. Proctor. It is a Rule, that in Caſe where a Recovery will not bar the Iſſue in Tail there a Fine will not bar them. 2 Brownl. 138. Paſch. 1611.

17. Tenant in Tail of 300 *Acres levies a Fine of* 100 It is no Bar of all or any Part till *Election* made, and till then the Lands remain entailed; Arg. 2 Chan. Caſes 114. Mich. 2 Jac. 2. in Caſe of Hale v. Thomas.

(X. 2) Bars of Eſtate Tail in Truſt.

1. TENANT in Tail of a *Truſt* may bar his Iſſue by *Feoffment* or *Bargain and Sale.* Chan. Caſes 64. Trin. 33 Car. 2. in Caſe of Ld. North Ch. J. v. Williams. 2 Vern. Rep. 133. S. P. Per Commiſſioners Beverley v. Beverley. —— Vern. Rep. 14. North v. Way. —— 2 Vern. Rep. 345. S. P. Arg. —*Deviſe* or *Bargain and Sale* not ſufficient, but it muſt be by *Decree*; Per Cowper K. 2 Vern 552. Paſch. 1706. Legat v. Shewell and Weller. —— For a Truſt or equitable Intereſt *is a Creature of Chancery*, and therefore diſpoſable by the Rules of Chancery; Per Finch C. 2 Vern. 350. in Caſe of Sale v. Freeland —— Wms's Rep. 91. S. C. and thete Ld. Cowper ſaid, that it was a Doubt with him if a Deed only executed by Ceſty que Truſt in Tail ſhould bar the Remainder man, or even the Iſſue, in regard a Deed may be made at a Tavern or by Surprize, whereas a Recovery by him is a ſolemn and deliberate Act.

2. *Bare Articles* ſhall be a Bar to an Entail *of an Equity.* 2 Vern. 226. pl. 205. Paſch. 1691. cites it as the Caſe of North v. Champernoon. And ſays though there was a Recovery in that Caſe, yet it was not material in regard there was no Tenant to the Premiſſes. Ibid.

3. *Truſtee joining with Ceſty que Truſt* in Tail in a *Feoffment* will bar an Eſtate Tail in Truſt; Per Somers C. 2 Vern. 344. pl. 318. Hill. 1697. Bowater v. Elly. Chan. Prec. 81. pl. 72. S. C and held a good Bar. —— S. C. cited Arg. 2 Vern. 704. in Caſe of White v. Thornburgh. —— S. C. cited in S. C. by the Name of Allee v. Allee. Chan. Prec. 427.

4. Entail of a Truſt *is not within the Statute De Donis*, and ſo a Fine or Recovery not neceſſary, but is *alienable by any* other *Conveyance* made by him who has an Eſtate of Inheritance in the Truſt; Arg. 2 Vern. 344. pl. 318 Hill. 1697. in Caſe of Bowater v. Elly.

5. *Lands are deviſed to A. and B. and the Heirs of the Survivor in Truſt to ſell*; though the Inheritance be in Abeyance, yet the *Truſtees by a Fine may make a good Title by Eſtoppel.* 3 Wms's Rep. 372. Trin. 1735. Vick v. Edwards.

6. *By Articles before Marriage of the Mortgagor's Father and Mother, it was agreed, that the Wife's Portion (being 1500 l.) ſhould be laid out in Land by the Truſtees in Truſt for the Husband and Wife, and the Heirs of their two Bodies begotten without any Remainder over*; the *Husband dies*, leaving a Son and a Daughter; and after his Death the *Truſtees purchaſe Lands, and declare the Truſt according to the Marriage Articles*; Afterwards the *Wife dies*, and the *Son ſurvives* her, *and mortgages theſe Lands inter al' by Leaſe and Releaſe* to the Plaintiff Harvey without ſuffering Recovery. Cooper C. of Opinion, that the Mortgagor being only Tenant in Tail in Equity, cannot bar the Entail in Equity by Leaſe and Releaſe without Fine or Recovery, and that his Siſter ſhall have the Lands by Virtue of the Entail in Equity, notwithſtanding the Leaſe and Releaſe of her Brother, though it was inſiſted on by the Plaintiff's Counſel, that an Entail in Equity may be barred by Deed without Fine or Recovery, and cited ſeveral Caſes to that Purpoſe; but Cowper C. ſaid, he would not have it taken for a Rule that an Eſtate Tail in Equity may be barred by Deed only, and ſaid, that in thoſe Caſes where it has been holden to be a Bar, there were always ſome particular Circumſtances to induce the Court to it, as Refuſal by Truſtees to convey the legal Eſtate to Ceſty que Truſt, et Similia. Paſch. 1 Geo. in Canc. Harvey v. Parker.

(Y) Tail at Common Law.

[How conſidered.]

1. **WHEN Land was given** to one and the Heirs of his Body; after Iſſue he had a Fee, **becauſe that now the Condition was performed.** 18 Aſſ. 58. 18 E. 3. 46.

Co. Litt. 19. a. S. C. — 7 Rep. 34. b 35. a. S. P per Cur. obiter in Nevil's Caſe.

2. *At Common Law* if a Gift had been to a Man and the Heirs of his Body, or the Heirs Males of his Body, *if he had Iſſue*, then *he ſhould have Fee Simple*, and if he died his *Iſſue ſhould have Mortdanceſtor*; for it was Fee Simple at Common Law; Contra after the Statute Weſtm. 2. cap. 1. per Grene J. and Huſe agreed to the Mortdanceſtor, and that *after Iſſue had, he might alien*; but if he died without Iſſue, and did not alien, Formedon in Reverter lay, and by him Heir Collateral ſhould not have the Mortdanceſtor. Br. Tail and Dones &c. pl. 19. cites 18 Aſſ. 5.

3. A Man *gave Land in Tail*, and after he *granted the Reverſion to a Stranger*, and the Tenant in Tail attorned. Jenney ſaid, this is a void Grant and a void Attornment; for Poſt prolem ſuſcitatam habet Poteſtatem alienandi, which was a conditional Fee Simple at the Common Law, and the ſame Law ſtill; for nothing is reſtrained but the Alienation; But per Catesby, *becauſe the Alienation is reſtrained it is included that he has ſuch ſpecial Eſtate that he cannot alien, which is an Eſtate*

Eſtate Tail, quod Littleton and Choke J. conceſſerunt, et hoc probatur, for if he viz. the Donor, gives in Tail, the Remainder over in Fee to J. S. there the Donee has Eſtate Tail, and he in Remainder has the Fee Simple, and if the firſt Eſtate was Fee the Remainder was void; for no Remainder can depend upon the Fee Simple; and *upon Gift in Tail, if the Donor diſſeiſes the Donee, and makes a Feoffment*, and *Donee reenters*, the *Feoffee has the Fee*, and ſo it is proved that the Donor has the Reverſion in him. Per Brian J *before the Statute* of Weſtm. 2. the *Donee ſhould not have had Fee, though he had Iſſue*; For if he had Iſſue and died, and after the Iſſue had died without Iſſue, no Alienation being made, the Donor might have entered, and not the Heir Collateral, and ſuch Matter 18 E. 3. in Aſſiſe. And the Juſtices held, that if a Man *give Land in Tail*, the Donor may grant the *Reverſion* by Fine, and the King Donor may grant it by his Letters Patents, and the Reverſion ſhall paſs without Attornment. Br. Tail and Dones, pl. 28. cites 12 E. 4. 2. 3.

4. At Common Law the *Tenant in Tail ſhall have Fee*, therefore this remains now, and therefore Tenant in Tail who dies ſeiſed dies ſeiſed in Fee; for the Statute of *Weſtm. 2. cap. 1. reſtrains nothing but the Alienation*, and that the *Iſſue ſhall have Formedon where at Common Law he ſhould have no Remedy*; Per Townſend. But per Kirton, Fairfax, Huſſey, and by all the Court, and by all the Serjeants, after this Statute the Tenant in Tail ſhall not have but Fee Tail and not Fee Simple; for *by the Statute the Donor retains the Fee Simple*, and two Fee Simples cannot be of one and the ſame Land; and alſo there is a *Tenure between the Donee and the Donor for the Reverſion*, as it is ſaid elſewhere; and therefore there is Fee in the Donor, and the *Donor holds the Reverſion of the Lord* as before the Gift, as appears 4 H. 6. 19. and the Donor may *give or forfeit this Fee Simple*; quod nota. Br. Eſtates, pl. 40. cites 5 H. 7. 14. Br. Tail and Dones &c. pl. 27. cites S. C.

5. Tenant in Fee Tail is by Force of *the Statute of Weſtm. 2. cap. 1.* for *before the ſaid Statute all Inheritances were Fee Simple*, (as well conditional or qualified as abſolute, to diſtinguiſh them from Eſtates in Tail ſince the Statute) for all the Gifts which are ſpecified in the ſame Statute were Fee Simple conditional at Common Law, as appears by the Rehearſal of the Statute. Litt. S. 13.

6. The *Cauſe of the making the Statute* of Weſtm. 2. was to preſerve the Inheritance in the Blood of them to whom the Gift was made. Co. Litt. 19. a.

7. *Before the Statute of Donis* &c. if Land had been given to a Man, and *the Heirs Males* of his Body, the *having Iſſue Female* had been no Performance of the Condition; But if he had Iſſue Male and died, and the Iſſue Male had inherited, yet had he not had a Fee Simple abſolute; for if he had died without Iſſue Male the Donor ſhould have entered as in his Reverter. Co. Litt. 19. a.

8. *By having Iſſue* the Condition was performed for three Purpoſes, viz. 1. To *alien*. 2. To *forfeit*. 3 To *charge with Rent*, *Common* &c. But the *Courſe of Deſcent was not altered* by having Iſſue; for if the Donee had Iſſue, and died, and the Land had deſcended to his Iſſue, yet if that Iſſue had died (without any Alienation made) without Iſſue, his *Collateral Heir* ſhould not have inherited, becauſe he was *not within the Form* of the Gift, viz. Heir of the Body of the Donee. Co. Litt. 19. a.

9. If Land had been given at the Common Law *to a Man and the Heirs Females* of his Body, and he *had Iſſue a Son and a Daughter*, and died, the Daughter ſhould have inherited this Fee Simple at Common Law, for *the Statute* de Donis &c. *creates no Eſtate Tail but of ſuch an* Eſtate as was Fee Simple at Common Law. Co. Litt. 19. a.

10. *Before*

10. *Before the Statute* Weſtm. 2. the *Donee had holden of* the Donor as of his Perſon, and now of him as of his Reverſion. Co. Litt. 23. a.

11. Whoſoever ſhall be to inherit by Force of a Gift in Tail made to the Heirs Male muſt *convey his Deſcent* wholly by the Heirs Males. Litt. S. 24.

12. It is a certain Rule in Law, that in every Eſtate in Tail within the ſaid Statute it *muſt be limited* either by expreſs Words or *by Words* equipollent *of what Body* the Heir inheritable ſhall iſſue. Co. Litt. 27. b.

(Z) By whom it might be Docked.

S. C. cited 9 Rep. 140. a.

1. IF Baron and Feme were ſeiſed to them and the Heirs of their Bodies, the Baron alone after Iſſue could not have docked it; But the Iſſue after his Death ſhould have a Cui in Vita. 24 E. 3. 45. Co. Litt. 19.

* 2 Le. 37. 3 Rep. 51. b. Cro. J. 689. Cro. E. 478. Hob. 258. D. 115. Pl. C. 560. 1 Rep. 49. b. 2 Bulſt. 45. Jo. 33.

2. A Fine levied by *Tenant in Tail, Remainder to him in Fee* with Proclamations is an Extinguiſhment of the Eſtate Tail, as much to all Intents as if Tenant in Tail had died without Iſſue; For otherwiſe the Cognizee muſt have two diſtinct Eſtates in Fee, viz. A *baſe Fee* determinable upon the Death of the Tenant in Tail without Iſſue, and alſo an *abſolute* Fee, which is very abſurd, and therefore the greater Fee which is abſolute ſhall *merge* or ſwallow up the baſe Fee, and be conſolidated into one entire Eſtate. Reſolved per Cur. and to prove this the Caſes in the Margin * were cited. Carth. 258. Hill. 4 W. & M. in B. R. Simmonds v. Cudmore.

(A. a) At what Time it might be Docked.

[*And How.*]

1. AFTER Iſſue the Donee might bar the Iſſue by Alienation. 7 H. 4. 46. pl. 6. 18 E. 3. 56. b. Admitted by Iſſue. Co. Litt. 19.

2 Inſt. 334. S. P.

2. After Iſſue he might bar the Iſſue by Forfeiture for Felony or Treaſon. 7 H. 4. 46. pl. 6. Co. Litt. 19.

2 Inſt. 333. S. P. cites 19 E. 2. Formedon 61. 30 E 1. Formedon 65. Pl. C. often in Ld. Berkley's Caſe. ——

3. If Donee at Common Law had aliened before Iſſue and after had Iſſue, this Alienation ſhould bind him, becauſe he claims a Fee. Co. Litt. 19.

4. But in this Caſe if the Iſſue dies without Iſſue this Alienation ſhall not bind the Donor, but he may re-enter, becauſe at the Time of the Alienation he had no Power to bar the Poſſibility of the Donor. Co. Litt. 19.

7 Rep. 35. a. Same Caſes out of Fitzh. cited in a Nota. And ſays, Nota bene, theſe Rules yet hold Place in Caſe of Grant of an Annuity to one and the Heirs Male of his Body, and to all other Inheritances which are not within the Statute De Donis Conditionalibus.

5. If

5. If *the King before the Statute* of Donis Conditionalibus *had made a Gift to a Man and to the Heirs of his Body begotten*, the Donee poſt prolem ſuſcitatam might have aliened as well [as] in the Caſe of a common Perſon. Co. Litt. 19. a. b.

6. *But if the Donee had no Iſſue, and before the Statute had aliened with Warranty, and died, and the Warranty had deſcended upon the King*, this ſhould not have bound the King of his Reverſion without Aſſets; But otherwiſe it was in the Caſe of a common Perſon. Co. Litt. 19. b. 9 Rep. 132. b. S. P. per Cur. but this ſhall not bar the Reverſion of the King though it be with Collateral Warranty, unleſs Aſſets deſcend, ſo as the King might have plenary Satisfaction and Recompence; For without Warranty and Recompence it is not ſuch compleat Alienation, the Alienor not having a compleat Eſtate ſo as to bar the King of his Reverſion.

7. Of the other Side, if *Lands* had been *given to the King, and to the Heirs of his Body*, he could not before Iſſue have aliened in Fee, but only to have barred his Iſſue as a common Perſon might have done, but not to have barred the Reverſion, for that ſhould have been a Wrong in the Caſe of a Subject and the King's Prerogative cannot alter this Caſe, nor make it greater than the Donor gave unto him; And it is a Maxim in Law, That the King can do no Wrong. Co. Litt. 19. b. 1 Rep. 44. b. cites Pl. C. 246. b. Ld. Barkley's Caſe, S. P.

(B. a) Frank-marriage.

How it may be created.

1. **It may be created** without Deed. 39 H. 6. 30. b.

2. **It may be created** by this Word Frank-marriage, without Words Heirs of the Body &c. 20 H. 6. 36. b.

By what Words.

3. **If a Man** gives Land with his Couſin in Frank-marriage, rendering Rent, **this Reſervation is void, becauſe it cannot ſtand with the Eſtate to render any Rent before the** 4th Degree paſſed, **and ſo good Frank-marriage,** * 4 H. 6. 22. **Contra** † 26. Aſſ. 66. **adjudged, a Rent and Service of Chivalry reſerved.** * Br. Frank-marriage, pl. 3. cites S. C. the Reſervation is contrary to the Nature of the Tenure; Per Martin J. quod non negatur.——Br. Reſervation, pl. 13. cites S. C. ——S. P. this is a Taile and not Frank-marriage, by reaſon of the Reſervation. Br. Frank-marriage, pl. 9. cites the old Book of Tenures. But Brook ſays, Ideo Quære, becauſe the Pleas 3 and 5 [cited here] are contrary, and ſays that it ſeems no Taile, becauſe the Word (Heirs) is wanting, and where Lands is given in Frank-marriage with a Man and a Woman who is not Couſin to the Donor, this is only an Eſtate for Life, for it is not within the Maxim, and therefore it ſeems that the Maxim makes this to be an Eſtate of Inheritance in this Caſe.

† Ibid. pl. 5. cites S. C. & S. P. by Kitchen that it is void till the 4th Degree is paſt; but it is not expreſsly adjudg'd.——Br. Reſervation, pl. 32. cites S. C.

4. **If Gift be in Frank-marriage to the Baron and Feme** Habendum to them and their Heirs in Fee, **the** Frank-marriage is deſtroyed, **and they have Eſtate in Fee, Demurrer,** 10 H. 6. 16.

5. Land was given *to J. N. and to the Cozin of the Donor in Frank-marriage, Habendum to them and the Heirs*, and yet a good Frank-marriage. Br. Frank-marriage, pl. 7. cites 13 E. 1. And Brooke ſays, that this was the ſame Year in which the Statute of the Tayle was made, cites Fitzh. Formedon. 63.

6. A Man gave in Frank-marriage *to the Donee and his Feme, and their Heirs, and to whomſoever he would aſſign it*, and yet it was awarded Frank-marriage, and the Reverſion remain'd in Donor. Br. Eſtates, pl. 70. cites 13 E. 1. and Fitzh. Formedon 63.

7. If Lands be given in Frank-marriage unto a Man *with the Kinſwoman of the Donor of the whole Blood, by theſe Words (Frank-marriage)* they have an Eſtate in ſpecial Tail if they intermarry, and if in ſuch Caſe the *Husband dies*, and the *ſame Donor gives more Lands in Frank-marriage unto a ſecond Husband of the ſame Woman*, this is a good Frank-marriage. Perk. S. 236.

8. And a Gift in Frank-marriage *made after the Marriage* is good, and yet ſome have ſaid the contrary, and their Reaſon is, Becauſe that the Gift in Frank-marriage ought to be made for Advancement of the Kinſwoman of the Donor by Marriage, and therefore ſuch a Gift made after the Marriage cannot be intended to that Purpoſe; againſt which it may be ſaid, that ſuch a Deed made to ſuch Perſon after the Marriage between them may be the Cauſe of the Marriage, as well as if ſuch a Gift had been made to them before the Marriage. Perk. S. 237. cites H. 4 E. 3. 8.

And if after ſuch Gift in Frank-marriage, and after the Marriage ſolemnized between the Donees, the Donees are divorced at the Suit of the Husband, in this Caſe the Woman ſhall hold the whole Land, and the Husband ſhall have none of it. But if ſuch a Divorce be in other Gifts in ſpecial Tail by expreſs Words, yet they ſhall hold the Land ſo given jointly, during their Lives &c. Perk. S. 238 cites 12 Aſſ. p. 22. ——— S. P. And if the Divorce be Cauſa Præcontractus the Woman ſhall enjoy the whole Land, becauſe ſhe was the Cauſe of the Gift. Co. Litt. 22. a. in Principio.

9. Land was *given* to the Husband and Wife in Frank-marriage, *Infra annos nubiles*, and afterwards *they are divorc'd*; the Wife has an Eſtate in Tail. Godb. 19. Arg. cites 19 Aſſ.

10. Note, that *at Common Law* before the Statute De Donis Conditionalibus Weſtm. 1. Frank-marriage *was Fee-Simple Conditional*, and the Donee poſt Prolem ſuſcitatam had Power to alien it. Br. Frank-marriage, pl. 8 cites 30 E. 3. and Fitzh. Formedon 66.

11. Where Gift is made in Frankmarriage, there *after the 4th Degree the Iſſues ſhall hold of the Donor* as the Donor held over, per Finchden. Quod non negatur. Br. Tenures, pl. 8. cites 45 E. 3. 20.

Br. Eſtates, pl. 8. cites 45 E. 3. 19, 20. that Gift in Frank-marriage habendum to them and their Heirs for ever is not Frank-marriage; Contra of Gift in Tail, habendum to them and their Heirs, there it is Tail in Poſſeſſion, and Fee in Remainder.

12. In Formedon the Demandant counted of a Gift in Frank-marriage, and the Tenant pleaded that Ne dona pas Modo & Forma, and at Nihil Prius the Demandant gave a Deed in Evidence, by which the Donor gave to J. S. in liberum Maritagium with A. his Siſter *To Have to them and their Heirs for ever*, and whether this was Frank-marriage was the Doubt. Finchden ſaid, that where a Gift is made to Baron and Feme in Frank-marriage Habendum to them and the Heirs of the Baron, this is an Eſtate Tail, and Fee-Simple, and the Fee ſhall take Effect after the Tail determin'd, but Knivet held e contra, and that they have Fee by the Gift, Quod Mombrey conceſſit, becauſe the Donees ſhall hold of the Lord Paramount and not of the Doner; and afterwards Finchden agreed with them that it is not Frank-marriage; But Brook ſays Quære, quia non adjudicatur; But by Finchden where a Gift is made in Tail Habendum to them and their Heirs, there it is a good Tail in Poſſeſſion and Fee in Remainder. Br. Frank-marriage, pl. 1. cites 45 E. 3. 19.

Br. Eſtates, pl. 8. cites 45 E. 3. 19, 20. ——— 9 Rep. 14. a. cites S. C. ſays Judgment was given againſt the Demandant, becauſe a Fee Simple and not an Eſtate Tail paſſed by the Deed. ——— 10 Rep. 117. b. 118. a. cites S. C and obſerves that Fitzh. Tail 14. ſays, that the Gift was adjudg'd a Fee-Simple and not Frank-Marriage; and that Statham in abridging the Caſe tit. Tail, ſays it was adjudg'd that it was an Eſtate in Frank-marriage, and Brook [as here in the principal Caſe] ſays, Quære Quia non adjudicatur. ——— S. C. cited Godb. 19.

13. If

13. If a Man *gives in Frank-marriage rendering* 10*s. Rent, this is a Tail* and no Frank-marriage by reaſon of the Reſervation for Frank-marriage ſhall be Frank, till the 4th Degree be paſs'd. Br. Eſtates, pl. 77.

14. *But* per Martin Juſtice *the Reſervation is void*, and it is a good Frank-marriage, for the Gift ſhall be taken moſt ſtrong againſt the Donor, and alſo it ſeems that it cannot be Tail, for it *wants this Word Heirs*. Br. Eſtates, pl. 77. cites 4 H. 6. 22.

15. Land *cannot be given* in Frank-marriage *with a Man who is Couſin* to the Donor, *but* it ought to be *with a Woman* who is his Couſin. Br. Frank-marriage, pl. 10. cites it as ſaid for Law in Time of H. 8. Co. Litt. 21. b this Caſe denied. —— See pl. 21.

16. A *Gift in Frank-marriage* the *Remainder to J. N. in Fee* is not Frank-marriage; For Warranty and Acquittal are incident to Frank-marriage by reaſon of the Reverſion in the Donor, which cannot be where the Donor gives the Remainder in Fee to a Stranger upon the ſame Gift. Br. Frank-marriage, pl. 11. ſays that this was ſaid for Law in the Time of H. 8.

17. If a Man *gives* in Frank-marriage *with one who is not his Couſin*, this is only for Term of Life, for it is a Maxim that ſhe ought to be his Couſin. Br. Eſtates, pl. 79.

18. J. H. gave Lands in Frank-marriage to one W. by theſe Words, viz. *Dedi & conceſſi &c. Johanni White in Liberum Maritagium Johannæ Filiæ meæ*, (in the *Dative Caſe*) whereas the Words of Frank-marriage are in the *Ablative Caſe*, as (Cum Joanna Filia mea,) habendum dictæ Johannæ White, & Hæredibus in perpetuum tenendum de Capitalibus Dominis Feodi, with Warranty to the Husband and his Heirs; the Court held the ſame good; But afterwards it was adjudged to be no Frank-marriage nor Gift in Tail, but a Fee-Simple. And the Juſtices ſaid that the ancient Books were, that where it took not Effect as a Frank-marriage it ſhould be in eſpecial Tail, yet thoſe at this Time are not Law; But they agreed that though this at one Time took Effect as Frank-marriage, yet by Matter Ex Poſt Facto may be made an Eſtate Tail. Ow. 26. 25 Eliz. Webbe v. Potter. Godb. 18. pl. 25. S. C. held accordingly. —— Mo. 645. pl. 888. S. C. cited as adjudged.

19. 5 E. 3. Robert gave the Reverſion of Lands which Agnes his Wife did hold for her Life to Stephen Delamore habendum Poſt Mortem dictæ Agnetis in *liberum Maritagium cum Joanna* Filia ejuſdem Roberti, it is adjudged that it is a good Eſtate Tail, wherein three Things are to be obſerved, 1ſt. That Joan the Daughter took with her Husband an Eſtate in eſpecial Tail, albeit ſhe were named, but *under a* (*Cum*) viz. Cum Joanna &c. 2dly, That (Cum) doth come after Habendum, for it is but all one Sentence. 3dly, That theſe Words (in Liberum Maritagium) do create an Eſtate of Inheritance in eſpecial Tail, as Littleton ſays, Le Donee ad un Inheritance per reaſon de ceux Parols &c. albeit the Gift is made of the Land to the Man with his Daughter &c. yet is the Gift good to them both in eſpecial Tail. Co. Litt. 21. a.

20. If Lands be given by theſe Words (*in Frank-Marriage*) according to the Rules of the Law, then do the Words create an Eſtate of Inheritance in ſpecial Tail; For the Conſideration of Marriage is in that Caſe more favoured in Law than any other Conſideration. But though the Gift be in the Words, yet if it be not *conſonant to the Rules of the Law* in other Things requiſite thereunto, there they create but an Eſtate for Life. Co. Litt. 21. b.

21. Four Things are incident to a Frank-marriage. Firſt, That it be given *for Conſideration of Marriage either to a Man with a Woman*, or as ſome have held, *to a Woman with a Man*; For in 6 E. 3. 33. in Piers de Saltmarſh's Caſe, a Man gave Land to his Son in Frank-marriage, and

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and Fitzh. N. B. 172. taketh the Law ſo alſo. And 7 E. 4. 12. per Moyle againſt a new Opinion in temps H. 8. Br. Tit. Frank-marriage, the former Books being not remembered. Secondly, *That the Woman or Man* that is the Cauſe of the Gift *be of the Blood of the Donor*, but it may be made as well after Marriage as before, and it may be made with a Widow &c. Thirdly, If the Gift be made of ſuch a Thing as lieth in Tenure, *that the Donees hold of the Donor at the Time of the Eſtate in Frank-marriage made.* A Rent Service may be given in Frank-marriage becauſe it may be holden. And ſo may a Rent-charge or Rent-ſeck, as Fitzh. N. B. holds, and it appears in our Books that a Common was granted in Frank-marriage. Fourthly, That *the Donees ſhall hold freely of the Donor till the fourth Degree be paſt.* And therefore if Land be given to a Woman, with a Son of the Donor in Frank-marriage, there paſſeth an Inheritance; but if the Donee that is the Cauſe of the Gift be not of the Blood of the Donor, then there paſſeth but an Eſtate for Life if Livery be made. Co. Litt. 21. b.

(B. a. 2) Frank-Marriage.

Privileges and Pleadings.

Br. Frank-marriage, pl. 2. cites S. C.

1. FOrmedon ſhall be *Quod dedit in Liberum Maritagium*; Per Hank, *though the four Degrees be paſſed*, and the Heir ſhall vouch, and have Writ of Meſne as before the fourth Degree; But Hull and Culpepper contra, therefore Quære. Br. Formedon, pl. 27. cites 12 H. 4. 9.

2. If Land is given in Frank-marriage, and the *fourth Degree is paſſed*, and he makes *mention of the Frank-Marriage*, *the Writ ſhall abate*; for he ought to have Writ and *Count upon a general Gift*, and not upon the Frank-Marriage; for this is determined after the fourth Degree, quod Juſticiarii conceſſerunt in Treſpaſs upon the Caſe. Br. Formedon, pl. 41. cites 21 H. 7.

3. Note that *the third Heir in Frank-Marriage ſhall do Homage and Services and not before.* Br. Frank-Marriage, pl. 6. cites 15 H. 3. And Brooke cites 6 H. 3. accordingly, and that *before they ſhall do Fealty only*, but there by Littleton in his Book, the fourth Degree ſhall be paſſed firſt, and the third Heir is the very fourth Degree; for the Donees who are not Heirs are the very firſt Degree, cites Fitzh. Droit 60.

Fol. 841.

(C. a) Tail Special.

By what Words.

[By Deed.]

1. IF Land be given to the Baron and Feme, and to the Heirs of their two Bodies, and if the Baron dies without Heir of the Body of the Feme, the Remainder to a Stranger, this is a Special Tail

Tail in the Wife, inaſmuch as it was expreſly limited to her before. 30 E. 3. 18. b.

2. But if Land be given to the Baron and his Heirs of the Body of his Wife begotten, and if the Baron and Feme die without Heirs of their Bodies, the Remainder to another, yet it ſeems the Wife has not any Eſtate by Implication againſt the expreſs Limitation before. 30 E. 3. 18. b.

3. A. levies a Fine to the *Uſe of himſelf for Life*, then to his Son for Life, then to the Uſe of the *intended Wife for Wife*, Remainder to the Uſe of the *Heirs to be begotten upon the Body of the Wife by the Son.* Adjudged, that the Words Heirs ſhall be applied to Heirs of both Parties, and that where the Words are plain, and ſhew the Intent of the Father, they ſhall not be conſtrued to any other Meaning. Sty. 325. Paſch. 1652. Goſſage v. Taylor.

(D. a) Tail at Common Law.

Deſcent. [To whom.]

1. If Lands at Common Law had been given to one and his Heirs Males of his Body, the Heirs Collateral, who were not of the Body of the Donee, ſhall never inherit, though the Donee had Iſſue before his Death. * 18 E. 3. 46. 18 Aſſ. 58. Co. Litt. 19. * Fitzh. Tail, pl. 16. cites S. C.

2. If Land had been given to one and his Heirs Males of his Body, and afterwards he had Iſſue a Male and a Female, and after the Male dies the Female ſhall inherit the Land. * 18 E. 3. 46. 18 Aſſ. 58. Contra Co. Litt. 19. * Fitzh. Tail. pl. 16. cites S. C. 8 Rep. 36. a. in Principio. S. P. per Cur. obiter.

3. If *Land* had been given *before the Statute to Baron and Feme, and the Heirs of their two Bodies*, and *they have Iſſue*, and the *Feme dies*, and the *Baron takes another Wife*, the Iſſue, which by Poſſibility he may have by her, ſhall inherit the Land. 8 Rep. 36. a. Trin. 29 Eliz. C. B. per Cur. obiter.

(E. a) Tail.

Deſcent of it.

1. If an Eſtate be given to one for Life, Remainder to the right Heirs of the Body of J. S. If the Tail attaches upon the eldeſt Son of J. S. and he enters after the Death of the Leſſee, the ſecond Brother ſhall not have the Land by Force of the Tail, becauſe the Eldeſt was Purchaſor. D. 4 & 5. Ma. 156. This was Griſwold's Caſe. —— And 3. pl. 4. Creſwold's Caſe, S. C. adjudged that this Remainder to the right Heirs Males &c. did not make Eſtate Tail, nor give any other Eſtate, but was void. —— S. C. cited by Hobart Ch. J. Hob. 30. —— Mod 238. S. C cited per Cur. and agreed that at Common Law a Man could not make his right Heir a Purchaſor without parting with the whole Fee, but that by Way of Uſe he might, and that Greſwold's Caſe in Dyer is of an Eſtate executed. —— S. C. cited 2 Mod. 209. 211.

2. **In the Caſe of Littleton of a** Gift to the Son and the Heirs of the Body of the Father, **it ſeems** the ſecond Brother ſhall not inherit the Tail. D. 4 & 5. Ma. 156. 25. **Quære.**

When the Donee died without Heir Male of his Body, and the Daughter

3. If Deviſe be to one and the Heirs Males of his Body, if Donee has Iſſue a Daughter who has Iſſue a Son, **the Son ſhall not have the Land; for the Deviſe does not extend further than to ſettle the Eſtate, and not to direct the Deſcent.** 9 H. 6. 23. b. * 11 H. 6. 12. b.

who was the Heir to the Fee Simple, entered and aliened, and none was then in Eſſe who could claim as Heir Male of the Body of the Donor, it was held by the beſt Opinion, that he who is born after, and not in Eſſe when the Remainder falls, ſhall not have it. Br. Deviſe, pl. 5. cites 9 H. 6. 23 —— But in Caſe the Daughter had died, leaving Iſſue a Son, in the Life of the Donee her Father, and then the Donee had died, Paſton held, that the Son ſhould have the Land upon ſuch Limitation by Deviſe, though he ſhould not upon ſuch Limitation by Deed. Ibid. —— S. P. of ſuch *Gift*, for there the Lands ſhall revert to the Donor, and the Son of the Daughter ſhall not have it, but otherwiſe in a Deviſe. Br. Deviſe, pl. 29. cites 30 H. 8.

* Br. Deviſe, pl. 32. cites S. C. that the Son of the Daughter ſhall have the Land; but contra in Grant by ſuch Words; Per Babington.

4. A *Gift to M. and to the Heirs of her deceaſed Husband on her Body begotten*, (ſhe *having a Son and a Daughter by him*) gives her a State for Life, and the Son a State in Tail; and if the Son dies without Iſſue, his Siſter ſhall recover per Formam Doni, and name herſelf Siſter and Heir to him in the Writ, becauſe ſhe can have no other, and yet the Land did not properly deſcend from him; but ſhe takes as he himſelf did, as Heir of the Body of A. *But* in the ſame Caſe, *if the Heirs of the Body of the Husband had been named after the Habend*, they had taken nothing; for they could not take a preſent Eſtate in Poſſeſſion, becauſe not named before the Habend. nor by Way of a Remainder, becauſe there is no mention of any Eſtate but only of ſuch which is to take Effect preſently. Hawk. Co. Litt. 37.

5. A Son's Daughter cannot *take* by a Limitation to the Heirs *Female of the Body of the Father*, becauſe ſhe muſt derive all by Females; Per Wright K. 2 Vern. 409. Hill. 1700. Johnſon v. Northey.

(F. a) What Charge made by Tenant in Tail ſhall bind the Iſſue.

Eſtoppel (F) pl. 1. S. C.

1. **If Tenant in Tail** acknowledge a Tenure of the King by Eſtoppel, **yet the Iſſue ſhall avoid it by the Statute** nec per factum &c. 1 H. 4. 5.

2. **If Tenant in Tail** charge the Land **the Iſſue may defeat it.** 38 E. 3. 23. b.

3. **If Tenant in Tail** grants Eſtovers **to another, this is void by his Death.** 38 E. 3. 23. b.

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4. **If Tenant in Tail** acknowledges a Statute or Recognizance, **upon which the** Land tailed is extended, **the Iſſue after his Death may ouſt him.** 38 E. 3. 23. b. 18. b. **admitted by Iſſue** * 38 Aſſ. 5. **adjudged.**

* Br. Entre Congeable, pl. 77. cites S. C—— Br. Recognizance, pl. 7. cites S. C.

5. If

5. If Tenant in Tail grants the Veſture of his Wood and dies, the Grantee cannot cut the Wood after. Contra 38 E. 3. 24.

6. If Tenant in Tail forfeits the double Value of the Marriage and dies, the Lord ſhall retain the Land till it be levied againſt the Iſſue. 1 H. 4. 5. b.

7. In Aſſiſe, *Tenant in Tail granted a Rent-charge and died*; the *Iſſue entred and enfeoffed N.* and *retook Eſtate* &c. and yet it was awarded that the Charge was determined; for *by the Entry of the Heir all was extinct*. Br. Charge, pl. 20. cites 14 Aſſ. 3. S. C. cited Paſch. 15 Eliz. Pl. C. 437. a. by Counſel Arg. in Caſe of Smith v. Stapleton, as Wm. Cauxton's Caſe, and ſaid he well allowed the Judgment therein; But Bromley and he both diſallowed the Caſe of 19 E 3. where it is adjudged, that where Tenant in Tail was bound in a Statute Merchant and died and the Iſſue entered into the Land and aliened, that the Land ſhall be charged; For the Remitter diſcharges the Execution as well as the Rent Charge; And by them there is a Diverſity, where the Thing may be to the Benefit of the Iſſue in Tail, and where to his Charge. —— The Book of Aſſ. 3. cites * 19 E. 3. 8. &c. and Hill. 14 E. 3. tit. Charge 10.

8. *Nevertheleſs* it was ſaid, that *Execution upon a Statute Merchant* made by Tenant in Tail was executed *againſt the Feoffee of the Iſſue in Tail*; quære; for it ſeems that the Land was diſcharged in the Hands of the Iſſue by reaſon of the Tail, and once diſcharged it is for ever. But quære if the Purchaſor ſhall have Advantage of the Tail; quære; for it ſeems all one. Br. Charge, pl. 20. cites 14 Aſſ. 3.

* Fitzh. tit. Reſceit pl. 112. cites S. C.

9. A. deviſed Land *to B. in Tail*, Remainder *to C. in Fee upon Condition that B. grant a Rent to J. S.* and adjudged that he in Remainder ſhall be charged with this Rent after the Eſtate Tail ended; Per Jones J. Lat. 138. in Caſe of Daniel v. Upley, cites 34 E. 3. 11 H. 7.

10. *Grant of Tenant in Tail to hold without Impeachment of Waſt with Aſſets deſcended*, is no Bar againſt the Iſſue in Tail; For the *Statute of Glouceſter does not ſpeak but of Warranty and Aſſets*, and the Statute of *Weſtm. 2. cap.* 1. mentions Quod non habeat poteſtatem alienandi, yet this is *intended of all Things which may turn in Diſinheritance of the Iſſue*, and that Leaſe for Years, Charge, Statute-Merchant, Recognizance &c. made by Tenant in Tail, ſhall be avoided by his Iſſue after his Death; And per Belk. if the Tenant in Tail leaſes for Years and dies, and Aſſets is deſcended, *if the Iſſue ouſts the Termor he ſhall have Writ of Covenant*, and ſhall recover his Term; But Skip. and Thorp contra, and that he ſhall not recover but his *Damages*. Br. Tail and Dones &c. pl. 13. cites 38 E. 3. 23.

11. A Man *ſeiſed of a Rent grants it to J. S. in Tail*, and after the *Grantor releaſes to the Grantee and his Heirs*, (for it was ancient Rent) by which the Grantor had Tail in Poſſeſſion and Fee in Reverſion, and the *Grantee grants all his Eſtate in the Rent to W. N.* and dies; the Grant is determined, for his Eſtate is that which he had in Poſſeſſion, which is only Tail; Quære. Br. Grants, pl. 159. cites 43 Aſſ. p. 8.

12. If the Iſſue in Tail or *Tenant in Tail* (upon whom J. N. might lawfully enter becauſe the Tail was *by Defeaſible Title*) *charges the Land* to him whoſe Entry is lawfull *to have a Releaſe of all his Right* this Charge ſhall bind the Iſſue in Tail and his Heirs and all others, Per Opinionem Curiæ, quod nota. Br. Tail and Dones, pl. 6. cites 44 E. 3. 22. S. P. Br. Tail and Dones, pl. 37. cites 20 E. 4. 13.

13. If *Donee* in Tail *makes Feoffment* in Fee, in Rei Veritate the Donee has neither Jus in Re, nor ad Rem, and yet the *Donor may extinguiſh his Rent by Releaſe or Confirmation* made *to him*. 3 Rep. 29. b. in Caſe of Butler v. Baker, the Reporter in a Nota there cites it as agreed 14 H. 4. 38. a. b. 1 H. 5. tit. Grants 43. 10 Rep. 48. b. S. P. in Lampet's Caſe. —— Hob. 337. S. P. in Caſe of Sheffield v. Ratcliffe. —— Hobart Ch. J. ſaid, that the Statute W. 2. ſays, that Tenant in Tail by his Feoffment non habet Poteſtatem alienandi, therefore he cannot paſs the Right, and he who has not Poteſtatem alienandi, *habet Poteſtatem retinendi*. Jo. 73. in S. C. —— S. P. Hob. 336. in S. C. but there he calls

calls this remaining Right, which he had not parted withal, and could not make another's, Summum or *Merum Jus* in Tail.

S. P. Pl. C. 561. a. in Walſingham's Caſe, per Sanders Ch. B. cites 48. E. 3. 8. Trebony's Caſe.

14. The Donee, *after a Feoffment* by him made in Fee *remains Tenant as to the Donor*, and he muſt neceſſarily avow for his Rent upon the Donee; For he *cannot avow upon the Diſcontinuee*, the Reverſion to which the Rent is incident not being deveſted out of him by the Diſcontinuance. 3 Rep. 30. a. in a Nota of the Reporter, in Caſe of Butler v. Baker.

——Hob 337. S. P. by Hobart Ch. J. in Caſe of Sheffield v. Ratcliffe, cites 48 E. 3. But whenſoever the Tenant in Tail ſuffers a Recovery, or levies a Fine at this Day the Avowry, together with the Right of Entail, will ceaſe.———It was objected, Godb. 302. Arg. in Caſe of Sheffield v. Ratcliffe, that becauſe the Tenant in Tail remained Tenant to the Avowry of the Donor, therefore ſome Right remained in him of the Old Eſtate; But it was anſwered, Arg. that the Matter of the Avowry does not ariſe out of the Right or Intereſt which a Man has in the Land, but out of the Privity, and cites 5 E. 4. 3. 48 E. 3. 8. b. 20 H. 6. 9. 14 H. 4. 38. b. 2 [but is miſprinted for 31 Rep. 30. a. ——Godb. 314. S. P. Arg. S. C.———Cro. C. 428. pl. 19. Mich. 11 Car. in the Exchequer, in Caſe of Stone v. Newman, it was agreed, that in ſuch Caſe the Privity of Eſtate remains between the Donor and Donee, and cannot be transferred over, which is the Reaſon that the Donor may avow upon him for his Rent, and ſhall not be compelled to alter his Avowry, and cites 48 E. 3. 8. 5 E. 4. 34. 4 H. 4. 32. [N. B. The Books laſt cited in Cro. C. and thoſe cited in Godb. are not all alike therefore Vide.]———Co. Litt. 269. a. S. P. ſays it was ſo reſolved. Trin. 18 Eliz. C. B. in Sir Thomas Wiat's Caſe.

15. If *Tenant in Tail grants a Rent-charge* and dies, and the *Iſſue pays the Rent*, this ſhall not bind him; for Grant of Tenant in Tail is determined by his Death, and a thing determined is void, and a thing void or determined cannot be made good by Payment, but muſt have a new Creation; Per Yelverton. Br. Bar, pl. 27. cites 21. H. 6. 24.

16. *So* where Tenant in Tail *diſcontinues and retakes in Tail, rendring to the ſecond Donor* 10 *l. Rent* and dies, the *Iſſue pays the Rent*, it does not bind him, for he was remitted before, and by this the Rent was determined, and therefore void as above, per Yelverton; which Newton affirmed, and theſe are adjudged in Aſſiſe of Rent Hill. 14 E. 3. Br. Bar, pl. 27. cites 21 H. 6; 24.

* Br. Contract, pl. 26. cites S. C. per Littleton and Catesby.

17. If Tenant in Tail *ſells Trees and dies before they are cut*, and the Iſſue enters, the Bargainee ſhall not have the Trees. Pl. C. 437. b. in Caſe of Smith v. Stapleton, cites * 18 E. 4. 6.

——11 Rep. 50. a. S. C. cited per Cur. in Liford's Caſe. ——Br. Contract, pl. 11. cites 11 H. 4. 32. contra.——Br. Waſte, pl. 67 cites 11 H. 4. 32. that Hill ſaid, that ſuch Sale was Colourable to be avoided by the Iſſue in Tail, but did not ſay preciſely that he might avoid it. But Ibid. cites † 27 H. 8. 5. that the Grant is good though the Trees are cut after the Grantor's Death.

† Br. Tail, pl. 1. cites S. C. accordingly.——Br. Treſpaſs, pl. 2. cites S. C. accordingly and ſays, quod non fuit dedictum.——Br. Contract, pl. 2. cites S. C. accordingly by Fitzherbert and Shelly. ——Poph. 194. Arg. in the Caſe of Sacheverel v. Dale, cites S. C. and 16 E. 4. that the Vendee cannot cut after the Vendor Tenant in Tail's Death, [but ſeems miſprinted.]———Perk. S. 58. cites 18 E. 4. that Grantee cannot cut after ſuch Grantor's Death, but S. 59. ſays, if the Grant had been of Corn growing it might be ſevered after his Death, and cites 10 E. 4. 2.—Hardr. 96. pl. 2. Paſch. 1657. in the Exchequer, Roberts v. Roberts, a Contract was made in the Life of the Plaintiff's Mother who was Tenant in Tail, for Purchaſe of Timber growing on the Land. The Mother died. The Daughter, her Heir an Infant, brought a Bill by Guardian againſt her Father, Tenant by the Courteſy and her Guardian, and the Purchaſor, to ſtay Waſte by ſelling it, and the Court held that the Contract made nothing in the Caſe, and an Injunction to ſtay Waſte was continued.

The Power of leaſing given by the Statute of H. 8. binds only the Iſſue, and not the Remainder or Reverſion,

18. *Tenant in Tail*, the Remainder over, *leaſes for Years rendring Rent, and dies without Iſſue*, and he in *Remainder accepts the Rent*, this ſhall not bind him, the Reaſon ſeems to be, becauſe when the Tail is determined all that is compriſed within it is determined, and ſo the Leaſe void, and he in Remainder does not claim by the Leſſor. Br. Acceptance, pl. 19. cites 1 E. 6.

But where an Expreſs Power is given to the Tenant in Tail to make Leaſes, in

in ſuch Caſe Leaſes made in Purſuance thereof will bind the Remainder or Reverſion as well as the Iſſue; Per Northey Arg. Wms's Rep 144. and admitted by Ld. Harcourt Ibid. 145. ſaying that ſuch Power of Leaſing is more beneficial than that given to Tenant in Tail by Statute. Paſch. 1711. in Caſe of Bale v. Coleman.

19. *A.* the Grandfather was *Tenant for Life*, Remainder *in Tail to B. his Son. A. levied a Fine* to J. S. 60 *Years ſince*, and *B. alſo conveyed* the Land *by Bargain and Sale, and ſo it came* by mean Conveyances *to W. R.* Upon a Bill in Equity by W. R. againſt C. the Son and Heir of B. and Grandſon of A. it was reſolved by the Ld. Keeper, aſſiſted by Ld. Ch. J. Hobart, that W. R. could have no Relief in Chancery, becauſe Tenant in Tail is diſabled by Statute to bar his Iſſue, unleſs by ſuch means as the Laws and Statutes have allowed. Hob. 203. pl. 256. Cavendiſh v. Worſley.

20. Tenant for Life *entred into a Statute* and died and a *Sci. Fa.* iſſued againſt his Heir who was Iſſue in Tail, and the Sheriff returned *Scire Feci* &c. and upon this Execution was had without any Plea pleaded by the Heir. Adjudged per tot. Cur. that the Iſſue in Tail ſhall be bound by this Execution, and has no Remedy either by Ejectment, Error, or Aud. Quer. nor any other Way, unleſs againſt the Sheriff if he had made a falſe Return of the Scire Feci. Adjudged per tot. Cur. Sid. 54. Mich. 13 Car. 2. Day v. Gilford.

Lev. 41. S. C adjudged per three J. but Windham Dubitabat.—— Raym. 19, 20. S. C. Windham and Mallet were for the Defendant, and Forſter and Twiſden for the Plaintiff; & adjornatur; But afterwards Judgment was given for the Plaintiff againſt the Heir. ——— Windham J. thought the Heir might falſify this Recovery in an Action of a more high Nature, though not in this Action of Ejectment brought againſt him, becauſe this is of a more baſe Nature, according to 6 Rep. Ferrars's Caſe; But Twiſden J. doubted if he could Falſify in any Action, by reaſon it is a Term only. Sid. 55. S. C.

(G. a) What Charges made by Tenant in Tail ſhall bind the Iſſue.

1. IF **Tenant in Tail** grants a Rent to him who has Right to the Land for a Releaſe **of his Right, this ſhall bind the Iſſue, becauſe the Iſſue has Advantage by the Releaſe.** 44 E. 3. *Octa. Lumb.* 22. *Pl. C.* 436. b. Br. Charge, pl. 4. cites 44 E. 3. 21, 22. ——— Br. Tail, pl. 6. cites S. C. ——— Ibid. pl. 37. cites 20 E. 4. 13. S. P. ——— Fitzh Charge, pl. 7 cites S. C. ——— 1 Rep. 94. b. 96. b. S. P. cites S. C ——— S. C. cited 10 Rep. 37. b. ——— 2 Brownl. 67. cites S. C. —— S. C. cited 2 Bulſt. 43. ——— Co. Litt. 343 b. S. P. ——— S. P. as to a Feme that has Title of Dower out of the Land. And. 288. pl. 296. Paſch 34 Eliz. by two Juſtices.

2. So if **the** Rent be granted **by a Tenant in Tail** to him who pretends Title **to the Land, this ſhall bind Iſſue.** 8 H. 6. 23. Br. Charge, pl. 4. cites 44 E. 3. 21. 22. where there is a Quære for Title in Action where the Entry is not congeable. ——— So that the Difference is this, where the Act of the Anceſtor is apparently miſchievous to the Iſſue, it becomes abſolutely void by his Death; where it is apparently beneficial it is abſolutely good and binding for ever; where it is indifferent, and doubtful whether it will be of Profit or Loſs, there it is neither valid nor void, but only voidable at Election; Arg. Show. 374. Paſch. 4 W. & M.

3. **If a Man** deviſe Land to J. S. and his Heirs, upon Condition that he ſhall grant a Rent in Fee to J. D. and that if J. S. **the Donee** dies without Iſſue, **that** the Land ſhall remain to a * Stranger; **and dies, and** J. S. grants the Rent accordingly, **and dies; this Grant ſhall bind the Iſſue, becauſe this was not againſt the Will of the Teſtator, but agreeable to his Will, and this was granted for the** Pre- * Cro. J. 427 S. C. reports that the Land was limited to remain to J. D. and that J. D.

granted the Rent over to a Stranger. Poph. 131. Gouldwell's Caſe, S. C. agreed. — S. C. cited 5 Mod. 267. — Noy 80. S. P. per Cur. obiter cites 10 H. 7. 20.

Preſervation of all the Eſtate; for if this had not been done the Condition had been broken; And the Donee does not make this Grant meerly by Force of his Intereſt, but alſo by Force of an Authority given by the Deviſor; And ſome ſay, that the Donee is ſeiſed in Fee till the Rent granted, and after is Tenant in Tail by this Deviſe, inaſmuch as this doth not limit a Tail at firſt but a Fee. Mich. 15 Ja. B. R. per tot. Cur. between *Dutton and Ingham.*

Cro. Jac. 427. S. C. — Poph. 131. S. C. agreed — 5 Mod. 267. S. C.

4. So if a Deviſe be to another in Tail, upon Condition that he ſhall grant a Rent in Fee, and he does it accordingly, and dies, his Iſſue ſhall hold it charged with the Rent for the Cauſe aforeſaid; for this is mixed with the Authority of the Deviſor. Mich. 15 Ja. B. R. per Cur. between *Dutton and Ingham.*

Dal. 65. pl. 28. 6 Eliz. S. P. and ſeems to be S. C. but held

5. A *Woman Tenant in Tail makes a Leaſe for Years*, and afterwards *takes Husband and dies*; The *Husband being Tenant by the Curteſy ſurrenders* to the Iſſue. The Court held that the *Iſſue ſhall avoid the Leaſe.* Mo. 8. pl. 30. Paſch. 1 E. 6. Anon.

e contra, that the Iſſue ſhall not avoid the Leaſe, during the Life of the Tenant by the Curteſy; becauſe ſo long he ſhould be ſaid to be in of that Eſtate. —— 4 Le. 200. pl. 321. in Time of Eliz. Anon. S. P. and ſeems to be S. C. held accordingly. —— Ow. 83. Paſch. 6 Eliz. C. B. Powtrell's Caſe, S. P and ſeems to be S. C. and the Court held that the Iſſue could not avoid the Leaſe during the Life of the Tenant by the Curteſy; for the Tenant is a Purchaſor.

Ibid. 14. b. in Manſell's Caſe.

6. The Iſſue in Tail ſhall never avoid Things done by their Anceſtor, but ſuch as are or may be *to their Diſadvantage*; Arg. Pl. C. 426. b. Paſch. 15 Eliz. in Caſe of Smith v. Stapleton.

7. Tenant in Tail *by Letters Patents of the King* ſurrendered his Patents, and cancels them, and a *Vacat is made of the Inrollment*; the Iſſue ſhall be bound by it; for no other Perſon at ths Time of cancelling hath Intereſt; Per Manwood Ch. B. 3 Le. 165. pl. 217. Mich. 29 Eliz. in the Exchequer. The Maſter and Chaplains of the Savoy's Caſe.

8. If *Tenant in Tail aſſigns a Rent* out of the Land *to a Woman that is intitled to Dower thereof, not exceeding the yearly Value of her Dower*, and dies, this ſhall bind his Iſſue; Reſolved by two Judges. And. 287. 288. pl. 296. Paſch. 34 Eliz. Bickley v. Bickley.

9. Tenant in Tail *grants Rent* in Fee *to begin from* the Time of *his Death*; afterwards he *ſuffers a Recovery*; Some hold that this Rent charges this Land for ever; Arg. 2 And. 11. in pl. 6.

10. Tenant in Tail makes *Feoffment rendering Rent*, and dies, the Iſſue *accepts the Rent*, he cannot during his Life have a Formedon; Arg. Roll Rep. 153. Paſch. 13 Jac. B. R.

11. Tenant in Tail has a *Power to make a Leaſe for* 89 *Years, if three Perſons live ſo long, and reſerving the old Rent*, due and *payable yearly*, and he *makes a Grant in Reverſion for Years*, and whether that be good or no was the Queſtion, *there being a Leaſe for Life in Poſſeſſion*; the ſecond Leaſe was for 89 Years, if three live ſo long; for the Matter in Law, the Court held the Leaſe good, but for want of an Averment of the Life &c. the Plea was not good. Brownl. 173. Hill. 19 Jac. Oabel v. Perrot.

Chan. Caſes 103. S. C. Ld. Keeper and the Maſter of the Rolls held that the Mortgagee could not be relieved in Equity. Nevertheleſs at the Plaintiff's Impor-

12. Tenant in Tail *mortgages without Fine*, and in the Mortgage is a *Covenant for further Aſſurance*, the Iſſue is not bound in Equity to make it. Lev. 238. Paſch. 20 Car. 2. B. R. in Cane. Jenkins v. Keymis.

Importunity he directed a Caſe to be made, but afterwards he diſmiſſed the Bill. —— Chan. Rep. 275. S. C. and the Court diſmiſſed the Bill.

13. There was an *Entail in Equity but not in Law*, by Means of a Marriage Agreement and Portion. The Queſtion was, Whether the Iſſue ſhall be bound by the Agreement of his Father without a Fine? Chan. Caſes 234. Mich. 26 Car. 2. Norcliff v. Worſeley. 3 Chan. Rep. 30. S. C. decreed that the Conveyance be made according to the Covenant. —— Fin. Rep. 128. S. C. but S. P. does not fully appear.

14. Tenant in Tail *deviſed to his Wife for Life* voluntarily, and not in Purſuance of Marriage Articles, it was inſiſted that the Father, the Deviſor, had Power to dock the Intail, and that there were Precedents for making good the Deviſe againſt the Iſſue. Per Finch C. I will never help the Iſſue againſt a *Purchaſor*, but here it is only a Bounty in this Caſe, and in ſuch Caſe, the Heir having a good Title, ſhall be aided; and decreed for the Plaintiff. 2 Chan. Caſes 4. Mich. 32 Car. 2. Anon.

15. Tenant for Life, Remainder for Life, Remainder in Tail; *Tenant for Life grants a Building Leaſe*, Remainder-man for Life conſents by Parol, *Remainder-man in Tail*, both during his Minority, and after his full Age, *negotiated to procure* his Father's Conſent, who was the Remainder-man for Life; But whether he ſhould be decreed to confirm Ld. Chancellor would adviſe, but decreed Remainder-man for Life to confirm. 2 Chan. Caſes 27. Paſch. 32 Car. 2. Sidney v. the Earl of Leiceſter.

16. *Partition* between Tenants in Tail, though but *by Parol*, decreed to bind the Iſſue; Per Cur. 2 Vern. 233. Trin. 1691. cites the Caſe of Burton and Jeux, and the Caſe of Roſe v. Roſe.

17. If Tenant in Tail *exchanges Land* and dies, and *Iſſue enters on the Lands taken in Exchange*, the Exchange ſtands good during his Life, and after his Death his Iſſue may avoid it by entering, and ſo on Toties Quoties; ſo that a *baſe Fee* paſſes from the Tenant in Tail; and ſo it does in Caſe of a Leaſe and Releaſe, Bargain and Sale, and Covenant to ſtand ſeiſed to Uſes in Fee, ſuch Conveyances paſs a baſe Fee, which continue till determined by the Act of the Iſſue in Tail. 7 Mod. 25. Trin. 1 Ann. B. R. in Caſe of Machil v. Clerke.

(H. a) What Charges made by Tenant in Tail ſhall be void as to one, and not againſt another as the Iſſue, and thoſe who claim under the Tail.

1. If the King gives in Tail, and after Donee leaſes for Years, rendering Rent and dies his Iſſue of full Age, and this is found by Office this Leaſe is of Effect againſt the King, for he ſhall have Primer Seiſin as of Land in Poſſeſſion, and yet this is not void againſt the Iſſue, but that after Livery ſued the Iſſue by Acceptance of the Rent ſhall make it good. Co. Litt. 46. cites *Auſtin's Caſe*. P. 2 & 3 Ph. & Ma. to be adjudged in the Exchequer. 7 Rep. 8 b. cites S. C.

2. If Tenant in Tail leaſes for Years rendering Rent, and after takes Wife and dies without Iſſue; now as to him in Reverſion the Leaſe is merely void. But if he endows the Wife of the Tenant in Tail 8 Rep. 34. a. S. P. contra to the

Opinion in 33 H. 8. 48 a D. [48.

Tail of the Land as to her who is in of the Eſtate of her Baron, this is good Leaſe and revived. Co. Lit. 46.

b 49. a] Quod fuit conceſſum per tot. Cur. Trin 29 Eliz. C. B.——D. 49. a. Marg. pl. 6. cites Mich. 1 E. 6 By all the Juſtices, that Leaſe for Years by Tenant in Tail if he dies without Iſſue ſhall not bind him in Remainder, and that it was ſo adjudg'd Hill. 40 Eliz. in C. B. Reeve v. Cor, in Caſe of a Leaſe for three Lives made by Tenant in Tail, that it does not bind thoſe in Remainder. And that the Court held 4 Ma'. that the Leaſe is void againſt him in Remainder or Reverſion.

7 Rep 8. b. S. P.

3. So if Tenant in Tail leaſe for Years reſerving Rent, and after dies without Iſſue, his Wife Privement enſeint, he in Reverſion enters, the Leaſe is void againſt him; But after the Iſſue is born the Leaſe is good againſt him if it be made according to the Statute, and otherwiſe voidable. Co. Litt. 46. a.

Three Juſtices denied this Caſe to be Law, and held that the Iſſue in Tail has Election to avoid or affirm the Leaſe, and

4. If Tenant in Tail leaſe for Years to commence 10 Years after, reſerving Rent, Tenant in Tail dies, the Iſſue enters and makes Feoffment, and after the 10 Years expire, and then the Leſſee enters; if Feoffee accepts the Rent of the Leſſee the Leaſe is made good, for it cannot be certainly known whether the Iſſue avoided this or not by his Entry, and therefore it ſhall be at the Election of the Feoffee to make it good or not. Co. Litt. 46. b. (Quære) Vide Pl. C. 437.

that by the Statute of Weſtm 2. but that the Conuſee had not; becauſe the Power and Privilege is Perſonal and cannot be transferr'd; But Holt Ch. J differ'd, and held the Leaſe actually void, quoad the Iſſue, as if the Tenant in Tail had made a Leaſe to commence after his Death; and that as by Law no Act is neceſſary to be done to avoid the Leaſe, ſo the Fine does not prevent its being void. ——Carth. 260 S. C. cited, and the three Juſtices and Holt Ch. J. differ'd as above.

S. C. cited Roll Rep. 403.——S. C. cited 2 Bulſt 44. and by Williams J. ibid. 45.——S. C. cited by Bridgman. Bridgm 27. but ſays, that it is otherwiſe of a Rent granted.——3 Le. 154. in pl. 205. S. C. cited Arg. and agreed by Gawdy J.——Show. 377. Arg. cites S. C. & S. P. as admitted Bridgm. 27. and ſays that the ſame Law is for thoſe that come to the Land under the Tenant in Tail, though the Eſtate Tail remains not barred or diſcontinued, (except the Iſſue in Tail who are help'd by the Statute de Donis); and therefore if Tenant in Tail make a Leaſe for Years the Feme ſhall hold it charged, ſo ſhall Tenant by Curteſy of a Feme Tenant in Tail; and Tenant for three Lives warranted by the Statute 32 H. 8. ſhall not avoid ſuch Leaſes, and the Reaſon is, Becauſe the Statute de Donis does not aid them, as it does the Iſſue.

5. If Tenant in Tail *before the Statute* 27 *H.* 8. had made a *Feoffment in Fee to the Uſe of himſelf and his Heirs, and he and his Feoffees had made a Leaſe for Years, rendring Rent,* and *after the Statute Tenant in Tail had died ſeiſed,* and his *Iſſue before any Entry* or Acceptance of the Rent had *aliened by Fine,* his *Alienee ſhould not have avoided this Leaſe*; for though the Son was remitted, it was not meerly void by the Death of Tenant in Tail without an actual Entry made by the Iſſue. Reſolved by the better Opinion of both Courts, except Saunders. 7 Rep. 9. a. cites D. 51. b. [pl. 17. Mich.] 33 H. 8. Anon.

S. C. cited Show. 377. and ſays the Reaſon was becauſe the King could

6. *Tenant in Tail,* the *Reverſion in Fee to the King made a Leaſe for Years,* and after is *attainted of Treaſon and dies, having Iſſue,* Quære if the King ſhall avoid the Leaſe during the Life of the Iſſue. Dy. 107. b. pl. 26. Mich. 1 & 2 P. & M. Anon.

not have two Fee Simples, one as Donor, and ſo he had the Reverſion; the other by the Attainder, as determinable on Death without Iſſue, but held there that if the King had had the Eſtate Tail as forfeited by Act of Parliament only, he ſhould not avoid Leaſes made by the Tenant in Tail, and obſerves that there the King became ſeiſed by Act in Law, viz. the Attainder.

Tenant in Tail, Remainder to the King, makes a Leaſe for Years, and is attainted, the King ſhall avoid the Leaſe; For the Eſtate Tail is as much gone by Merger as if Tenant in Tail was dead without Iſſue; Per Cur. 1 Salk. 338. in pl. 3. Hill. 5 W. & M.

7. If *Tenant in Tail makes a Leaſe for Years, and dies without Iſſue, his Wife enſeint* with a Son, and he in the *Reverſion enters,* againſt him the

the Leaſe is void; But after the Son is born the Leaſe is good, if it be made according to the Statute 32 H. 8. cap. 28. and otherwiſe it is voidable. Co. Litt. 46. a.

8. Gift in Tail to Baron and Feme, and to the *Heirs of the Body of Survivor*; As to the Eſtate Tail here is Uncertainty in the Perſon, and therefore if they make a *Leaſe for* 21 *Years*, obſerving all Circumſtances required by the Statute, yet this Leaſe ſhall not bind the Iſſue; for by *Uncertainty* of the Perſon of the Survivor the Eſtate Tail was not veſted. 10 Rep. 51. a. Mich. 10 Jac. in Lampet's Caſe.

9. When a Tenant in Tail makes Leaſe for Years, or grants a Rent, Common &c. or acknowledges a Statute, or does in ſome other Manner charge the Land, this is a good Leaſe, Grant or Charge, to bind the Tenant in Tail, and all other except the Iſſues in Tail and thoſe in Reverſion; and the Reaſon of this is, becauſe the Statute *Weſtm.* 2. cap. 1. that was made to avoid ſuch Charges, *does not aid any Perſon except the Iſſues in Tail, and thoſe in Remainder and Reverſion*; Per Bridgman. Bridgm 28. in Caſe of Croker v. Kelſey.

10. A *Man ſeiſed in Fee made a Leaſe for* 99 *Years, if three Perſons ſo long lived*, then *ſettled the Reverſion upon himſelf in Tail, with Power to make Leaſes for* 21 *Years*, and then he *made ſuch a Leaſe and died.* The Son, who was the Iſſue in Tail, (and not the Father as it is reported in Sid. 260.) *levied a Fine and ſold the Reverſion.* The *firſt Leaſe determined* upon the Death of three Lives. It ſeemed to the Court, that the *Cognizee might avoid this ſecond Leaſe*, becauſe it was never in the Election of the Tenant in Tail, or of his Iſſue, to avoid it, they having conveyed away their Eſtates before this ſecond Leaſe was to commence; For if Tenant in Tail makes a *Leaſe to commence in Præſenti*, and conveys away his Eſtate by Fine, the Cognizee muſt hold it charged with ſuch Leaſe; but if it be to commence *in futuro* it is otherwiſe, becauſe it cannot be avoided before the Commencement; But he ſaid there was no Judgment given in that Caſe; There were only three Judges then in Court, Kelynge who ſpoke nothing to the Point, and Twiſden and Windham were divided in Opinion. Cited by Dolben J. 4 Mod. 6. as Paſch. 15 Car. 2. Rot. 375. the Caſe of Opie v. Thomaſius, in Sid. 260. but ſays the Caſe is neither well ſtated, nor well reported there.

Lev. 168. S. C. Twiſden held that the Conuſee could not avoid it, but Windham held that he might as the Iſſue might; ſed adjornatur. —— Raym. 132. S. C. Keyling J. ſaid, that the Conuſee ſhall here have Advantage of Election as well as the Iſſue; Adjornatur. —— Keb. 778. pl. 20. S. C. adjornatur. —— Ibid. 910. pl. 13. S. C. & S. P. by Keyling; Adjornatur. —— Show. 178. cites S. C. and ſays that there never was any Judgment in it. —— Comb. 373 Trin. 8 W. 3. B. R. Holt Ch. J. ſaid, that the Caſe of Opy and Thaumaſius is much abuſed in Siderfin, and ſcarce intelligible there. —— Carth. 261. Dolben J. ſaid that no Judgment was given.

(I. a) What Charges made by Tenant in Tail ſhall be void by his Death; And what only voidable; And who ſhall avoid them.

Fol. 843.

1. IF Tenant in Tail of a Manor to which an Advowſon is appendant, grants the next Avoidance of the Advowſon, and dies, and the Iſſue enters into the Manor, the Grant is void, becauſe this is a Thing which lies in grant whereof no Formedon lies, and no Rent is reſerved upon it. P. 13 Ja. B. R. ſuch Judgment given in Bank affirmed in Writ of Error between *Bowles and Walter.*

Roll Rep. 82 pl. 27. Bolde v. Walter, S. C but S. P. does not appear. —— Ibid. 190. pl. 29. S. C. and Judgment affirmed. —— Bulſt. 31. Walter v. Bould, S. C. and S. P. per Cur. agreed. —— Noy 70. S. C. but S. P. does not appear.

Tenant in Tail grants the Advowſon to others, to the Uſe of himſelf and his Wife, and the Heirs Males of the Husband, and the Husband dies, and the Wife ſurvives, and the Ld. Say marries the Woman, and brought the Quare Impedit, the Eſtate is determined by the Death of the Tenant in Tail, and Judgment was given for the Biſhop, upon a Demurrer in Quare Impedit. Browal. 161. Mich. 30 Jac. Ld. Say v. Peterborough (Biſhop of).

Roll Rep. 190, 191. pl. 29 S. C. accordingly — S. C. cited Arg. Show. 384.

2. If Tenant in Tail leaſe for Years to commence at Michaelmas next enſuing, rendering Rent, and dies before Michaelmas, and the Iſſue enters into the Reſidue of the Land deſcended, yet he may make his Leaſe good by Acceptance of the Rent after Michaelmas, becauſe his Election was not come before. P. 13 Ja. B. R. per Coke ſaid to be ſo adjudged in Bank.

* Bridgm. 27. S. C. reports that the Wife and the Iſſue joined in the Fine, and that after ſhe made a Leaſe; but the other Reports are not ſo

3. If Baron and Feme ſeiſed in Tail to the Heirs of their Bodies begotten, the Remainder to the right Heirs of the Baron, and after the Baron dies, and the * Iſſue of their Bodies levies a Fine to J. S. in the Life of the Feme, and after the Feme makes Leaſe for † 30 Years, rendering Rent, and dies, the Conuſee ſhall not avoid this Leaſe at the Common Law, for the Eſtate Tail is barred by the Fine, and the Leaſe is good, being made by the Feme when ſhe was Tenant in Tail, and ſo not void againſt the Iſſue if no Fine had been levied, and now the Fine has barred the Iſſue and the Entail, and the Conuſee does not come in in Privity of the Tail, but is a Stranger to it, and therefore cannot avoid it, and therefore the Leaſe good as long as there is any Iſſue of their Bodies. Hill. 22 Ja. B. R. between *Crocker and Kelſey* adjudged upon a ſpecial Verdict, and after affirmed in Writ of Error in the Exchequer-Chamber, without any Doubt; but the Doubt of the Caſe was, Whether it was void by 11 H. 7. it being the Jointure of the Feme.

Cro. J. 688. pl. 5. S. C. adjudged. — Jo. 60. S. C. adjudged for the Leſſee for

Years, and affirmed upon Error in the Exchequer Chamber by all the Juſtices and Barons una Voce. —— Bridgm. 27. S. C. and the Leaſe adjudged good; For though the Eſtate Tail was barred, yet it was not extinguiſhed, but remains in Eſſe to ſupport the Leaſe ſo long as any Iſſue in Tail remains alive. —— Hutt. 84. Mich. 2 Car. S. C. affirmed in Cam Scacc. —— 2 Roll Rep. 490. 498. S. C. adjudged accordingly. —— S. C. cited Sid. 62. —— S. C. cited Skinn. 31. and the Juſtices ſaid, that the Reſolution therein went very far, and perhaps if to be adjudged at this Day, it would be contrary. —— 2 Show. 376. cites S. C.

† Roll ſeems to be miſprinted (30 Years) inſtead of (21 Years) For ſo are the Reports, and the Leaſe was held not to be an Alienation within the Statute of 11 H. 7. for that very Reaſon, becauſe it was an ordinary Leaſe for 21 Years

4. In Waſte, where Tenant in Tail *leaſes for Years and dies*, and *Aſſets deſcend*, and the Iſſue ouſts the Termor, the *Termor ſhall have Covenant*, and ſhall recover the Term; Per Belk. but Thorp and Skip. contra; for he ſhall *recover only Damages*. Br. Covenant, pl. 19. cites 38 E. 3. 24. and ſee 32 H. 6. 11.

5. When Tenant in Tail makes any *Grant of the Thing itſelf entailed*, this Grant is not void by the Death of the Grantor, and the ſame may after be made good; but it is otherwiſe of a *Thing granted out of a Thing entailed*, as of a *Rent*, ſuch Grant is void by the Death of the Grantor, and can never be made good; Arg. Bulſt. 32. Trin. 8 Jac. in Caſe of Walter v. Bould.

6. Grant of the *next Avoidance of an Advowſon appendant* is meerly void after his Death. Bulſt. 35. Trin. 8 Jac. Walter v. Bould.

7. If Tenant in Tail makes a Leaſe for Years *without reſerving any Rent*, yet this Leaſe is not void, but voidable only by the Iſſue, notwithſtanding the Statute De Donis; Reſolved per Cur. But it ſeems if the Leaſe be expreſſed *to commence after his Death* it is void. 1 Sid. 261. Trin. 17 Car. 2. Opie v. Thomaſius.

8. If Tenant in Tail makes a *Bargain and Sale to another and his Heirs*, the Bargainee has a Fee, and the *Eſtate ſhall continue* after his Death, *till avoided by the Iſſue*; Per Holt Ch. J. in delivering the Opinion

nion of the Court, though he ſays that hereby he contradicts Litt. S. 612. but that he does it upon great Authority, viz. **the Caſe of Fines,** and Hob. 319. which ſays, the Law abhors Abeyance, and never ſuffers it but in Caſe of Neceſſity; And that though Saund 260 (**Tooke v. Glaſcock**) is againſt him, yet he has the Authority of **Seymour's Caſe.** 7 Mod. 24. 27. Trin. 1 Ann. B. R. in Caſe of Machil v. Clerk.

(I. a 2) Leaſe for Years by Tenant in Tail.

1. 32 *H.* 8. 28. *S.* 2. ENables *Tenant in Tail to make Leaſes, provided no old Leaſe be in Being, nor to extend to Reverſions, or Lands not uſually letten, and not to exceed* 20 *Years, or three Lives, and the ancient Rent at leaſt to be reſerved.*

2. If it be *agreed by Indenture* between two Men that J. S. and J. D. after Eſtate executed to them of certain Land ſhall ſtand ſeiſed to the Uſe of one of the Parties in the Indenture in Tail, and that the ſaid Tenant in Tail *may make Leaſe for* 40 *Years at his Pleaſure*, and that the ſaid Feoffees ſhall be ſeiſed to the ſaid Uſes, now, notwithſtanding the Statute of Uſes, the Leaſes made are good, and the Statute does not alter it; Per Hales J. Dal. 11. pl. 14. Paſch. 7 E. 6.

3. *Leaſe for Life* by Tenant in Tail; Tenant in Tail *dies without Iſſue*; By two Juſtices the Leaſe is void; by two it is only voidable. 4 Le. 118, 119. pl. 238. Mich. 23 Eliz. C. B. Anon. Godb. 9. 23 El. C. B. Court divided as to a Leaſe for Life.—— D. 49. pl. 6. that it was not voidable by either Remainder-man or Donor.——Ibid. Marg. pl. 6. cites 4 Mar. per Cur. that it is void, 1 E. 6. accordingly and 40 El. in C. B. adjudged in Caſe of a Leaſe for Years, and ſo in Caſe of a Leaſe for Life, cites Hill. 39 Eliz. Reve v. Cox. ——Noy 66. S. C. and though the Leaſe was with Warranty, yet the Entry of the younger was not hindred by it; For the Remainder was not deveſted, becauſe the Leaſe was not a Diſcontinuance.——Cro. E. 602. pl. 13. Hill. 40 Eliz. C. B. Keen v. Cope, S. P.——Adjudged void contrary to the Opinion in D. 48. 8 Rep. 34. Paynes Caſe.——The difference is between a Leaſe for Life and a Leaſe for Years Co. Litt. 45. b.——Eyre J. held that a Leaſe for Years by Tenant in Tail becomes void by his dying without Iſſue And per Gregory J. no Acceptance of Rent by Reverſioner &c. can make it good, becauſe the Eſtate out of which it was created is determined. Skin. 329. Hill. 4 W. & M. B. R. in Caſe of Simmonds v. Cudmore.

4. Leaſe by Tenant in Tail for 20 *Years, to begin at Michaelmas next*, is good by 32 H. 8. So is a Leaſe for 10 *Years and after for* 11 *Years.* Le. 148. in pl. 205. Trin. 31 Eliz. cites D. 246. Cart. 15. Mich. 16 Car. C. B. Bridgman Ch. J. cites the Caſe in D. 246. and ſaid, that true it is a future Intereſt, not a good Leaſe, and that ſo it was reſolved in the Exchequer; For it is expreſsly within the Words of 32 H. 8. and ſays, ſuppoſe there were a Leaſe in being of Tenant in Tail, and 8 or 9 Years are expired, if he makes a Leaſe to begin 20 Years after theſe 9 are expired, it is not good.

5. 32 H. 8. makes Leaſes good againſt the Tenant and his Heirs, yet it is not good againſt the *Donor or him in Remainder.* Mo. 133. Arg. pl. 278. Trin. 25 Eliz. Noy 6. Windham's Caſe S. P. as to him in Remainder. Noy 6. Windham's Caſe, S. P. as to him in Remainder. —It is void againſt him in Remainder, and Acceptance cannot make it good, becauſe the Eſtate out of which it iſſues is determined. Roll R. 260. pl. 31. Mich. 13 Jac. B. R. in Caſe of Bridgman v. Charlton. —So where a Leaſe for three Lives was made with Warranty againſt him and his Heirs, it determines by his dying without Iſſue. Cro. E. 602. pl. 13. Hill. 40 Eliz. C. B. Keen v. Cope.—— Cro. C. 156. Salvin v. Clerke, Contra, which See Fines (H. a)

6. *Baron*

See tit. Baron and Feme (F. a. 10) the Notes to pl. 3.

6. *Baron and Feme* ſeiſed in Tail make a Leaſe reſerving rent; The Baron dies. The Feme enters and dies; The Iſſue in Tail brings Waſte, and counts of a Leaſe made by Baron and Feme. Defendant pleads that Baron and Feme did not demiſe, and upon this Iſſue joined, and the Matter before found adjudged againſt the Plaintiff, becauſe the *Feme had Election to agree or diſagree* to the Leaſe, and when ſhe diſagrees it is as if it had never been her Act. And. 220. pl. 239. Paſch 28 Eliz. Rot. 122. Thetford v. Thetford.

4 Le. 57. S. P. not reſolved.

7. *Baron and Feme*, Tenant in ſpecial Tail; *Baron dies*; *Feme makes a Leaſe according to* 32 *H.* 8. The Leaſe ſhall bind the Iſſue according to the 32 H. 8. 28. Godb. 102 pl. 119. Mich. 28 & 29 El. C. B.

8. Upon a Leaſe made by Tenant in Tail, it is not ſufficient that the Verus and *Antiquus redditus* be *reſerved* to the Heirs in Tail, but it muſt be reſerved alſo to the Tenant in Tail himſelf, ſo that if he reſerve to himſelf leſs Rent during his Life, and after his Death the true and ancient Rent, the Leaſe is not good; Per Wray Ch. J. 5 Rep. 6 a. Mich. 31 & 32 Eliz. B. R in Ld. Mountjoy's Caſe.

Cro. E. 340. pl 7. S. C. held accordingly.

9. Tenant in Tail ſeiſed of a *Manor and three Acres*, *Part thereof* in Demeſne, makes a Leaſe of the three Acres, and alſo of the Manor, for 21 Years, rendring Rent for the three Acres, and all the Premiſes therewith demiſed 5 l. Though the Manor comprehends the three Acres, yet the Leaſe being *for three Acres and of the Manor*, yet in Conſtructions of Law they ſhall be taken as two *ſeveral Demiſes*. Ow. 119 Hill. 37 Eliz. B. R. Tanfield v. Rogers.

10. Error of a Judgment in Replevin. The Defendant avow'd for Rent, for that H. M. was Tenant in Tail, and *leaſed* the Lands *for three Lives*, *rendring Rent*, and that the Reverſion deſcended to him as *Heir in Tail*, wherefore he *avows and avers*, that at the Time of the Demiſe, & Diu antea the Lands were demiſed, and *that the Rent reſerved was Verus & Antiquus Redditus*. Upon Demurrer to this Avowry, the Juſtices were all of Opinion that the Averment, that the Lands were formerly demiſed, was not ſufficient, for he *ought to have averred*, *that they had been ſo demiſed for* 11 *Years next before* the making this Leaſe, becauſe the Statute 32 H. 8. limits the Leaſes to be made by Tenant in Tail, that they ſhould be made only of ſuch Lands which had been commonly let by the greater Part of 20 Years next before the Leaſe made, alſo the Averment that the Rent was Verus & Antiquus Redditus is not ſufficient, for it may be the ancient Rent which was 20 or 100 Years ſince; but it ought to have been averred that it was the ancient Rent which had been reſerved for the greater Part of 20 Years preceding, and of that Opinion were all the Juſtices; For theſe Averments might be true, and yet the Circumſtances of the Statute not be obſerved. Cro. E. 707. pl. 29. Mich. 41 & 42 Eliz. B. R. Mallet v. Mallet.

Ibid. 110. Bank v. Brown, S. P.

11. Tenant in Tail of a *Copyhold Manor*, wherein Copyholds are demiſable for Life &c. for a certain Rent; the Copyholder for Life dies, and the Lord demiſed it by Indenture for 21 *Years (inſtead of Life)* rendring the ancient Rent &c. and by the better Opinion of the Court it is good within the 32 H 8. for it is not any Prejudice to the Iſſue as to the Rent. Noy 106. Mich. 43 Eliz. C. B. Ld. Norris's Caſe.

Leaſe by Deed inſtead of Copy rendring the ſame Rent as before is good within. 32 H. 8. Cro. J. 76. pl. 6. Trin 3 Jac. B R. Baugh v. Hains.

12. Tenant in Tail of a *Copyhold* Manor, upon ſurrender by Tenant for Life, grants for three Lives to commence *a Die Datus*, reſerving the *ancient Copyhold Rent* and more; 1ſt, The *Demiſe by Copy* ſhall make the Land to be within the Words uſually demiſed in 32 H. 8. 2dly, The Copyhold Rent ſhall be ſaid the antient accuſtomed Rent. 3dly, The Grant of Leaſe to commence *a Die Datus* is good with this Proof, that *Livery was made after the Date*. Mo 759. pl. 1050. Paſch. 3. Jac. Banks v. Brown.

—— 6 Rep. 37. a. S. C.

13. Leaſe

13. Leaſe made by Tenant in Tail *for more Years than the Statute allows* is void in the whole; Arg. per Warburton J. Roll R. 472. Hill. 4 Jac. in Cam. Scacc.

14. Leſſee *for Years ſurrendered on Condition* to Tenant in Tail, who leaſes for *three Lives*; Leſſee for Years *enters for Condition broken*; If the Leaſe for Life be good againſt the Iſſue in Tail; Quære. Mo. 783. pl. 1084. Trin. 4 Jac. in Caſe of Sidenham v. Caps.

15. Tenant in Tail makes *Leaſe for Life to a Feme Covert*; *Baron ſurrenders*; After Tenant in Tail makes *Leaſe for three Lives* and dies; Baron dies; Feme enters and dies; The Iſſue ſhall not avoid the Leaſe. Mo. 783. Trin. 4 Jac. cited per Popham to be adjudged between Sidenham and Caps.

16. If Tenant in Tail makes a Leaſe *to commence at a Day to come, and dies before the Day*, this is merely void by his Death; Per Tanfield Ch. B. ad quod non fuit reſponſum. See Pl. C. For there it is made a Quære in Caſe of **Smith v. Stapleton.** Lane 96. Hill. 8 Jac. in the Exchequer, in Caſe of Wentworth v. Stanley.

A Leaſe was made to the Defendant by Tenant in Tail for 40 Years, to commence at a Day to come, though this was void in Law, yet it was holpen in Equity againſt the Heir. Toth. 225. cites Trin. 40 El. Prince v. Green.

17. Leaſe made by Tenant in Tail *is good againſt all but* thoſe who were aided by Weſtm. 2. which are the *Iſſue* in Tail *and the reverſioner*. Jo. 61. Hill. 22 Jac. B. R. Croker v. Kelſey.

A Woman Tenant in Tail made a Leaſe for 31 Years, and took Husband, had Iſſue, and died; the Husband is Tenant by the Curteſy, and ſurrenders to the Heir; though this Surrender be good, yet the Iſſue cannot avoid this Leaſe during the Life of the Tenant by the Curteſy, for the Tenant is in as Purchaſor. Ow. 83. Paſch. 6 Eliz. C. B. Sowtrell's Caſe.——— Dal. in Fine Novel Bendl. 65. S. P. accordingly.———D. 46. b. Marg. pl. 9. cites S. C. accordingly, though the Tenant ſurrenders to him, and though the Leaſe is not warranted by 32 H. 8. ———Mo. 8. pl. 30. Paſch. 3 E. 6. Anon. ſeems to be S. C reports that the Court held that the Iſſue ſhall avoid the Leaſe. ———4 Le. 200. pl. 321. Anon. S. P. and ſeems to be S. C. held that he ſhould not avoid the Leaſe during the Life of the Tenant by the Curteſy.——S. C. cited Arg. Show. 377.

18. Two *Coparceners* in Tail, the Baron of one being *Tenant by the Curteſy joins* in a Leaſe, *rendering Rent to him and the other Coparcener and their Heirs*, this is not a good Leaſe by 32 H. 8. of Eſtates Tail, inaſmuch as it is not reſerved to the Donee and her Heirs, but to the Tenant by the Curteſy jointly with her, becauſe Rent goes ſtrictly as it is reſerved by the Leſſor, and not otherwiſe. Lat. 45. Trin. 2 Car. Thompſon's Caſe.

19 Baron and Feme Tenants in Tail; Baron dies leaving two Daughters and his Wife living; The *Daughters levy a Fine* to a Stranger and his Heirs; The Mother Tenant in Tail grants a Leaſe for 100 Years; This is a good Leaſe againſt *Conuſee of the Fine* ſo long as there is Iſſue in Tail in being. Sid. 62. pl. 32. Mich. 13 Car. 2. B. R. Cudmore v. Betiſon.

S. C. cited Arg. Show. 253.

20. There is a Difference between a voidable Leaſe by Tenant in Tail to *commence In Præſenti, or In Futuro*; In the firſt Caſe, if he *conveys his Eſtate over*, the Conuſee ſhall hold it charged with the Leaſe; In the ſecond Caſe, not; for the Avoidance cannot be before the Commencement. Sid. 271. pl. 9. Trin. 17 Car. 2. B. R. Opee v. Thomaſius.

21. If Tenant in Tail makes a *Leaſe for* 21 *Years*, which *expires*, and then the Land *continues undemiſed* 12 *Years*, and Tenant in Tail dies, his Iſſue cannot demiſe this Land by the Statute; Per Moreton J. Raym. 166. Hill. 19 Car. 2. B. R. in Caſe of Pemble v. Stern.

22. Though a Leaſe for three Lives is warranted by the Statute, yet if a *Warranty be added againſt all Perſons*, whether this is a Diſcontinuance of the Reverſion, cites Cro C. 156. and Jo. 208. and Lat. 72. Salvin, alias Sawle v. Clark, that it is; But Vaughan Ch. J. denies it. Vaugh. 388. Mich. 25 Car. 2. in the Caſe of Bole v. Horton.

23. If Tenant in Tail makes a Leaſe for Years, after his Death his *Widow* ſhall hold it charged; ſo ſhall *Tenant by the Curteſy* of a Feme Tenant in Tail; Arg. Show. 377. Paſch. 4 W. & M. in Caſe of Simmonds v. Cudmore.

24. A *Reverſionary Leaſe* made by Tenant in Tail with Remainder to him in Fee, *contrary to a Power*, is not void but voidable only by the Iſſue in Tail. Carth. 258. Hill. 4 W. & M. in B. R. Simmonds v. Cudmore.

25. Tenant in Tail, *Remainder to his own Right Heirs*, makes a Leaſe for Years and dies without Iſſue; his *Heir general* cannot avoid this Leaſe; Arg. Show. 375. Paſch. 4 W. & M. in Caſe of Simmonds v. Cudmore, cites 1 Inſt. 46.

26. If Tenant in Tail makes a *future Leaſe for Years, which by Poſſibility may be to commence during the Life of Tenant in Tail*, it is not void but voidable as to the Iſſue, but if a future Leaſe be to *commence after the Death of Tenant in Tail* it is merely void in its Creation; Per Holt Ch. J. in delivering the Opinion of the Court. 2 Salk. 620. Trin. 1 Ann. B. R. in Caſe of Machil v. Clark.

Chan. Prec. 165. pl. 137. S. C. and the Decree in Chancery diſmiſſed in the Houſe of Lords. — Show. Parl. Caſes 76.

27. Leaſe by Tenant in Tail in Conſideration of procuring a Match between the Tenant in Tail and the Lady Ogle, was endeavoured to be ſet aſide by Remainder-man, to whom the Eſtate was come by Death of Leſſor without Iſſue; Per Cur. if the Leaſe was *gained by Fraud or unjuſt Conſideration* it is to be deemed void, and the Eſtate diſcharged of it as if no ſuch Leaſe had been made. 2 Vern. 445. pl. 410. Mich. 1703. Stribblehill v. Brett.

Hall v. Porter, S. C. accordingly.——Equ. Abr. 89. pl. 3. cites S. C.——3 Lev. 411. S. C. accordingly, and ſo a Decree in Chancery after two Verdicts at Law was diſmiſſed in the Houſe of Lords.

(I. a. 3) Leaſe by Tenant in Tail not good, but made good by ſome After-Act.

1. TENANT in Tail makes a Leaſe for Years *rendering Rent* 20 *s.* and afterwards *releaſes all the Rent but* 1 *s.* and dies, and the *Iſſue accepts the* 1 *s.* whether the Iſſue can now diſtrain for more than the 1 s. Quære. D. 304. a. pl. 53. Mich. 13 & 14 Eliz.

And the Acceptance of the Rent by the Iſſue will not confirm the Leaſe, becauſe the Iſſue was remitted to the Eſtate Tail by Deſcent, and ſo the Leaſe is utterly void which was made by the Father then being Tenant in Fee Simple. Mo. 846. pl. 1143. Mich. 13 Jac. B. R. ——For the Leaſe for Years iſſued out of the Fee, which is determined by the Remitter, and Acceptance of the Rent cannot make it good againſt him in Remainder, for as to him it is void. Roll Rep. 260. pl. 31. Mich. 13 Jac. B. R. Bridgman v. Charlton.

2. Tenant in Tail *makes Feoffment in Fee* to the Uſe of himſelf in Fee, and after leaſes for Years, and dies, the Eſtate of the Leſſee is immediately changed into a Tenancy *at Sufferance*. Roll Rep. 260. pl. 31. Mich. 13 Jac. B. R. Bridgman v. Charlton.

3. A. Tenant for Life, Remainder to B. in Tail, Remainder over. A. and B. made *Leaſe for Life, Remainder for Life. Acceptance of Rent by the Iſſue* in Tail of Leſſee for Life, is an Affirmance of the Leaſe for Life and of that in Remainder. Le. 243. pl. 329. Trin. 33 Eliz B. R. Geoffries v. Coites.

Cro E 252. pl 22. Jefferis v. Coyte, S. C adjudged that the Leaſe in Remainder was good.

4. *A. Tenant for Life*, Remainder *to B. his Son in Tail*, Remainder *to the right Heirs of B. B. in the Life-time of A makes a Leaſe for Years, and* then *ſuffers a Common Recovery*, and *dies without Iſſue*; In this Caſe theſe Points were held clearly, 1ſt, That when the Son makes a Leaſe for Years, this operates as well out of his Remainder in Fee as out of his Eſtate Tail; ſo that when he dies without Iſſue, this is a good Leaſe againſt the Heir in Fee, unleſs the Iſſue of Tenant in Tail had entered and avoided it. 2dly, When Tenant in Tail makes a Leaſe for Years, and then ſuffers a Recovery, this works by Way of Corroboration upon the Leaſe, and makes that good. Freem. Rep. 310. pl. 379. Mich. 1675. Anon.

5. Tenant in Tail, *Reverſion to himſelf in Fee, with a Power to make Leaſes in Poſſeſſion, makes a Leaſe for 21 Years, and afterwards* makes *another Leaſe to commence upon the Determination of the firſt Leaſe. Before the ſecond Leaſe commenced* the *Tenant in Tail died*, and the *Iſſue in Tail levied a Fine* in order to make a Settlement. All the Judges held this Fine had made the ſecond Leaſe unavoidable, becauſe by the Fine the Eſtate Tail was as it were merged in the Fee, and he had no Way to avoid the Leaſe but only by Virtue of the Eſtate Tail, which was now deſtroyed. Freem. Rep. 503. pl. 677. Hill. 1692. B. R. Symonds v. Cudmore.

Show 370. to 386. S. C. argued. Holt Ch. J. ſaid it would be hard to make it ſo far to have a Continuance as to prejudice the Intereſt of a Stranger, eſpecially the Reverſion being in him; ſed Curia adviſare vult. —— 1 Salk. 338. pl. 3. S. C. the whole Court agreed that the Remainder in Fee ſtood chargeable with this Leaſe, and it ſhould have been ſerred out of the Remainder in Fee had the Tenant in Tail died without Iſſue. —— 4 Mod. 1. S. C adjudged that the Conuſee of the Fine could not avoid this Leaſe. —— Skinn 284. pl. 3. S. C. Curia adviſare vult. And ibid. 317. pl 4. Curia adviſare vult. —— 3 Salk. 335 pl. 1. S. C. and per Curiam the Leaſe is not void but voidable by the Iſſue in Tail, and that only in reſpect of the Eſtate Tail, and therefore ſince this Leaſe iſſued out of all the Intereſt and Eſtates which the Leſſor had, viz. as well out of the Reverſion in Fee as the Eſtate Tail, and ſince the Eſtate Tail is now extinguiſhed by the Fine, which has now turned all into an intire Fee Simple, it has thereby made the Eſtate unavoidably ſubject to this Leaſe —— Carth. 257. S C. reſolved per tot. Cur that this Fine with Proclamations hath not only barred but extinguiſhed the Eſtate Tail, as much to all Intents as if Tenant in Tail had died without Iſſue; for otherwiſe the Cogniſee muſt have two diſtinct Eſtates in Fee, viz. a baſe Fee, determinable upon the Death of Tenath of Tenant in Tail without Iſſue, and alſo an abſolute Fee; and therefore the greater Fee which is abſolute ſhall ſwallow up the baſe Fee, and be conſolidated into one intire Eſtate; and that this Eſtate Tail being extinguiſhed by the Fine, the reverſionary Leaſe is a good and unavoidable Leaſe, iſſuing out of the Remainder in Fee, which the Leſſor had at the Time of the Leaſe made. —— 12 Mod. 32. S. C. held accordingly per tot. Cur. and that none but Privies in Blood ſhall avoid ſuch Leaſe.

(K. a) What Perſon may be Leſſee.

1. **If a Leaſe be granted to a** Corporation aggregate for their Lives, **this is no Eſtate for Life, but Fee; for they** never die. 21 E. 4. 76. **Contra** 11 H. 7. 12.

Br. Eſtates, pl. 90 cites S. C. that if a Man gives Land to the Mayor and Commonalty of London, they have Fee-ſimple without other Words; but contrary of Abbot and Covent; for the Covent does not take.

2. **But Corporation aggregate may be Leſſee** for Life of the Leſſor. 21 E. 4. 76.

(N. a)

Fol 844.

N. B. (L. a) Roll is carried to tit. Deviſe (P. a) and (M. a) Roll is carried to tit Deviſe (Q. a)

(N. a) Eſtate for Life.

Eſtate for Life or Fee.

1. IF Leſſee for Life grants the Land to another and his Heirs of his Body, for the Life of the Leſſee, this is but an Eſtate for Life. 18 E. 3. 44. b.

2. If I give Land to another till I come from St. James's, this is an Eſtate of Franktenement. 3 Aſſ. 9.

3. If the King grants to another Ballivam vel hujuſmodi, donec bene & fideliter ſe geſſerit in Officio illo, this is an Eſtate of Franktenement. 3 Aſſ. 9.

Fitzh Aſſiſe, pl. 186. cites S. C.

4. If a Man leaſe Land to another to have and to hold Donec Solverit to the Leſſor 12 Marks Annuatim & ſi dictus redditus a retro fuerit, liceat prædicto (*) the Leſſor prædictam Terram ingredi quouſque &c. the Leſſor has an Eſtate of Franktenement in the Rent, and the Leſſee has a Franktenement in the Land. 38 Aſſ. 9. adjudged.

* Fol 845.

5. If a Man grants to another Common of Turbary in certain Land, and to dig and carry at his Will, this is an Eſtate of Franktenement, for the Word (at Will) refers to the uſage and not to the Common. 5 Aſſ. 9. adjudged.

6. Waſte upon a Leaſe for Life; the Defendant ſaid, that he *leaſed to him, his Heirs, and Aſſigns, for Term of his Life and a Year over*, Judgment of the Writ, and there it is admitted that this is no Eſtate of Inheritance by this Word (Heirs) by Reaſon of theſe Words (for Term of Life.) Br. Eſtates, pl. 26. cites 39 E. 3. 25.

7. If *Rent* be granted *for Life, and that he and his Heirs may diſtrain*, it is Fee Simple. Br. Eſtates, pl. 13. cites 8 H. 4. 19.

S. P. adjudged, Paſch. 7 Jac. Mo. 876. Wilkins v. Perrat, and ſeems to be S. C and cites 2 E. 2. Fitzh. Judgment 99 39 E. 3. 21 H. 6. 7.

8. A *Rent De Novo* was granted *to B. and his Heirs Habend' to B. and his Heirs, to the Uſe of him and his Heirs during the Life of J. S.* It ſeems, that becauſe the *Intent* appears to paſs only an Eſtate for Life, nothing more ſhall paſs; Per Doderidge Serjeant; to which the Juſtices ſeemed to incline, and Coke and Foſter ſaid, that there ſhall be a ſpecial Occupancy of the Rent. D. 169. Marg. cites Paſch. 7 Ja. C. B. Davis's Caſe.

9. If Land is given to one *and his Aſſigns* it is an Eſtate only for Life. Litt. S. 1.

10. A. in Conſideration of 7000 l. enfeoffs B. C. and D. *Habend' Heredibus ſuis* in perpetuum *ad Opus et Uſum ipſorum* B. C. and D. in perpetuum, (but *not ſaying "Hæredum ſuorum")* with *Warranty to them Heredibus & aſſignatis* ſuis *in Forma prædicta*, this gives only an Eſtate for Life; for the Uſe is expreſſed only *to themſelves by their Names in perpetuum*; But if thoſe Words had been wanting the Conſideration had been wanting the Conſideration had been ſufficient, for the Law will intend ſufficient Conſideration by reaſon of the ſaid Sum; but when the *Uſe is expreſſed* otherwiſe by the Party himſelf it is otherwiſe, and the *Warranty* was Eis Hæredibus & Aſſignatis ſuis *in Forma prædicta*, which is a Declaration of the *Intent* of A. that the Feoffees ſhould not have the Uſe in Fee Simple, and it may be that the Uſe during the three Lives was worth the 7000 l. D. 169. a. pl. 21. Trin. 1 Eliz. in the Court of Wards. Wilkes's Caſe.

11. H.

11. H. in Conſideration of Marriage covenanted to execute an Eſtate in Fee to the Uſe of H. for Life, and after [* his Deceaſe] to the Uſe of A. his intended Wife *for by and until one of the Sons of H. of the Body of the ſaid A. lawfully begotten, ſhall be* 21. H. dies without Iſſue by A. A. has a good Eſtate for Life before Iſſue had; but if there had been Iſſue a Son, and that Son had lived to 21, the Eſtate of A. had been abridged. Mo. 15. pl. 56. Hill. 3 Eliz. C. B. Cockett v. Sheldon.

D. 300. b pl. 39. Anon. Paſch. 13 Eliz. S. P. and ſeems to be S. C. notwithſtanding the Difference of the Years; adjudged that the Entry of A. was lawful. —— Bendl. 203. pl. 220. S. C. 3 Eliz. and ſays it was adjudged Paſch. 13 Eliz. that A recover. —— And. 19 pl. 40 S. C. adjudged accordingly; For thoſe Words (* after his Deceaſe to the Uſe of A.) without ſaying more, gives an Eſtate to A. for Life notwithſtanding the ſubſequent Words; But the Reporter makes a Quære as to the Reaſon. —— S. C. cited Le. 197.

12. Grant of Eſtovers *to B.* to be burnt in his Houſe, *and that B. and his Heirs may take* them at certain Times in the Year; Adjudged that this was but Eſtate for Life of B. becauſe *the Word (Heir) is not in the Grant itſelf*, though it is in the Sequel of the Deed. D. 253. pl. 100. Trin. 8 Eliz. Marg. cites it as Ld. Paget's Caſe.

13. If a *Feoffment* be made *to A. and his Heirs Donec & Quouſque J. S. ſhall pay to A.* 1000 *l. J. S before the Day of Payment dies.* A. and his Heirs ſhall retain the Land for ever. D. 300. b. pl. 39. Paſch. 13 Eliz. ſays it was held by all at Dinner at Serjeant's Inn in Fleet-ſtreet.

14. Limitation to the Uſe of *himſelf for Life*, Remainder to the Uſe *of his Heirs*, and *the Heirs Female of the Body of the ſaid Heirs.* The Heir takes by Purchaſe, and has the Inheritance, and the Anceſtor only an Eſtate for Life. 3 Lev. 433. per Cur. in Caſe of Loddington v. Kime cites 1 Rep 95. (b.) [Trin. 23 Eliz. in Shelley's Caſe.]

15. M. a Jointreſs *did give and grant* to J. S. *Habendum to J. S. his Heirs and Aſſigns, to the ſole Uſe of J. S. and his Heirs Pro Termino Vitæ of the ſaid M.* this was held a Forfeiture, becauſe *Pro Termino Vitæ* refers to the Uſe only, and not to the Eſtate and Uſe. D. 169. Marg. pl. 22. cites Hill. 37 Eliz. B. R.

16. A. *Tenant for Life grants a Rent to B. and his Heirs*; this at firſt Sight ſeems to be a Rent in Fee, but when it *appears in the Conveyance that A. was only Tenant for Life*, there upon Conſtruction of the Deed itſelf it cannot be intended that he granted a Fee, but that an Eſtate for Life only paſſed in the Rent; Arg. Godb. 443. Mich. 4 Car. B. R.

17. Covenant that the Grantee of Rent and his Heirs, for want of a Diſtreſs, or upon a Reſcous, Replevin, or Pound-breach may *enter and retain the Land to him and his Heirs, until* the Rent be ſatisfied; It was agreed per totam Curiam, that upon Entry by the Grantee for Part of the Rent-Arrear he has a Fee Simple determinable. Poph. 126. Trin. 15 Jac. B. R. Havergill v. Hare.

Cro. J. 510. pl. 22. S. C. reſolved, that he has Quaſi a conditional Inheritance, which ſhall go to his Heirs and Aſſigns, but always determinable on the Payment of the Rent. —— 2 Roll Rep. 12. S. C. argued.

18. *Rent granted in Fee, Proviſo* that the Grantee ſhall *enter and retain till ſatisfied* of the Profits. The Power of Entry is an Inheritance, and deſcends with the Rent to the Heir, but when the Entry is made it is only a Chattel Intereſt in the Land, which ſhall go with the Arrears to the Executors. 1 Lev. 171. Trin. 17 Car. 2. B. R. Jemmot v. Cooly.

Were it not for the Words (till he be ſatisfied) the Inheritance of the Land would go to the Heir as a Penalty, but now it is but a Chattel. Ibid. —— Raym. 135. 158. S. C. adjudged. —— Saund. 112. S. C. adjudged, and Judgment affirmed in the Exchequer Chamber. —— Sid. 223. 262 344 S. C. but ſtates it as a Rent granted for Years. —— 2 Keb. 270 pl. 32. 19 Car. 2. B. R. the S. C. and that when this falls it is but a Chattel as the Arrears are, and therefore the Grantee

cannot cut Trees or pull down Houſes, but he may Plough and cut Graſs as he that has a particular Intereſt may.

Cart. 107. Mich 18 Car. C. B. per Bridgman Ch. J. S. P. accordingly, that

19. *Lands are limited to the Uſe of J. S. and W. R. and their Heirs, until they ſhall have raiſed ſo much Money*; Bridgman Ch. J. in delivering the Opinion of the Court ſays, it ſeems to be a Fee Simple, and that ſo it was agreed in **Boſworth's Caſe** in this Court. Cart. 75. Trin. 18 Car. 2. C. B. in Caſe of Thomaſin v. Mackworth.

it is a Fee Simple limited or conditional; The Difference is between a Limitation of an Uſe till 1000 l. be raiſed, that perhaps in a Uſe may be a Chattel; But if to A. and B. till ſo much be raiſed, perhaps it may be doubtful; But if it be limited to them and their Heirs till 1000 l. be raiſed, it is a limited Fee Simple.

Lands were conveyed *to A. and his Heirs Habendum for the Lives of B. C. and D.* this is no Fee Simple, but only a deſcendible Freehold, and it is all one as if all had been in the Premiſſes; and Judgment accordingly. 2 Keb. 865. pl. 20. Hill. 23 & 24 Car. 2. C. B. Ph. v. Piatt.

(N. a 2) For Life or in Tail.

By Deed.

1. GIFT *to a Man and two Women, and to the Heirs of their Bodies, or to two Men and a Woman, and the Heirs of their Bodies,* is but an Eſtate for Life; For Duplicationem Poſſibilitatis Lex non patitur; Per Coke. 3 Bulſt. 108. cites Fitz. tit. Tail, pl. 13.

Cro. C. 230. pl. 11. S. C. adjornatur. —— Ibid. 244. pl. 6. Meredith v. Jones, S P. and ſeems to be S C. and all

2. A. gives Lands *to Baron and Feme, Habend' to them to the Uſe of them and the Heirs of their Bodies begotten*; This is an Eſtate Tail; But if Lands are given *to J. S. for Life to the Uſe of J. D. and his Heirs,* J. S. has only an Eſtate for Life, and when this determines, the Uſe derived out of it is gone alſo, but when the Uſe is to the ſame Party it is but Limitation of Eſtate. Jo. 253. pl. 3. Hill. 7. Car. B. R. Jenkins v. Young.

the Court, abſente Richardſon, held that it is a Limitation of the Land itſelf, being all to one Perſon, and is as if it had been ſaid to them and to the Heirs of their Bodies, and is not like to the Caſe of 2 & 3 Eliz. D. 186. [a. pl. 1.] For true it is, when the Eſtate is limited to one or two, to the Uſe of others and their Heirs, the firſt Eſtate is not inlarged by the Implication, and the Uſe cannot paſs a greater Eſtate; But here, when the Grant and the Habendum convey the Eſtate, and the Limitation of the Uſe is to the ſame Perſon, this ſhews the Intent of the Parties, and is a good Limitation of the Eſtate; For it is not an Uſe derived out of the Eſtate, as where it is limited to a Stranger, but the Uſe and Eſtate go together, and therefore it is all one as if the Limitation had been to them and the Heirs of their Bodies; and ſo a Judgment in Wales was affirmed.

3. Settlement was made by A. to the *Uſe of A. for Life*, without Impeachment of Waſte, Remainder to the Uſe of the *Heirs of A lawfully begotten*, and to be begotten, and *for want of ſuch Iſſue* &c. Held to be a good Limitation to create an Eſtate Tail in A. and the Heirs of his Body. 1 Chan. R. 213. 13 Car. 2 fo. 571. Shelly v. Earsfield.

4. Eſtate limited *to one and his Heirs during four Lives*; being during four Lives it is no Fee; Arg. Cart. 166. Hill. 18 & 19 Car. 2. C. B.

5. To

5. *To A for Life the Remainder to the Heirs of his Body*, is an Eſtate Tail both in a Deviſe and in a Deed; Per Bridgman Ch. J. Cart. 171. Hill. 18 & 19 Car. 2. C. B.

6. A. covenants for him and his Heirs to ſtand ſeiſed of Land to the Uſe of *himſelf for Life*, Remainder *to B. for Life*, *Remainder to the firſt Son of B. in Tail Male* and ſo on to the fourth *and ſo ſeverally and reſpectively to every of the Heirs Male of the Body of B. and the Heirs Male of their Bodies*, *Remainder to C.* Proviſo if B. die without Iſſue Male, then &c. A. dies. B. enters and ſuffers a Recovery, wherein he is vouched, and vouches the Common Vouchee. B. dies without Iſſue Male. Adjudged in B. R. that B. had Eſtate for Life, and that the Words (every of the Heirs Male) were intended (Sons,) but the Judgment was reverſed in Cam. Scacc. 2 Jo. 114. Trin. 30 Car. 2. B. R. Liſle v. Grey.

7. Diſtinguiſhed by Sentences of Indulgence, As *without Impeachment of Waſte*. 9 Mod. 165. Feb. 6. 1719. in Dom. Proc. in Caſe of Trevor v. Trevor.

(O. a) In what Caſes, where no Eſtate is limited, the Law ſhall ſay that it ſhall be an Eſtate for Life.

1. IF the King grants Land or Rent, and limits no Eſtate, this ſhall not be any Frankteheement. Da. 1. 45. 17 E. 3. 45. If the King grants an Office to one at Will, and grants a Rent to him for the Exerciſe of his Office for Term of his Life, this is determinable upon the Determination of his Office. Co. Litt. 42. a.

2. But if a Common Perſon grants to a Thing which lies in Grant, and limits no Eſtate, this ſhall be for the Life of the Grantee, becauſe it ſhall be taken moſt ſtrong againſt the Grantor. Da. 1. 45. 17 E. 3. 45. The ſame Law of Land if Livery be made. Co. Litt. 42. a. S. P. as to Lands, Tenements, Reverſions, Remainders, Rents, Advowſons, Commons, or the like if due Ceremonies requiſite by Law are obſerved.

3. But if the King grants a Deanry, or Biſhoprick generally, without limiting any Eſtate, they ſhall have Fee becauſe he could not have limited to them any other Eſtate. Da. 1. 46.

4. A Parſon cannot be preſented, inſtituted, and inducted for Life or Years, but he ſhall have the uſual Eſtate notwithſtanding this. Da. 1. 46.

5. If the King grants a Deanry of a Free Chapel to another, without limiting any Eſtate, he ſhall have Fee, becauſe he cannot have other Eſtate, and for the Miſchief of Abeyance. Da. 1. 46. Contra 17 E. 3. 45.

6. If a Man grants a Rent to another without limiting any Eſtate, it ſhall be an Eſtate of Frankteneement. 7 Aſſ. 1. 8 Rep. 84. *Sir Richard Pexhall's Caſe.* Co. Litt. 42. Br. Eſtates, pl. 30. cites 7 Aſſ. 1. that it ſhall be for Life of the Grantee.

7. If a Man deviſe to another 100 Sheep, 10 l. Rent iſſuing out of all his Land, payable Quarterly, and that the Deviſee may diſtrain for the Rent and Arrearages, and the Diſtreſs ſo taken to hold until he be paid, and to hold Courts of all his Manors for Life upon

upon Requeſt to Nicholas Moore or his Deputy, **this is a Rent for Life, for it is in Recompence of his Service in keeping of his Courts, which is for Life.** 8 Rep. 15. b. adjudged per Cur. *Sir Richard Pexhall's Caſe.*

8. If a Man *leaſes Land to B. N. Dummodo ſolverit* 20 *s. per Ann.* this is an Eſtate for Term of Life upon Condition, without more Words; Quod nota. Br. Aſſiſe, pl. 433. cites 3 E. 3. 15.

9. Aſſiſe of Turbary; the *Grant* was *of Turbary in* 200 *Acres of Moor to dig, ſearch, and carry away at his Will*; Per Herle, theſe Words (*at will*) do not go but to the taking of them when &c. and not to the Eſtate, and the Aſſiſe was taken, and ſo it ſeems to be an Eſtate for Term of the Life of the Grantee by Livery of the Deed of Grant always of Things which lie in Grant. Br. Eſtates, pl. 63. cites 7 E. 3. 43 and Fitzh. Aſſiſe. 134.

Cro. E. 721. pl. 50. S. C. held accordingly.—Ow. 126. S. C. ruled accordingly.—S. C cited D. 186. a. Marg pl. 1.

10. Grant of Rent *to A.* and *B. to the Uſe of the Wife during her Life*, this determines on the Death of the Grantees; But if the Rent or Land had been granted *to A.* and *B. during the Life of the Wife to the Uſe of the Wife*, then by the Statute of Uſes ſhe ſhould enjoy it for her Life abſolutely. 2 And. 130. pl. 74. Mich. 41 & 42 Eliz Crawley's Caſe.

And adding the Word (*Only*) will make no Alteration; Per Gregory J. Ibid. 524.

11. *Quamdiu ſe bene geſſerit* gives an Eſtate for Life determinable on the Behaviour of the Party, if requiſite Circumſtances and Ceremonies are performed; Per Eyre J. Show 520. Trin. 5 W. & M. in Caſe of Harcourt v. Fox.

——S. P. per Dolben. J. Ibib. 525.——and per Holt Ch. J. Ibid. 531, 532.

12. Where the Words are, that ſuch an one *ſhall hold and enjoy* an Office &c. ſpeaking indefinitely, this makes an Eſtate for Life; Per Gregory J. Show. 524. Trin. 5 W. & M. in Caſe of Harcourt v. Fox.

See tit. Grant (H. 14) (H. 15) and (H. 16) per tot. as to Continuance of Grants.

(P. a) Where the Law will create Eſtate for Life, where no Eſtate is limited.

1. IF Baron ſeiſed in Right of his Wife for Life, bargains and ſells it by Deed inrolled, **this is an Eſtate of Franktenement, for it is an Eſtate during the Coverture. M. 10 Ja. B. per Curiam.**

Fitzh. Verdict, pl. 42. S. C. but cites it as 33 E. 3 lib. Aſſ pl. 15.

2. **If a Man** grants a Rent of 20 l. **to another** till he has levied 100 l. **this is an Eſtate for Years in the Grantee, and no Eſtate for Life, becauſe it is certain that he ſhall have it for five Years. Co. Litt. 42. 33 Aſſ. 2.**

——Br. Verdict, pl. 64. cites S. C. but S. P. does not appear.

3 Bulſt. 100. S. C. cited by Coke Ch. J. accord-

3. **If A.** leaſes Land, **or a Manor** worth 20 l. per Ann. to B. till he has levied 100 l. **this is an Eſtate for Life if** Livery **be made, and no Eſtate for Years if no Livery, becauſe it is not certain that the**

the Profits will be worth 20 l. every Year. Co. Litt. 42. 6 Rep. 35. b. *The Biſhop of Bath's Caſe.*

ingly, but that if no Livery be made it is only a Leaſe at Will.

4. If I have a Rent of 20 s. per Ann. out of Land, and I grant it to B. till he has levied 20 l. this is a Leaſe for 20 Years, for it is certain. 6 Rep. 35. b. *Biſhop of Bath's Caſe.* Pl. C. 273. b S. P. by Weſton.

5. In Aſſiſe, M. *leaſed* Land *to J. N. Habendum &c. ſo that he pay an Annuity to the ſaid M. of* 10 *l. for the Life of the ſaid M. and if it be Arrear it ſhall be lawful for the ſaid M. to re-enter quouſque* &c. And it was agreed, that the one has Franktenement in the Land, and the other Franktenement in the Rent, and this as it ſeems upon Condition in Law, viz. if he fails of Payment by one Year. Br. Eſtates, pl. 29. cites 3 Aſſ. 9.

6. *As* per Scrope, where I *give Land* to you *till I come from St. James's* &c. Br. Ibid.

7. Rent was granted to J. N. *as long as the Grantor his Heirs and Aſſigns ſhall hold the Manor of C.* and it was adjudged Franktenement in the Grantee; quod nota. Br. Eſtates, pl, 31. cites 11 Aſſ. 8.

8. If a Man *grants Common in his Land when he puts in his Beaſts*, or grants *Eſtovers when he comes to his Manor of D.* the Grantee has an Eſtate for Term of Life; Quære. Br. Eſtates, pl. 57. cites 17 Aſſ. 7.

9. If I *leaſe Land* to W. N. *Habendum till* 100 *l. be paid*; If *no Livery is made* then it is only a Leaſe at Will; but if he makes Livery the Leſſee ſhall have it for Life upon Condition implied to ceaſe upon the levying the 100 l. Br. Leaſes, pl. 67. cites 2 Mar. 1. but ſays that 3 Mar. 1. this Leaſe was held by all to be good.

(Q. a) Where no Eſtate is limited, and the Law ſaith that it ſhall be an Eſtate for Life, for whoſe whoſe Life it ſhall be; And ſo where an Eſtate for Life is limited, and it is not mentioned for whoſe Life. Fol. 846.

1. If A. ſeiſed in Fee leaſes for Life, without mentioning for whoſe Life, this ſhall be for the Life of the Leſſee; for it ſhall be taken moſt ſtrong againſt the Grantor. Co. Litt. 42. 4 Mod. 172. Arg. S. P.

2. But if A. Tenant in Tail leaſes for Life, without mentioning for whoſe Life, it ſhall be for the Life of the Leſſor; becauſe otherwiſe it ſhould be a Diſcontinuance, and a tortious Eſtate, the which the Law by Conſtruction will not make. Co. Litt. 42. Co. Litt. 183. b. in Principio, S. P. —— 2 Mod. 80. 81. Arg. cites S. C. and yet if before the Statute of Entails he had made ſuch Leaſe, he being then Tenant in Fee Simple, it had been an Eſtate for the Life of the Leſſee; but when the Statute had made it unlawful for him to bind his Heir, then the Law conſtrued it to be for his own Life, becauſe otherwiſe it would work a wrong. —— Such Leaſe by Tenant in Tail ſhall be intended for the Life of Tenant in Tail; but in Caſe of Tenant in Fee, it ſhall be intended for the Life of the Leſſee, becauſe of the different Capacities of the two Perſons; for the one could make a Leaſe for no longer than his own Life, and the other may make a Leaſe for a longer Term; Arg. 4 Mod. 172. Hill. 4 & 5 W. & M. in B. R.

3. If a Man *deviſes Land to three, and that the one ſhall take the Profits*, and dies, this makes a Uſe in him, and when Ceſtuy que Uſe dies, the other two ſhall be compelled by Subpœna to releaſe to the Heir of

the Deviſor; and ſo ſee that it is only an Eſtate for Term of Life. Br. Eſtates, pl. 74. cites 30 H. 6. and Fitzh. Deviſe 22.

4. *Where an Eſtate is limited* by the Party *there are four Circumſtances to be obſerv'd*, 1ſt, The *Eſtate of the Grantor*, As if a Man ſeiſed in Fee grants a Rent, it ſhall be for the Life of the Grantee; becauſe the Grantor has Power by his Eſtate to grant it ſo, cites 7 Aſſ. 1. 17 E. 3. 45. if Tenant in Tail grants a Rent it ſhall be for the Life of the Grantee, but it ſhall determine by the Death of the Tenant in Tail for his Eſtate; And if the King grants a Rent by his Letters Patents, the Grantee ſhall have only at Will, as 22 E 4. and 17 E 4. is. If Leſſee for Years grants a Rent during the Life of the Grantee, this is determinable on the Grantee's Death, as Weld. 525. 2dly, In reſpect of *the Grantee*, As Gift to an *Abbot and Covent* is a Fee, cites 11 H. 4 84. So 10 H. 7. 12. Gift to a *Mayor and Commonalty* is Fee, 27 H 8. 25. Gift to a Dean and Chapter is a Fee. 3dly, In reſpect of *the Conſideration*, As *Deviſe to J. paying ſo much to B.* is a Fee by reaſon of the Conſideration, cites 29 H. 8. Br. Teſtaments, and 4 H. 6. Br. Eſtates 28. a Bargain and Sale ſhall paſs a Fee, becauſe the Conſideration is abſolute, cites 27 H. 8. 5. 4thly, In reſpect of *the Recompence and Loſs*, As *Leſſee for twenty Years leaſes for ten Years rendering Rent*, the Rent ſhall be for ten Years, becauſe it is a Recompence for the Term, cites 39 E. 3. 1. *Tenant in Dower exchanges with another, and no Eſtate is limited to her*, yet it ſhall be for her Life, as the Eſtate for which he had it was, cites 15 H. 7. 14. 2 H. 7. 5. If a Rent be reſerved upon Partition, and no Eſtate is limited, it ſhall be for the ſame Eſtate as he has in the Land, cites 15 E. 4. Per Doderidge. Roll Rep. 370, 371. Paſch. 14 Jac. B. R. in Caſe of Goſſe v. Haywood.

(Q. a 2) Eſtate for Life.

Where it is not a Freehold but a Chattle.

1. BARON *and Feme ſeiſed in Fee*, the *Baron is arraigned of Felony, and betakes himſelf to his Clergy*, and is *found Guilty*, by which the *King ſeiſes* the Land for Life of the Baron, the King ſhall not have it but as a Chattle. Br. Eſtates, pl. 87. cites 4 E 3. 47. and Fitzh. Aſſiſe, 166.

2. If a *Patron grants to J. W. and his Heirs and Aſſigns the next Preſentation* of his Benefice, yet this is only a Chattle notwithſtanding this Word (Heirs.) Br. Eſtates, pl. 27. cites 39 E. 3. 37.

3, A Grant of a *Rent for Life out of a long Term of Years*, is a good Grant to endure for ſo many Years as the Term endureth, but it is only a Chattle, and not a Franktenement; Per Manwood, to which Gent and Clark J. inclined, but ſaid they would adviſe. Cro. E. 183. pl. 5. Paſch. 32 Eliz. B. R. St. Auby's Caſe.

S. P. 7 Rep. 23. a. Trin. 42 Eliz. C. B. in the firſt Reſolution in Butt's Caſe.

——— Ibid. 25. a. S. P. in S. C. that it is repugnant to have Franktenement out of a Term for Years, and becauſe the Avowant pleaded that he was ſeiſed in Dominico ſuo ut de libero Tenemento pro Termino Vitæ ſuæ, Judgment was given againſt him.

(R. a) What Things or Eſtates may be leaſed.

Supra. 320.

1. D. 8 El. 251. 90. Copyholder in Fee ſurrenders **to the Lord to the Intent that his Lord ſhall grant it back** to him for Life, Remainder to his Wife till his Son comes to full Age, and after to his Son; **The Copyholder dies, and the ſaid Lord executes it accordingly to the Wife; Per Cur. this Intereſt of the Wife is a Term.**

2. It was admitted clearly that a Man may make a Leaſe of his *Beaſts*. Br. Leaſe, pl. 23. cites 1 H. 6. 1.

(R. a 2) Eſtate for Life or Years.

1. IF a Leaſe made *to a Feme ſole ſo long as ſhe continues ſole* and unmarried, this is a Leaſe for Life in Law if *Livery* be made; Per Doderidge J. 2 Bulſt. 84. Trin. 11 Jac. Arg. Ow. 118. cites 30 H. 6. —Per Raymond J. Raym. 428. cites Co. Lit. 42. a S. 56. —If a Man grants an Eſtate to a Woman Dum Sola

2. Leaſe to Baron and Feme *during Coverture*, they are Jointenants for Life; Arg. Ow. 118. cites Littleton.

3. Every Grant *Durante Viduitate* is Eſtate for Life, as appears; Per Curiam. 4 Rep. 30. Paſch. 36 Eliz. in Caſe of Down v. Hopkins, cites Litt. fol. 90. a. and 37 H. 6. 27. 14 H. 8. 13. a

4. A Grant to a Man *till he be promoted to a Benefice*, or *Dummodo ſe bene geſſerit*, are Freedholds; Arg. 118. cites 14. E. 2.

ſuit, or Durante Viduitate, or Quamdiu ſe bene geſſerit, or to a Man and Woman during the Coventure, or as long as the Grantee dwell in ſuch a Houſe, or ſo long as ſhe pay 10 l. &c. or till the Grantee be promoted to a Benefice, or for any Life in certain Time, which time, as Bracton ſays, is Tempus indeterminatum, in all theſe Caſes, if it be of Lands or Tenements, the Leſſee has in Judgment of Law an Eſtate for Life determinable if Livery be made, and if it be of Rents, Advowſons, or any other Thing that lie in Grant, he has a like Eſtate for Life by the Delivery of the Deed, and in Count or Pleading he ſhall allege the Leaſe and conclude that by Force thereof he was ſeiſed generally for Term of his Life. Co. Litt. 42. a.

5. If a Man *leaſes* Land, *ſo that the Leſſee pay to him* 10 *l. per Ann.* this is an Eſtate for Life upon Condition that the Tenant pay annually &c. Br. Eſtates, pl, 88. cites 30 E. 3. 15. and Fitzh. Aſſiſe 172.

6. Where a Man *leaſes Land for Life, rendering the firſt ſeven Years* 2 *d. and for the reſt, if he will hold over, four Marks*; and he *ſurrender'd at the End of the ſeven Years*; It was adjudged that his Eſtate ſhall be taken to be for Years, and Covenant and Waſte ſhall be brought accordingly; quod mirum! Br. Eſtates, pl. 10. cites 50 E. 3. 27. The Plaintiff ſaid, that at the End of ſeven Years the Defendant ſurrendered

the Land, and therefore in Covenant brought by the Leſſor the Writ was awarded good. Br. Covenant, pl. 16. cites S. C. but Brooke ſays, Quod Mirum! For the ſeven Years refer only to the Reverſion, and not to the Eſtate; for the Eſtate was Franktenement by the Livery, and the ſurrender cannot make it only to be a Term.

7. A Man *leaſes to J. S. at the Will of the Leſſee*, and held that if it be *by Livery* he has an Eſtate for his Life, and if no Livery, then it is in Doubt; therefore Quære. Br. Eſtates, pl. 72. cites 35 H. 6. 63.

8. *A De-*

8. *A Deviſe* to B. *during the Minority of J. S* or of *Land extended* for Debt is only a Term. Cro. E. 315. pl. 10. Hill. 36 Eliz. B. R. in Cordal's Caſe.

9. Before the Stat. 21 *H.* 8. *cap.* 15. *enabling Termors to falſify Common Recoveries*, the Terms for Years were uſually granted for a ſhort Time, for no Body would take long Terms, becauſe the Tenant of the Freehold could deſtroy them Ad Libitum by ſuffering a Common Recovery; therefore thoſe Eſtates for Years were accounted the leaſt, and next to Eſtates at Will; But after the Remedy given by that Statute Eſtates for Years became more permanent, and for that Reaſon the Leſſees took long Terms; Per Cur. 9 Mod 102, 103. Mich. 11 Geo. in Caſe of Theobalds v. Duffoy.

1. Kn. 144.

* It is only Chattle and Quaſi a Term being by Will, but had it been by Deed it had been a conditional Eſtate for Life.

10. * *Deviſe* of Land *till Debts paid*, the Executors have a Term; but a *Leaſe* of Land being of a certain yearly Value, till his Debts are paid, is but a Leaſe at Will, unleſs *Livery* be made, and then it is a Freehold; Per Coke. 3 Bulſt. 100. cites 6 Rep. 35. [Trin. 3 Jac. C. B.] Biſhop of Bath's Caſe.

Cro. E. 315. pl. 10. Hill. 36. Eliz. B. R. Cordals Caſe.——S. C. cited 8 Rep. 96. a.——Co. Litt. 42. a. S. P.——S. C. cited. Jo. 25.——Allen 47. Arg. in Caſe of Price v. Vaughan.

(R. a. 3) Eſtate pur Auter Vie.

If Leſſee pur auter Vie continues Poſſeſſion for two or three Weeks after the Death of Ceſtuy que Vie, where he could not have more ſpeedy Notice of his Death, he is no Treſpaſſor; Arg. 4 Le. 63 cites 22 E. 4.

1. IF *Tenant for Life leaſes for Years and dies within the Term*, and the firſt Leſſor brings Treſpaſs, the Termor ought to take Notice of the Death of the Tenant for Life. Br. Notice, pl. 15. cites 22 E. 4. 27.

2. Eſtate pur Auter Vie may be *limited to a Man and his Heirs*, and may be *entailed*, and ſhall deſcend, and is not like the ſettling of a Term for Years in Tail, where, as it has been often adjudged, the Tenant in Tail is looked upon to have the whole Eſtate in him, and may diſpoſe of it at his Pleaſure; Per Commiſſioners. 2 Vern. 185. pl. 167. Mich. 1690. Finch v. Tucker.

3. A. has *Eſtate for three Lives*, and ſettles it *to the Uſe of himſelf in Tail, Remainder to B.* The Remainder is void. Such a Leaſe pur auter Vie is not within the Statute De Donis, and therefore if a Limitation over had been good, it might have been *barred by* a Deed, Surrender, or other Conveyance, without a Common Recovery. 2 Vern. 225. pl. 205. Paſch. 1691. Baker v. Bayley.

4. Eſtate pur auter Vie of Lands in *Borough-Engliſh* ſhall *deſcend* and go to the Heir in Borough-Engliſh. 2 Vern. 226. pl. 205. Paſch. 1691. in Caſe of Baker v. Baily cites as adjudged per Ld. Ch. J. Hale in Caſe of Dowdeſwell v. Dowdeſwell.

5. Such Eſtate ſtill remains a Freehold, and the *Adminiſtrator is Tenant of a Freehold*, and the *Præcipe in a Common Recovery* muſt be had againſt him of thoſe Lands; Per Cur. Carth. 376. Paſch. 8 W. 3. B. R. Oldham v. Pickering.

6. G. A Copyholder for his own Life, procured a Copy in Reverſion to be granted to B. C. and D. for their Lives ſucceſſively, but this was in Truſt for A. and his Heirs. A. by Will deviſes the Copyhold *after the Deceaſe of him and B. his Wife to the Heirs of his Body on B. if ſuch Iſſue ſhall be living at the Deceaſe of him, his Wife, or Survivor, Remainder to J. S.* A. left Iſſue living at his Deceaſe, but ſuch *Iſſue died, living B.* Per Wright K. the Word (*Survivor*) muſt not be rejected, and the Word (*or*) muſt be expounded, (*and* living at the Deceaſe of the Survivor,) and ſo he held the Remainder to J. S. good; But if that Point had been otherwiſe, yet J. S. had been well intitled as *Heir at Law* to G. and decreed it accordingly. 2 Vern. 388. pl. 357. Mich. 1700. Nichols v. Tolley & al'.

7. An Eſtate pur auter Vie *may be limited to A. in Tail, Remainder to B.* For this is only a Deſcription who ſhall take as ſpecial Occupants during the Life of Ceſtuy que Vie. 3 Wms's Rep. 262. Paſch. 1734. Low v. Burron.

The Objection againſt this Remainder being good is, for that when the Leſſee had deviſed the Premiſſes in Fee, he then had nothing left in him but a Poſſibility, which he could not deviſe or limit over; As if a Man were ſeiſed in Fee-Simple, and at Common Law had granted Lands to one and the Heirs of his Body, this was a conditional Fee; and for as much as the Donor had only a Poſſibility of Reverter, he could not limit it over. Now, if at Common Law an Eſtate in Fee could not be limited over after an Eſtate given to one and the Heirs of his Body, much leſs ſhould an Eſtate for three Lives be limited over after ſuch a Failure of Iſſue. And as to the Notion, that in this Kind of Limitation the Heirs of the Body of A. take only as ſpecial Occupants; and that a Man may name as many ſpecial Occupants as he pleaſes; by the ſame Reaſon it may be argued, that this Eſtate for Lives may be limited to A. and his Heirs; and if A. die without Heirs, then to B. and his Heirs, which certainly would be a void Limitation to B and in Preſumption of Law, the Continuance of the Iſſue of a Man's Body may be for ever. From whence it ſhould ſeem, that after the Leſſee for three Lives has granted or deviſed the Premiſſes to A. and the Heirs of his Body, he (the Leſſee) has nothing but a Poſſibility, which he cannot grant or limit over. Note, This appears from the Reporter's Manuſcript to have been the Opinion of Mr. Webb an eminent Conveyancer, late of the Inner-Temple. However the Law is ſettled as above.

8. Eſtate pur auter Vie *is only a deſcendible Freehold*; Arg. and agreed by Ld. C. Talbot. 3 Wms's Rep. 263. Paſch. 1734. in Caſe of Low v. Burron.

For which Reaſon it has been determined that where a Leaſe for three Lives has been granted to a Man and his Heirs, and ſuch Grantee died leaving an Infant Heir, the Parol ſhall not demur. Ibid. in a Nota by the Reporter, cites it as ſo held by the Ld. Talbot in the Cauſe of Chaplin v. Chaplin, 18 July, 1735.

9. It is obſervable that a Law there *could be no general Occupant of a Rent*; As if I had granted a Rent to A. for Life of B. and A. had died living B. the Rent would have determined. 2 Roll Ab. 150. Salk. 189. *But* there might have been *a ſpecial Occupant* of a Rent, As if I had *granted a Rent to A. and his Heirs for the Life of B.* and *A. had died, living B. and leaving an Heir*, ſuch Heir would have been a ſpecial Occupant; yet if a Man had *granted a Rent to A. his Executors and Aſſigns during the Life of B.* and afterwards the *Grantee had died, leaving an Executor, but no Aſſignee*, the Executor ſhould not have had the Rent, in regard it being a Freehold the ſame could not deſcend to an Executor. Mo. 664. 2 Roll Abr. 152. 3 Car. **Sir Richard Buller & al' v. Chiverton**, agreed and admitted by Jones J. and Cur. and by the Counſel on both Sides, that the Rent is extinct. 3 Wms's Rep. 264. Paſch. 1734. in a Nota of the Reporter in the Caſe of **Low v. Burron**, cites the above Books, but ſays there ſeems no ſound Reaſon for this Diſtinction, and cites the Caſe of **Rawlinſon v. Montagu (Dutcheſs)** 4th December 1710. by Ld. K. Harcourt.

See tit. Occupant (C) pl. 2. and (G) pl. 2.

Pleadings.

(R. a. 4) Averment of the Life of Perſons.

In what Caſes neceſſary.

Br. Averment, pl. 30. cites 5 H. 7. 39. —— S. P. Br.

1. HE who *claims his Eſtate of the Tenant for Life*, Tenant *in Tail*, *or Parſon of a Church*, ought to aver his Life. Br. Averment, pl. 13. cites * 19 H. 6. 73.

Barre, pl. 72. cites 5 H. 7. 38. —— S. P. Br Brief, pl. 535. cites 5 H. 7. 38, 39. —— S. P. for he cannot aver their Eſtates but during their Lives. Br. Averment, pl. 40.

* Br. Eſtates, pl. 18. cites S. C.

2. In *Treſpaſs* the *Defendant ſaid, that A. was ſeiſed and enfeoffed him*, and gave *Colour* &c. the *Plaintiff ſaid, that B. was ſeiſed and leaſed to A. to hold at Will, who after enfeoffed the Plaintiff, and the ſaid B. perceiving it to be to his Diſinheritance, entered, and leaſed to the Plaintiff at Will, by which he was poſſeſſed till the Defendant did the Treſpaſs*, and a good Plea *without ſhewing that B. is alive*; for though the Will of B. be determined, yet the Plaintiff by his Poſſeſſion has a good Title againſt every Stranger. Br. Pleadings, pl. 99. cites 10 E. 4. 18.

3. *But* he who *derives from the Tenant pur auter Vie, or upon Condition, As* where a *Gift* is made *to A. as long as B. has Iſſue of his Body*, there the Tenant pur auter Vie, and the Iſſue of B. ſhall be averred to be alive; Per Pigot. Ibid.

4. *But* per Littleton, *in Treſpaſs where he recovers Damages only*, he need not aver the Life, and eſpecially where he *alleges Seiſin or Poſſeſſion*, for this proves the Eſtate to continue. Ibid.

5. *And* where a Man *pleads a Grant of Reverſion*, and that the Tenant attorned, he need not *allege that he attorned in the Life of the Leſſor*. Ibid.

6. If *Tenant in Tail of a Rent grants the Rent over*, the *Grantee* in Treſpaſs or Avowry making Title to this Rent *ought to aver the Life of the Tenant in Tail*; for after his Death the Grant is determined. Br. Averment, pl. 18. cites 15 E. 4. 6.

7. *So* by the beſt Opinion, where *ſuch Rent* is *granted in Tail which had not Eſſe before, and a Man recovers the ſame Rent againſt the Tenant in Tail, and makes his Title by the Recovery* upon the Matter he ought to aver the Life of the Tenant in Tail; for he cannot recover Fee-Simple of the Rent of which there was no Fee before, By ſeveral; but Quære inde. Br. Averment, pl. 18. cites 15 E. 4. 6.

8. Where *Tenant in Tail is of Rent which had no Eſſe before* the Grant made in Tail, and he grants it over, the *Grantee*, who avows or juſtifies, *ought to aver the Life of the Tenant in Tail*, ſo by ſeveral where he ſuffers a Recovery of the Rent, quære; For by ſome there is Fee-Simple for the time. Br. Tail and Dones &c. pl. 15. cites 15 E. 4. 6. 8.

9. Treſpaſs upon the 8 H. 6. the Defendant ſaid, that the *Abbot* of B. was ſeiſed in Fee &c. and *gave in Tail to A. with Aſſent of this Convent* the *Remainder to N. in Tail*, by which *A. was ſeiſed, and died without Iſſue*, and *N. entered* as in his Remainder, *and died*, and *J. as Heir in Tail, entered, Que Eſtate he has*, and had Tempore ingreſſus &c. *which J. is yet alive* and gave colour to the Plaintiff. And ſo ſee that he who claims Que Eſtate of a Tenant in Tail *ought to Aver his Life*; Quod nota. Br. Averment, pl. 19. cites 15 E. 4. 16.

(R. a. 5) Leaſes

Void or not on Account of the Maker.

Not having an Abſolute Eſtate.

1. *FATHER of an Infant* leaſed the Son's Lands for twenty Years, at full Age the Son on the Back of the Indenture releaſed to Defendant all his Right; Per Wray, this Leaſe by the Father as Guardian was voidable only by the Son, and then ſuch *Endorſement is a good Aſſignment.* 2 Le. 220, 221. pl. 278. Paſch. 16 Eliz. B. R. Anon.

2. Tenant in Socage made a Leaſe for four Years and died, his Heir within the Age of eight Years; the Mother being *Guardian in Socage* leaſes by Indenture to the ſame Leſſee for fourteen Years; the firſt Leaſe is ſurrendered, but otherwiſe it is of a Leaſe made by Guardian *by Nurture.* 4 Le. 161. pl. 267. Mich. 31 Eliz. C. B. Anon.

3. A Man by an *unlawful Entry* gains ſuch a Poſſeſſion that he may make a good Leaſe againſt any but him that hath Right. Cro. E. 331. pl. 9. Trin. 36 Eliz. B. R. Lee v. Norris.

4. A. ſeiſed in Fee, deviſed to his Son in Tail, and appointed that the *Overſeer of his Will* ſhould educate his Son till Twenty-one, and *receive, ſet and let* for him. The Overſeer has no Intereſt to make a Leaſe for Years in his own Name, but may make a *Leaſe at Will*, and his Receipts are for the Uſe of Deviſee. 5 Mod. 102. cites Cro. E. 674. 734. Trin. 41 Eliz. Pigot v. Garniſh.

5. Leaſe by *Guardian in Socage* ends by the Death of the Guardian. Brownl. 79. Trin. 16 Jac. in the Caſe of Balder v. Blackbourn.

6. A. acknowledges a *Statute*, then makes a Leaſe for Years to begin at a Day to come, Leſſee ſhall have a Scire Facias; Per Bramſton. Mar. 211. Trin. 18 Car.

7. *Leaſes made by Mortgagee* at Rack and improved Rent, are to be *allowed* and ſtand good, otherwiſe not. Chan. Rep. 172. 1656. Weldon v. Rallinſon.

Mortgagee before Foreclosure cannot make a Leaſe for Years of a Houſe &c. in Mortgage to bind the Mortgagor, unleſs to avoid an apparent Loſs, and merely in Neceſſity; Per Ld. Chancellor, Paſch. 1722. and ſo reverſed a Decree at the Rolls. 9 Mod. 2. Paſch. 8 Geo. Hungerford v. Clay.

8. Mother by *Colour of a Will*, which is after found to be *revoked*, makes Leaſes for Fines and full Rents, which ſhe offered to account for; yet the Court would not make them good, becauſe the *Mother* could not ſet or let Lands. Chan. Caſes 126. Paſch. 21 Car. 2. Hele v. Stowell.

9. A *Judgment Creditor*, having extended a Moiety of the Lands, made a *Leaſe for ſeven Years* of the ſame, reſerving the *full Rent*; Chancery will not ſet this Leaſe aſide. Fin. Rep. 115. Hill. 25 Car. 2. Doughty v. Stiles, Keat & al'.

10. *Four were Truſtees, three leaſe*; it is a Breach of Truſt, and Leſſee's Bill to eſtabliſh his Poſſeſſion and be relieved againſt Actions was diſmiſſed. 2 Chan. Caſes 202. Mich. 26 Car. 2. Rothwell v. Huſley.

11. Grant

Pleadings.

(R. a. 4) Averment of the Life of Perſons.

In what Caſes neceſſary.

Br. Averment, pl. 30. cites 5 H. 7. 39. —— S. P. Br. Barre, pl. 72. cites 5 H. 7. 38.

1. HE who *claims his Eſtate of the Tenant for Life*, Tenant *in Tail*, *or Parſon of a Church*, ought to aver his Life. Br. Averment, pl. 13. cites * 19 H. 6. 73.

—— S. P. Br. Brief, pl. 535. cites 5 H. 7. 38, 39. —— S. P. for he cannot aver their Eſtates but during their Lives. Br. Averment, pl. 40.

* Br. Eſtates, pl. 18. cites S. C.

2. In *Treſpaſs* the *Defendant ſaid, that A. was ſeiſed and enfeoffed him*, and gave *Colour* &c. the *Plaintiff ſaid, that B. was ſeiſed and leaſed to A. to hold at Will, who after enfeoffed the Plaintiff, and the ſaid B. perceiving it to be to his Diſinheritance, entered, and leaſed to the Plaintiff at Will, by which he was poſſeſſed till the Defendant did the Treſpaſs*, and a good Plea *without ſhewing that B. is alive*; for though the Will of B. be determined, yet the Plaintiff by his Poſſeſſion has a good Title againſt every Stranger. Br. Pleadings, pl. 99. cites 10 E. 4. 18.

3. *But* he who *derives from the Tenant pur auter Vie, or upon Condition, As* where a *Gift* is made *to A. as long as B. has Iſſue of his Body*, there the Tenant pur auter Vie, and the Iſſue of B. ſhall be averred to be alive; Per Pigot. Ibid.

4. *But* per Littleton, *in Treſpaſs where he recovers Damages only*, he need not aver the Life, and eſpecially where he *alleges Seiſin or Poſſeſſion*, for this proves the Eſtate to continue. Ibid.

5. *And* where a Man *pleads a Grant of Reverſion*, and that the Tenant attorned, he need not *allege that he attorned in the Life of the Leſſor*. Ibid.

6. If *Tenant in Tail of a Rent grants the Rent over*, the *Grantee* in Treſpaſs or Avowry making Title to this Rent *ought to aver the Life of the Tenant in Tail*; for after his Death the Grant is determined. Br. Averment, pl. 18. cites 15 E. 4. 6.

7. *So* by the beſt Opinion, where *ſuch Rent* is *granted in Tail which had not Eſſe before, and a Man recovers the ſame Rent againſt the Tenant in Tail, and makes his Title by the Recovery* upon the Matter he ought to aver the Life of the Tenant in Tail; for he cannot recover Fee-Simple of the Rent of which there was no Fee before, By ſeveral; but Quære inde. Br. Averment, pl. 18. cites 15 E. 4. 6.

8. Where *Tenant in Tail is of Rent which had no Eſſe before* the Grant made in Tail, and he grants it over, the *Grantee*, who avows or juſtifies, *ought to aver the Life of the Tenant in Tail*, ſo by ſeveral where he ſuffers a Recovery of the Rent, quære; For by ſome there is Fee-Simple for the time. Br. Tail and Dones &c. pl. 15. cites 15 E. 4. 6. 8.

9. Treſpaſs upon the 8 H. 6. the Defendant ſaid, that the *Abbot* of B. was ſeiſed in Fee &c. and *gave in Tail to A. with Aſſent of this Covent* the *Remainder to N. in Tail*, by which *A. was ſeiſed, and died without Iſſue*, and *N. entered* as in his Remainder, *and died*, and *J. as Heir in Tail, entered, Que Eſtate he has*, and had Tempore ingreſſus &c. *which J. is yet alive* and gave colour to the Plaintiff. And ſo ſee that he who claims Que Eſtate of a Tenant in Tail *ought to Aver his Life*; Quod nota. Br. Averment, pl. 19. cites 15 E. 4. 16.

(R. a. 5) Leaſes.

Void or not on Account of the Maker.

Not having an Abſolute Eſtate.

1. *FATHER of an Infant* leaſed the Son's Lands for twenty Years, at full Age the Son on the Back of the Indenture releaſed to Defendant all his Right; Per Wray, this Leaſe by the Father as Guardian was voidable only by the Son, and then ſuch *Endorſement is a good Aſſignment.* 2 Le. 220, 221. pl. 278. Paſch. 16 Eliz. B. R. Anon.

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3. A Man by an *unlawful Entry* gains ſuch a Poſſeſſion that he may make a good Leaſe againſt any but him that hath Right. Cro. E. 331. pl. 9. Trin. 36 Eliz. B. R. Lee v. Norris.

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8. Mother by *Colour of a Will*, which is after found to be *revoked*, makes Leaſes for Fines and full Rents, which ſhe offered to account for; yet the Court would not make them good, becauſe the *Mother* could not ſet or let Lands. Chan. Caſes 126. Paſch. 21 Car. 2. Hele v. Stowell.

9. A *Judgment Creditor*, having extended a Moiety of the Lands, made a *Leaſe for ſeven Years* of the ſame, reſerving the *full Rent*; Chancery will not ſet this Leaſe aſide. Fin. Rep. 115. Hill. 25 Car. 2. Doughty v. Stiles, Keat & al'.

10. *Four were Truſtees, three leaſe*; it is a Breach of Truſt, and Leſſee's Bill to eſtabliſh his Poſſeſſion and be relieved againſt Actions was diſmiſſed. 2 Chan. Caſes 202. Mich. 26 Car. 2. Rothwell v. Huſley.

11. Grant

11. Grant to the Warden and Aſſiſtants for the *Benefit of the Inhabitants*, for the Eaſe of Taxes, and for the Relief of the Poor, they cannot make Leaſes without the Conſent of the major Part of the Inhabitants. Chan. Caſes 269. Mich. 27 Car. 2. Inhabitants of Sutton-Co-field.

(R. a. 6) Leaſes. Good or not on Account of the Maker and the Thing.

By Biſhops, Parſon &c.

1ſt. The Leaſe muſt be made by Deed indented, and not by Deed Poll, or by Parol.

2dly, It muſt be made to begin from the Day of the making thereof, or from the making thereof.

1. 32 *H.* 8. *cap.* 28. *S.* 1. ALL *Leaſes made of any Manors &c. by Indenture ſealed for Years or Life, by any Perſon ſeiſed in Right of his Church, ſhall be good againſt him and his Succeſſors.*

S. 2. *Provided not to extend to Lands whereof an old Leaſe is in Being, unleſs it be expired or ſurrendered within a Year after the making of the new, nor to any Grant to be made of any Reverſion of Manors, Lands &c. nor to any Leaſe of ſuch Manor, Lands &c. which have not moſt commonly been let to farm, or occupied by Farmers thereof by the Space of* 20 *Years next before ſuch Leaſe made; nor to any Leaſe to be made without Impeachment of Waſte, nor to any Leaſe to be made for above* 21 *Years, or three Lives, from the Day of the making thereof.*

3dly, If there be an old Leaſe in Being, it muſt be ſurrendered or expired, or ended within a Year of the making of a Leaſe, and the Surrender muſt be abſolute and not conditional.

4thly, There muſt not be a Double-Leaſe in being at one Time, As if a Leaſe for Years be made according to the Statute, he in the Reverſion cannot expulſe the Leſſee, and make a Leaſe for Life or Lives according to the Statute, nor e converſo, for the Words of the Statute be to make a Leaſe for three Lives, or 21 Years, ſo as one or the other may be made, and not both.

5thly, It muſt not exceed three Lives, or 21 Years, from the making of it, but it may be for a leſſer Term, or fewer Lives.

6thly, It muſt be of Lands, Tenements and Hereditaments, manurable or corporeal, which are neceſſary to be letten, and whereout a Rent by Law may be reſerved, and not of Things that lie in Grant, as Advowſons, Fairs, Markets, Franchiſes, and the like, whereout a Rent cannot be reſerved.

7thly, It muſt be of Lands or Tenements which have moſt commonly been letten to Farm, or occupied by the Farmers thereof by the Space of 20 Years next before the Leaſe made, ſo as if it be letten for * 11 Years at one or ſeveral Times within thoſe 20 Years, it is ſufficient. A Grant by Copy of Court-Roll in Fee for Life, or Years, is a ſufficient letting to Farm within this Statute, for he is but Tenant at Will according to the Cuſtom, and ſo it is of a Leaſe at Will by the Common Law, but thoſe Lettings to Farm muſt be made by ſome ſeiſed of an Eſtate of Inheritance, and not by a Gardein in Chivalry, Tenant by the Curteſy, Tenant in Dower, or the like.

8thly, That upon every ſuch Leaſe there be reſerved Yearly during the ſame Leaſe, due and payable to the Leſſors, their Heirs and Succeſſors &c. ſo much Yearly Farm or Rent, or more, as has been moſt accuſtomably yielded or paid for the Lands &c. within 20 Years next before ſuch Leaſe made. See (R. a. 7) pl. 1.

9thly, Nor any Leaſe to be made without Impeachment of Waſte; therefore if a Leaſe be made for Life, the Remainder for Life &c. this is not warranted by the Statute, becauſe it is diſpuniſhable of Waſte; But if a Leaſe be made to one for three Lives, this is good, for the Occupant, if any happen, ſhall be puniſhed for Waſte. The Words of the Statute be, (Seiſed in the Right of the Church), yet the Biſhop that is ſeiſed Jure Epiſcopatus, a Dean of his ſole Poſſeſſions in Jure Decanatus, an Archdeacon in Jure Archideaconatus, a Prebendary, and the like, are within the Statute, for every one of them generally is ſeiſed in Jure Eccleſiæ; But a Parſon or Vicar are excepted out of the Statute 32 H. 8. and therefore if either of them make a Leaſe for three Lives &c. of Lands accuſtomably letten, reſerving the accuſtomed Rent, it muſt be alſo confirmed by the Patron and Ordinary, becauſe excepted out of 32 H. 8. and not reſtrained by the Statute of Primo, or 13 Eliz. and what has been ſaid concerning a Leaſe for three Lives does hold for a Leaſe for 21 Years. Co. Litt. 44. b.

* Contra per Keyling and Twiſden J. Sid. 416. Pemble v. Sterne. —— Becauſe the firſt Part of the Statute, as to the Leaſing, ſeems to refer to more ancient Time, and the laſt Part of the occupying by Farmers to the 20 Years. Ibid.

2. Brooke

2. Brooke ſays, it ſeems that a Prebendary may make *a Leaſe for 21 Years* by the Statute of 32 *H.* 8. which ſhall bind Succeſſors; for *Parſons and Vicars are there excepted*, but *not Prebendaries*, therefore it ſeems that the Leaſe ſhall bind; for he is *ſeiſed in Right of the Prebend*, which amounts to Seiſin in Right of the Church, and ſo Equity; Quære. Br. Prebend, pl. 2.

3. 1 *Eliz. cap* 19. *S.* 7. *It is enacted that all Gifts, Grants, Feoffments, Fines, and other Conveyances and Eſtates, from the firſt Day of this preſent Parliament to be had, made, done, or ſuffered by any Archbiſhop, or other Biſhop of any Honours, Caſtles, Manors, Lands, Tenements, or other Hereditaments, being Part of the Poſſeſſions of his Archbiſhoprick or Biſhoprick, or united, appertaining, or * belonging to any the ſame Archbiſhopricks or Biſhopricks, to any Perſon or Perſons, Body politick or incorporate, (other than to the Queen's Majeſty, her Heirs and Succeſſors) whereby any Eſtate or Eſtates ſhould, or may paſs from the ſaid Archbiſhops or Biſhops, or any of them, and † other than for the Term of 21 Years, or three Lives, from the Time of ſuch Eſtate made, and whereupon the old accuſtomed yearly Rent, or more, ſhall be reſerved and payable Yearly during ſuch Term of 21 Years, or three Lives, ſhall be utterly ‡ void and of none Effect, to all Intents, Conſtructions and Purpoſes, any Law, Cuſtom or Uſage to the contrary in any wiſe notwithſtanding.*

It was reſolved, that by the Act of the 1 Eliz. Biſhops are generally reſtrained to make any Eſtate or Intereſt of any Land, Tenement or Hereditament, Parcel of his Biſhoprick, or of any Charge or Incumbrance out of that

or any other Thing in their Diſpoſition to bind the Succeſſor, but only a Leaſe for 21 Years, or three Lives, of ſuch Lands, Tenements and Hereditaments, which have been uſually demiſed, and upon which the uſual Rent ſhall be reſerved, according to the ſaid Act of the 1 Eliz. 10 Rep. 60. a. b. Trin. 11 Jac. Biſhop of Sarum's Caſe.

If they make a Leaſe of any Lands uſually demiſed, and reſerve the uſual Rent, according to the Statute of 1 Eliz. yet if all the Limitations preſcribed by 32 H. 8. be not purſued, As if it be not all in Poſſeſſion, or that the old Leaſe will not be expired or ſurrendered within one Year, (which is not prohibited by the Statute of the 1 Eliz. as was adjudged in **Fox's Caſe**) then ſuch Leaſe ſhall not bind the Succeſſor unleſs it be confirmed by the Dean and Chapter, for the Statute of the 1 Eliz does not enable any Archbiſhop or Biſhop, alone, to make any Leaſe. 10 Rep. 60. b. Biſhop of Sarum's Caſe.

* Theſe Words in the Act of the 1 Eliz. (belonging to the Archbiſhoprick or Biſhoprick) ſhall be conſtrued concerning the Archbiſhoprick or Biſhoprick. 10 Rep. 61. Biſhop of Sarum's Caſe.

† Such Conſtruction has been made to diſable the Biſhop to do any Thing but to make Leaſes for 21 Years or three Lives, concerning the Biſhoprick, to bind his Succeſſor, As a Grant of the next Avoidance by the Biſhop of a Benefice to another, though it be confirmed by the Dean and Chapter, is reſtrained by the Statute of the 1 Eliz to bind his Succeſſor, as oftentimes has been adjudged, becauſe it was ſuch an Hereditament upon which Rent could not be reſerved; for all that which is not permitted by the Exception, other than &c. is reſtrained as to the Succeſſor by the general Purview of the Act. 10 Rep 60. b Biſhop of Sarum's Caſe

‡ But ſuch Grant ſhall bind the Biſhop himſelf, notwithſtanding the Statute ſays that it ſhall be void to all Intents, Conſtructions and Purpoſes, for the Makers of the Act intended not only the Advancement of Religion, but likewiſe the Increaſe of Hoſpitality, and regarded the Succeſſion more than the Biſhop himſelf. 10 Rep. 60. b. Biſhop of Sarum's Caſe.

4. King Edw. 6. *granted to a Biſhop and his Succeſſors the Advowſon of the Church of L. to hold to his and their proper Uſe after the Death of the Incumbent*; The *Biſhop made a Leaſe for* 40 *Years* of the Advowſon, *to commence at ſuch Time as the ſaid Parſonage ſhould come to the Hands of the Biſhop* by Reſignation, Death, or otherwiſe, of the Incumbent; which Leaſe was confirmed by the Dean and Chapter; and afterwards the Biſhop died, and ſo did the Incumbent; Reſolved, that the Leaſe was void againſt the ſucceeding Biſhop, becauſe his Predeceſſor had nothing in the Parſonage impropriate during the Life of the Incumbent, who ſurvived the Leſſor. D. 244. a. b. pl. 60. Mich. 7 & 8 Eliz. Anon.

Co. Litt. 252. b. S. P. and cites S. C. but mentions nothing of the Biſhop's Death.

5. 13 *Eliz. cap.* 10. *S.* 3. *All Leaſes, Grants, Conveyances, or Eſtates, made or ſuffered by any* Dean and Chapter *of any Cathedral Collegiate Church*, Parſon, Vicar, *or any other having any Spiritual or Eccleſiaſtical*

Living, or any Houſes, Lands, Tithes, or other Hereditaments, being Parcel of their College, Cathedral, Chapter, Hoſpital, Parſonage, Vicarage, or other Spiritual Promotion, or belonging thereunto, other then from 21 Years or three Lives from the making thereof, and thereupon the accuſtomed yearly Rent, or more, ſhall be reſerved, and payable yearly during the Term, ſhall be utterly void to all Intents and Purpoſes.

This Act ſhall not make good any Leaſe or other Grant againſt the private Statute of any Collegiate Church.

A Bond expreſſed to be for Payment of Money cannot be averred to be for enjoying ſuch a Leaſe. Godb. 29. pl. 38. 27 Eliz. C. B. Macrow's Caſe.

6. 14 *Eliz. cap.* 11. *S.* 15. *All Bonds, Contracts, Promiſes and Covenants, to be made for ſuffering any Perſon to enjoy any Benefice or Eccleſiaſtical Promotion with Cure, or to take the Profits thereof, other than ſuch Bonds and Covenants as ſhall be made for Aſſurance of any Leaſe heretofore made, ſhall be of ſuch Force, and not otherwiſe, as Leaſes by the ſame Perſons made of ſuch Benefices and Eccleſiaſtical Promotions with Cure.*

7. *S.* 16. *All Leaſes, Bonds, Promiſes and Covenants, concerning Benefices and Eccleſiaſtical Livings with Cure to be made by any Curate, ſhall be of no other Force than if the ſame had been made by the beneficed Perſon himſelf, that demiſed the ſame to ſuch Curate.*

8. *S.* 17. *Spiritual Perſons may let their* Houſes in Market Towns, *or the Suburbs, ſo as it be not the Capital or Dwelling Houſe, nor have above ten Acres of Land to it.*

Provided no Leaſe be made in Reverſion, *or without reſerving the accuſtomed yearly* Rent, *or without charging the Leſſee with* Repairs, *nor for a longer Term than* 40 Years.

9. *At the Common Law* a Biſhop might make an Alienation in Fee-Simple; but by 32 H. 8. 28. Biſhops without Dean and Chapter, or their Confirmation, may make a Leaſe for 21 Years, but with the Confirmation of the Dean and Chapter, may make a Leaſe for 1000 Years; But by the *Stat.* 1 *Eliz.* whether with or without Confirmation, they cannot leaſe but for 21 Years, or three Lives, and it muſt begin preſently from the making, and the Ancient Rent muſt be reſerved payable yearly during the Term; Arg. Le. 59. pl. 77. Paſch. 29 Eliz. B. R. in Caſe of Bunny v. Wright and Stafford.

So if it had been a Leaſe for 21 Years, rendering the ancient Rent, the Succeſſor

10. A Biſhop after the Statute 1 Eliz. made a Leaſe of a *Fair* for three Lives, rendering the Antient Rent, which was confirmed by the Dean and Chapter; Adjudged, that the Succeſſor ſhall avoid the Leaſe becauſe a Fair is but a Franchiſe or Liberty not manurable, out of which a Rent cannot be reſerved, and ſo the Leſſor &c. has no Remedy by Diſtreſs or Aſſiſe. 5 Rep. 3. a. Trin. 30 Eliz. B. R. Jewell's Caſe.

ſhall avoid it; for though the Rent reſerved be good by way of Contract between the Leſſor and Leſſee, yet it is not incident to, nor ſhall go with, the Reverſion; Reſolved, 5 Rep. 3. in Jewel's Caſe. —— S. C. cited as adjudged. Ley 74 —— S. C. cited 10 Rep. 60. b. —— S. C. cited 2 Saund. 304. Arg. and ſays, that as it may well be collected out of the Book, it was a Caſe on a Leaſe for Life, and not for Years, and ſo no Reſolution in the Point, and that the Point of a Leaſe for Years at the End of the Caſe is but an extrajudicial Opinion only, and then if the Succeſſor ſhall have Remedy by Action of Debt for ſuch Rent reſerved on a Leaſe for Years, it follows that it is ſuch Rent as ſhall go with the Reverſion, and that it does not lie in Privity of Contract only; for the Succeſſor of the Biſhop, who was the Leſſor, is not privy to the Contract of his Predeceſſor, but has only a Privity of Eſtate, viz. the Reverſion. —— Though ſuch a Thing as a Fair cannot be leaſed by itſelf, yet it may be leaſed with a Manor; Arg. Agreed. Litt. Rep. 305. —— A Biſhop may grant a Fair for Years, but not for Life, becauſe Debt lies on ſuch Leaſe. Raym. 11. Arg. Paſch. 13 Car. 2. B. R.

And. 193. pl. 228. Marler v. Wright, S. C. the

11. *Leaſe for Years was in Being*, of which ſome were yet to come; Biſhop makes a Leaſe for three Lives; Adjudged a void Leaſe; For the Intent of the Statute 1 Eliz. was not to tolerate two Leaſes in Eſſe at the ſame Time, viz. one for Years and another for Lives; the Words there

there is (or) in the Disjunctive, viz. for 21 Years, or three Lives, and ſo it is apparent that both cannot be by the Statute at one Time. Mo. 253. cites Trin. 30 Eliz. C. B. Marle v. Wright and Green.

Leſſee for Years attorned, and the Leaſe for Lives was confirmed by the Dean and Chapter, but held void againſt an After-Biſhop by the Statute 1 Eliz. — Cro. E. 141. pl. 3. S. C. adjudged accordingly, though confirmed by the Dean and Chapter; For as to the Rent reſerved on the Grant for three Lives in Reverſion, although it becomes due, yet the Succeſſor has no Remedy for the Recovery of it during the Leaſe for Years, either by Diſtreſs or Action of Debt, being reſerved upon a Leaſe for Life, nor by Aſſiſe, becauſe he had no Seiſin, and ſo is not due or payable according to the Intent of the Statute.

12. A Leaſe made by a *Prebendary* is within the Equity of the Statute 32 H. 8. cap. 28. becauſe that Statute ſpeaks of Men ſeiſed in Right of their Churches, and a Prebendary is ſeiſed in Right of his Prebend; Per totam Curiam. 4 Le. 51. pl. 132. Trin. 31 Eliz. C. B. Acton v. Pitcher.

13. A Parſon was *deprived* for ſlandering the Book of Common Prayer where he ought not to be deprived for the firſt Offence by the Statute 1 *Eliz.* yet he cannot enter and make Leaſe till the Sentence of Deprivation be annulled by Appeal. Mo. 228. at the End of pl. 366. Mich. 36 & 37 Eliz. B. R. Cowdry v. Acton.

14. After the *Death of the Dean*, who was Party to a Leaſe not warranted by 13 & 14 Eliz. ſuch Leaſe ſhall be void, and the *Succeſſor with the Chapter* ſhall *avoid* it. Carth. 13. cites Lincoln College's Caſe 3 Rep. 60 [b. Mich. 37 & 38 Eliz. C. B.]

Le. 308. S. C. cited in the Caſe of Carter v. Claycole. —— 3 Rep. 60. in Lincoln College's Caſe, cites it to have been ſo reſolved after great Doubt, per 39 Eliz. C. B. in Caſe of Hunt v. Singleton. —— But per Atkins J. the Caſe of Hunt v. Singleton is hard, conſidering that the Dean and the Chapter were all Perſons capable, that a Grant ſhould hold in Force as long as the Dean lived, and determine then; he thought, they being a Corporation aggregate of Perſons who were all capable, that there was no Difference betwixt that Caſe and this, Ellis ſaid, that in **Floyd and Gregory's Caſe**, reported in Jones, it was made a Point, and that Jones in his Argument denied the Caſe of Hunt and Singleton; he ſaid that himſelf and Sir Rowland Wainſcot reported, and that nothing was ſaid of that Point, but that Ld. Coke followed the Report of Serjeant Bridgman, who was three or four Years puiſne, and that he miſtook the Caſe. Mod. 205. pl. 35. Trin. 27 Car. 2. C. B. in Caſe of Chapter of Southwell v. Biſhop of Lincoln.

15. The *Biſhop* of N. *had a Manor to which an Advowſon was appendant*, and *granted the Advowſon to the Plaintiff for* 21 *Years, which was confirmed by the Dean and Chapter.* The *Biſhop was afterwards tranſlated*, and *while the Temporalities were in the Queen's Hands the Church became void*; the Queen preſented H. the Defendant, who was admitted, inſtituted and inducted, againſt whom and the Biſhop the Plaintiff brought a Quare Impedit; Reſolved, that though it was ſuch an Hereditament whereof no annual Profit nor Rent can be reſerved, this Grant was void by the Statute 1 Eliz. becauſe it is Parcel of the Poſſeſſions and Hereditaments of the Biſhoprick, and therefore void as well againſt the Queen as againſt the Succeſſor, though it is good ſo long as he who granted it continues Biſhop. Cro. E. 690. Trin. 41 Eliz. C. B. Armiger v. The Biſhop of Norwich and Holland.

Mo. 542. pl. 719. S. C. in B. R. but S. P. does not appear.

16. 43 *Eliz. cap.* 9. *S.* 8. *All Judgments to be bad, for the Intent to have or enjoy any Leaſe contrary to the Statutes* 13 *Eliz. cap.* 20. 14 *Eliz. cap.* 11. *and* 18 *Eliz. cap.* 6. *ſhall be void, as Bonds or Covenants made for that Purpoſe are appointed to be void.*

17. A *Layman is preſented* &c. and makes a Leaſe which is confirmed by Patron and Ordinary, and after is *deprived* by Sentence declaratory, yet the Leaſe is good, for when he made the Leaſe he was Patron *in Facto*, and the Deprivation ſhall not have ſuch Relation to make him no Parſon ab initio, though it be declaratory, for the Succeſſor ſhall not

not have the mean Profits. D. 292. b. pl. 72. Marg. cites Trin. 48 Eliz. B. R.

18. 1 *Jac.* 1. *cap.* 3. *S.* 2. *Every Archbiſhop and Biſhop ſhall be diſabled to do or ſuffer any Thing, whereby any Honors or Hereditaments, Parcel of the Poſſeſſions of the Archbiſhoprick or Biſhoprick, or belonging to the ſame, may be aliened, charged or conveyed to the King; And all ſuch Alienations, Charges and Conveyances, and all Confirmations of the ſame ſhall be void.*

Cro. J. 111. pl. 10. S. C. adjudged and affirmed in Error. — S. C. cited Arg. 2 Saund. 304.

19. Leaſe of *Tithes by Biſhop for three Lives* was reſolved not good, becauſe no Remedy is for the Rent by Diſtreſs nor Debt, and therefore it cannot be called Rent; But otherwiſe had it been a Leaſe for Years, becauſe Debt lies. Mo. 778. pl. 1078. Trin. 2 Jac. B. R. Talentine v. Denton.

——— So of a Portion of Tithes, and though Succeſſor accepts the Rent, yet the Leaſe remains void; for it is made abſolutely void by the Statute againſt the Succeſſor, but not againſt the Biſhop himſelf. Cro. J. 173. pl. 14. Trin. 5 Jac. B. R. Rickman v. Garth.

20. Dean and Chapter being ſeiſed of a Manor in which are *Copyholds demiſable for three Lives*, they let it *by Indenture* for three Lives; Adjudged good. Cro. 6. 76. pl. 76. Trin 3 Jac. B. R. Baugh v. Haines.

21. The *Dean and Canons of Windſor* in 35 Eliz. agreed to *caſt Lots to have Aſſurances made to each of them of a Leaſe of certain Part of the Poſſeſſions of the Church*, ſo that after Lots were caſt every one might know what Lands he ſhould have; they executed the Aſſurances thus, viz. The Body corporate entered into a Bond of 500 l. to every Canon, who was to have the Leaſe, to be paid in a ſhort Time before the Expiration of the old Leaſe in Eſſe; and the Canon the ſame Day entered into another Bond to the Corporation to pay them 510 l. if they made the Leaſe to him &c. and it was proved, that they agreed amongſt themſelves that one 500 l. ſhould be ſtopped for the other, and that the Corporation was only to have 10 l. for the new Leaſe; Decreed by Ld. C. Egerton, that the Bond by the Corporation of 500 l. to each Canon, was void by the Statute 18 *Eliz.* which *mentions Bonds and Covenants to be void which are entered into for making a Leaſe contrary to the Statute of* 13 *Eliz.* Mo. 789. pl. 1089. Hill. 4 Jac. in Canc. Dean and Canons of Windſor v. Penvin.

22. As to the diſabling Statutes of 1 Eliz. and 13 Eliz. the Words of the Exception out of the Reſtraint and Diſability of 1 Eliz. are, *Other than for Term of 21 Years, or three Lives, from ſuch Time as any ſuch Grant or Aſſurance ſhall be given, whereupon the old and accuſtomed yearly Rent, or more, ſhall be reſerved*; And to that Effect is the Exception in the Statute of 13 Eliz. Firſt, it is to be underſtood, that neither of theſe diſabling Acts, nor any other, do in any Sort alter or change the enabling Statute of 32 H. 8. but leaves it for a Pattern in many Things for Leaſes to be made by others. 2dly, It is to be known that no Leaſe *made according to the Exception of* 1 *Eliz. or* 13 *Eliz. and not warranted by the Statute of* 32 *H.* 8. if it be made by a Biſhop, or *any ſole Corporation*, but it *muſt be confirmed* by the Deans and Chapters, or others that have Intereſt, as hath been ſaid in the Caſe of the Parſon and the Vicar. Co. Litt. 44. b.

23. *As* if Biſhop make a Leaſe for 21 Years, and all thoſe Years being ſpent ſaving three or more, yet may the Biſhop make a new Leaſe to another for 21 Years, to begin from the making, according to the Exception of the Statute, but not a Leaſe for Life or Lives, as hath been ſaid, and this *concurrent Leaſe* hath been reſolved to be good as well upon the Exception of 1 Eliz. in Caſe of Biſhops, as upon 13 Eliz. which extend to Spiritual and Eccleſiaſtical Corporations, aggregate of many

many as Dean and Chapters &c. which 32 H. 8. did not. Co Litt. 45. a.

24. *But* in the Caſe of the concurrent Leaſe in the Caſe of the Biſhop it muſt be *confirmed*. Co. Litt. 45. a.

25. *Alſo* the Exception of 1 *Eliz. and* 13 *Eliz.* doth *differ from* the Statute of 32 *H.* 8 For the Leaſes for Years to be made according to the Exceptions of 1 and 13 Eliz. muſt *begin from the making*, and not from the Day of rhe making, but by Force of 32 H. 8. *from the Day of the making*. Co. Litt. 45. a.

26. *And* although the Statutes of the 1ſt and 13 Eliz. do not appoint the Leaſe to be *made by Writing*, yet it muſt therein, and in the other eight Properties and Qualities before-mentioned, and required by 32 H. 8. follow the Pattern thereof (the concurrent Leaſe only excepted.) Co. Litt. 45. a.

27. Although the Exception in 1 and 13 Eliz. concerning the *accuſtomed Rent* is more general than that of 32 H. 8. and there is not any Proviſion for Leaſes made *diſpuniſhable of Waſte* &c. yet muſt the Pattern of 32 H. 8. be followed; For Leaſes without Impeachment of Waſte made by ſuch Spiritual and Eccleſiaſtical Perſons, are unreaſonable and Cauſes of Dilapidations. Co. Litt. 45. a.

28. The Dean and Chapter of N. 37 H. 8. made a *Leaſe for* 50 *Years*, and 8 Eliz. they made a *Leaſe to T. for* 99 *Years, to begin after the Determination of the Leaſe for* 50 *Years, which expired* 38 *Eliz.* In 42 *Eliz. they made a Leaſe* to W. the Plaintiff *for three Lives, reſerving Rent, and a Letter of Attorney to make Livery, and covenanted that the Plaintiff ſhould enjoy the Lands againſt* the Leaſe made to T. *and all claiming under him.* T. brought Action againſt W. and had Judgment. W. brought *Covenant* againſt the Dean and Chapter *on this Leaſe.* Livery was made by the Attorney after three Rent-Days incurred. The Juſtices all agreed that the Leaſe was good, and the Livery well executed by the Attorney, who is not confined to any Time to make it; And alſo that the Leaſe for three Lives was not void by the Statute of 13 Eliz. becauſe *the Dean who made the Leaſe for three Lives was alive at the Time of the Eviction*; and Judgment for the Plaintiff. Mo. 875. pl. 1223. Paſch. 10 Jac. Walter v. The Dean and Chapter of Norwich.

Brownl. 21. S. C. adjudged that Covenant would lie though the Leaſe was void. —— 2 Brownl. 134. S. C. argued; ſed adjornatur. —— Ibid. 158. S. C. argued at Bar and by the Juſtices, and adjudged for the Plaintiff.

29. If a *Corporation aggregate* makes a Leaſe *not* warranted by 13 Eliz. ſuch Leaſe is void *againſt themſelves*; But if *a ſole Corporation* make ſuch a Leaſe it ſhsll bind him, though it ſhall be void againſt his Succeſſors; Per Hale Ch. B. Hardr. 326. pl. 6. Paſch. 15 Car. 2. in Scacc. in Caſe of Morris v. Antrobus.

Ibid. Said it had been after adjudged. — Cro. E. 690. Armeger v. Holland. —Le. 307. cites the Biſhop of Coventry's Caſe. —— Mo. 875. pl. 1223. agreed that it holds good during the Life of the Dean. —— The ſame of Warden of a College Le. 309. Carter v. Claycole. —— A Leaſe being in Eſſe the Dean and Chapter made a new Leaſe; it was reſolved that this was good as long as the Dean was living, cited per Coke Ch. J. 2 Bulſt. 79. Paſch. 11 Jac. as the Caſe of the Dean and Chapter of Norwich. —— Whether a Parſon making ſuch Leaſe ſhall be bound by it himſelf See Goldsb. 139. Revet v. Hart.

30. The Biſhop of Salisbury granted the Office of *Surveyor of a Manor to Two*, for their Lives, with the Fee of 6 l. 13 s. yearly, whereas the *Office was never granted but only to one.* The Biſhop and one of the Grantees died, and the Survivor diſtrained for the Rent-Arrear. Reſolved, that the Grant was void by the Act 1 Eliz. which reſtrains Biſhops &c. from making unuſual Grants; and being void, could not be good by any Accident or Matter ſubſequent, (as here by the Death of one) to bind the Succeſſor; that by the Common Law ſuch a Grant for two Lives, with the Aſſent of the Chapter, had been good, though

S. C. cited Cro. C. 259. pl. 2. Trin. 8 Car. B. R. in the Caſe of Walker v. Lamb, in which it was adjudged that the Office

of Official of an *Archdeacon* and of a *Commiſſary of a Biſhop* are within the Words and Intent

it had not been uſually granted for two Lives before; that the Grant of an ancient Office to one with the ancient Fee by a Biſhop, ſhall not bind his Succeſſor, unleſs it is confirmed by the Dean and Chapter; and if the Biſhop who made the Grant be tranſlated, or depoſed, or removed, it is void againſt the Succeſſor; and Judgment accordingly. 10 Rep. 58. b. Trin. 11 Jac. The Biſhop of Sarum's Caſe.

of the Statutes of 1 Eliz. and 13 Eliz. for they are Hereditaments, and are pertaining unto them, and that a Grant of thoſe Offices to two where they were only grantable to one for Life, and being granted in Reverſion, is a void Grant by thoſe Statutes againſt the Succeſſors; for they reſtrain all Grants but thoſe of Neceſſity, as well of Offices as of other Things not wartanted by thoſe Statutes ——— Jo. 264. S. C. cited in S. C. and adjudged accordingly.

31. Leaſe by Biſhop made *diſpuniſhable of Waſte* is void. Litt. Rep. 306. Mich. 5 Car. C. B. Sheer v. Pentor.

32. *Præcentors* of old Foundations are enabled to leaſe by the Statute; otherwiſe perhaps of new Foundations; Per Hide J. and where a Caſe was cited in the Exchequer that Leaſe made by the *Chanters of Paul's* ought to be confirmed; Hide ſaid, that they are not properly Chanters, but minoris Ordinis, and are only Singing-men; But Chanters, Præcentors &c. are *Majoris Ordinis*. Lev. 113. Mich. 15 Car. 2. B. R. in Caſe of Biſco als' Strode v. Holt.

Raym. 88. Sharrock v. Bourchier, S. C. and the Court divided, and the Court being divided no Prohibition was granted, but ordered that all Things ſtay as before

33. In a Prohibition the Caſe was, A *Prebendary, who had a peculiar Juriſdiction, made a Leaſe for Years* of his Prebend, *with all Profits, Commodities and Advantages* thereunto belonging. The Queſtion was, *Whether* the Eccleſiaſtical Juriſdiction paſſed to the Leſſee, ſo as *he could make a Commiſſary to hold Courts*? The Court was divided, two Judges being of Opinion, that the appointing a Commiſſary was annexed to the Spiritual Perſon, and not to the Lay Body of the Prebend; and two of another Opinion; therefore they ordered, that the Plaintiff ſhould declare on his Suggeſtion, and that the Defendant ſhould demur to it, that it might come judicially before the Court. Lev. 125. Hill. 15 & 16 Car. 2. C. B. Sherrock v. Boucher.

the Motion till farther Conſideration. But afterwards Hide Ch. J. ſaid that the Right of Office did come in Queſtion, and upon that a Prohibition was granted.

34. A Prebendary or Churchman *by* 13 *Eliz. cap.* 10. *cannot now make a Leaſe of the Poſſeſſions of his Prebend without Deed.* Vaugh. 197. Hill. 19 & 20 Car. 2. C. B. in Caſe of Holden v. Smallbrook.

35. If a Biſhop makes a Leaſe for Years, and the *Leſſee ſurrenders*, and the Biſhop keeps the Land in his Hands as long as the Leaſe has Exiſtence, the Succeſſor notwithſtanding *may demiſe* the Land, becauſe the Leaſe hath Exiſtence to ſome Purpoſe; Per Twiſden J. Raym. 167. Hill. 19 & 20 Car. 2. B. R. in Caſe of Pemble v. Stern.

Sequeſtration does not hinder the Demiſe; But if it be

36. If the *Temporalities are* 20 *Years in the King's Hands*, this does not *hinder* the Demiſe; Per Moreton J. Raym. 166. Hill. 19 & 20 Car. 2. B. R.

in the King's Hands its a great Doubt, and this Statute being an enabling Law implies a ſtrong Negative that it ſhall not be otherwiſe, being an introductive Law; Per Windham J. Ibid. ——— Per Twiſden J. according to Moreton J. Ibid. 167. cites Cox Biſhop of Ely's Caſe.

Lev. 212. S. C. and the Court divided, Keeling and Twiſden held the

37. In a ſpecial Verdict in Ejectment the Caſe was, The Lands in Queſtion was Parcel of the Inheritance of the Archbiſhops of York; that a *Leaſe was made* thereof *in* 1604, reſerving the ancient Rent; That *Anno* 1630, *the Leſſee ſurrendered it to Archbiſhop* Harſenett; *and that ever ſince it was kept by him and the ſucceeding Archbiſhops in Demeſne, till the Year* 1660, *and then* Fruyn *Archbiſhop* of York *made a*

Leaſe

Leaſe of it for 21 *Years* to the Plaintiff; and the Queſtion was, Whether this was a good Leaſe within the Statute 3 H. 8. by which Biſhops have Power to make Leaſes for 21 Years of ſuch Things which have for the greater Part of 20 Years laſt paſt, before the making thereof, been commonly demiſed, and in this Caſe the Lands had not been demiſed for 30 Years laſt paſt before the making of this Leaſe? Two Judges were of Opinion, that this Leaſe was not good, but may be avoided by the Succeſſor, becauſe the Statute being an enabling Law, ought ſtrictly to be purſued; all enabling Laws imply a Negative, that it ſhall be ſo and no otherwiſe; Two Judges of another Opinion, (viz.) that the Meaning of this Statute was to reſtrain Biſhops from making Leaſes of their Ancient Palaces and Demeſne Lands which were never demiſed before, and that it did not extend to ſuch Lands which had been demiſed, and had gained an accuſtomed Rent; for if it ſhould be conſtrued literally, theſe Inconveniences might happen, that if a Biſhop ſhould keep the Lands in his Hands for the Space of 11 Years, he can never make a good Leaſe of them afterwards for 21 Years; ſo if he ſhould be diſſeiſed, and kept out of Poſſeſſion for 11 Years, he would be in the ſame Caſe; No Judgment was given; but the Cauſe was adjourned, Et ſic pendet. Nelſ. Abr. 1094, 1095. pl. 16. cites Raym. 166. [19 & 20 Car. 2. B. R.] Pemble v. Sterne.

Leaſe good, but Windham and Moreton e contra. But afterwards Windham J. being dead, Keeling and Twiſden gave Rules for Judgment for the Plaintiff that the Leaſe was good, (the Record not being tranſmitted into the Exchequer-Chamber as was intended and directed) Niſi; but afterwards Exceptions were taken to the Pleadings, whereupon Judgment was ſtayed. —— Sid. 316. pl. 3. S. C. the Court ſeemed that the Leaſe was good, and that it is very hard to tie this up to the Words of the Statute where the Intent is purſued, which is only to preſerve the Antient Revenue; ſed adjornatur. ——— Ibid. 416. pl. 17. S. C and Judgment ordered accordingly to be entered for the Plaintiff, but on other Exception taken adjornatur.

38. Leaſe for Years by Parſon *confirmed by Biſhop &c.* does not determine by Death of the Parſon, as it does for his *Non-reſidence.* 2 Lev. 61. Trin. 24 Car. 2. B. R. Baily v. Monday als' Murrin.

Vent. 244. Baily v. Murin S. C. held accordingly by all the Juſtices. ——— See Reſidence (B) pl. 1. in the Notes.

39. Biſhop grants the *Stewardſhip* of a Manor *to J. S. for Life*, and ſays not for whoſe Life, it ſhall be for Life of the Grantee. Cro. C. 16. pl. 8. Mich. 1 Car. C. B. Cook v. Younger.

40. The *Chapter of the Collegiate Church of* S. was *ſeiſed of the Advowſon of H. in Groſs*, in the Right of their Church, and preſented one, and then *granted the next Avoidance* to K. from whom by meſne Aſſignments it came to B. who after the Death of E. preſented the Defendant; It was argued that the Words Deans and Chapters in the Statute 13 Eliz. cap. 10. might be taken ſeverally; for *of this Chapter there is no Dean*; that if they were to be taken jointly, then a Dean alone could not be within this Law, in reſpect of thoſe Poſſeſſions which he holds in Right of his Deanery; and as to the Grant of the next Avoidance it was inſiſted that the Statute reſtrains all Gifts, Grants &c. other than ſuch upon which the old Rent &c. and that the Grant was void ab Initio, or elſe it muſt be good for ever; for here is no Dean, after whoſe Death it may become void; and to this the Court agreed, and gave Judgment for the Plaintiff. Mod. 204. pl. 35. Trin. 27 Car. 2. C. B. Southwell (Chapter &c.) v. Lincoln (Biſhop) and J. S.

2 Mod. 56. S. C. and agreed that the Statute 13 Eliz. cap. 10. was a General Law, and that the Grant of the next Avoidance was not good; becauſe it was by thoſe who were not Head of the Corporation, and it muſt be void immediately or not at all, and Judgment was given accordingly.

41. *Two*

Mod. 203. pl. 34 S. C. adjudged accordingly in C. B and that Judgment affirmed upon a Writ of Error in B. R.

41. *Two Manors* were *uſually let for 67 l. a Year*, the *Biſhop lets* one of them for 21 Years, *reſerving the old Rent.* The Statute 1 Eliz. cap. 19. ſays that all Leaſes ſhall be void on which the old accuſtomed Rent is not reſerved. North, Windham and Atkins held the Leaſe good. 2 Mod. 57. Trin. 27. Car. 2. C. B. Threadneedle v. Lynam.

——— Freem. Rep. 92. S. C. argued. ——— Ibid. 119. pl. 150. S. C. argued, Et adjornatur. ——— Ibid. 165. pl 181. S. C. argued, and the Court ſeemed to incline that the Leaſe was good; Sed adviſare volunt. ——— Ibid. 179. pl. 191. S. C. argued by the Judges; and Judgment that the Leaſe was good. — But in all theſe Reſpects it appears that in Vaughan Ch. J. his Time he and Ellis held the Leaſe not good; but he dying, and North being made Ch. J. Judgment was given that it was good, Ellis diſſentiente. See the Argument of Vaughan in Freem. Rep. 183 to 187. ——— Pollexf. 176. S C. being Pollexfen's ſecond Argument provided for the Plaintiff in Error; but he ſays that Hale Ch. J. was ſo ſtrong againſt the Plaintiff that he would not admit of a ſecond Argument; but towards the End of the Term, when he intended to reſign, affirmed the Judgment.

42. A Biſhop may grant *Offices* for one, two, or three Lives, if he had Power ſo to do before the Statute 1 Eliz. cap. 19. but otherwiſe he cannot. 2 Lev. 136. Trin. 37 Car. 2. B. R. Ridley v. Pownell.

43. 1 *W. & M. cap.* 16. *S.* 3. *Makes good a Leaſe made by a* Simoniack *for a good and valuable Conſideration to any Perſon not privy to or having Notice of the Simony.*

The Effect of Non-Reſidence as to Leaſes by Clergymen, See tit. Reſidence (B).

See tit. Confirmation.

(R. a. 7) Leaſes. By Parſon &c.

Good or not in reſpect of the Rent, Reſervations &c.

Hereby firſt it appears, (as has been ſaid) that nothing can be demiſed by Authority of this Act, but that whereout a Rent may be lawfully reſerved.

1. 32 *H.* 8. *cap.* 28. *S.* 2. ENacts, that *upon every ſuch Leaſe there be reſerved ſo much Yearly Rent as has been uſually paid for the Lands ſo let, within twenty Years next before ſuch Leaſe made, and the Reverſioners of the Manors, Lands &c. ſo let, (after the Death of ſuch Leſſor or his Succeſſors) may have ſuch Remedy againſt ſuch Leſſee, his Executor and Aſſigns, as ſuch Leſſor might have had againſt ſuch Leſſee.*

2dly, That where not only a Rent was formerly reſerved, but Things not annual, as Heriots, or any Fine or other Profit, at or upon the Death of the Farmer, yet if the Yearly Rent be reſerved upon a Leaſe made by the Force of this Statute, it ſuffices by the expreſs Words of the Act.

3dly, If he reſerve more than the accuſtomable Rent, it is good alſo by the expreſs Letter of the Act; but if 20 Acres of Lands have been accuſtomably letten, and a Leaſe is made of thoſe 20, and of one Acre which was not accuſtomably letten, reſerving the accuſtomable Yearly Rent, and ſo much more as exceeds the Value of the other Acre, this Leaſe is not warranted by the Act, for that the accuſtomable Rent is not reſerved, ſeeing Part was not accuſtomably letten, and the Rent iſſues out of the whole.

4thly, If Tenant in Tail let Part of the Land accuſtomably letten, and reſerve a Rent pro Rata, or more, this is good, for that is in Subſtance the accuſtomable Rent.

5thly, If two Coparceners be Tenants in Tail of 20 Acres, every one of equal Value, and accuſtomably letten, and they make Partition, ſo as each have 10 Acres, they may make Leaſes of their ſeveral Parts, each of them reſerving the half of the accuſtomable Rent.

6thly, If the accuſtomable Rent had been payable at 4 Days, or Feaſts of the Year, yet if it be reſerved Yearly payable at one Feaſt, it is ſufficient; for the Words of the Statute are "reſerved Yearly." Co. Litt. 44. b.

3. *Arch-*

3. *Archbiſhop* of York made a *Leaſe for Years* which was *confirm'd by the Dean and Chapter, rendering Rent to him and his Succeſſors, provided that in the Time of Vacation the Rent ſhould be paid to the Chapter* of York, *ut in Jure ſuo proprio durante quolibet tempore talis Vacationis*; this was held a void Proviſo. And. 9. pl. 19. Paſch. 4 Eliz. Anon.

Mo. 51. pl. 152. Eires's Caſe. S. C. held that the Condition was repugnant and void.——D. 221. b. pl. 20. S. C. and the Reſervation to the Chapter held not good.——Dal. 53. pl. 31. S. C. argued by the Judges, and Judgment accordingly.——Bendl. 129. pl. 191. S. C. This was a void Proviſo, becauſe the Rent is not reſerv'd to the Chapter, and is alſo contrary to the Reſervation, and likewiſe becauſe this Rent cannot be paid to the Chapter, that being no Body without a Head, viz. the Dean, and this Proviſo is no Condition, but a Limitation or Demonſtration, and it cannot take from the Queen her Title to the ſaid Rent in the Time of Vacation of the ſaid Archbiſhoprick; And Judgment was given accordingly.——S. C. cited 4 Le. 71.

4. Rent reſerved payable *Yearly inſtead of Quarterly*, the ſame is within the Letter though not within the Intent of the Statute, ſo if made payable *off the Land*. Per Clench J. 4 Le. 78. pl. 166. 28 Eliz. C. B.

5. Dean and Chapter made a Leaſe of Lands to J. S. for the Lives of three others, *reſerving the ancient Rent Half-yearly where it uſed to have been reſerv'd Quarterly*, adjudged that this is not void by the Statute 13 Eliz. cap. 10. And though the ancient Rent was uſually made payable Quarterly, and by this Leaſe it was to be paid only Half-yearly, yet it was held well enough; For it is for the Succeſſor's Benefit, and there is no impairing of the Rent; and a Leaſe to J. S. for the Lives of three others, or to three for their three Lives is all one within the Intent of the Statute. Cro. J. 76. pl. 6. Trin. 3 Jac. B. R. Baugh v. Haynes.

6 Rep. 37. The Dean and Chapter of Worceſter's Caſe. S. C. and reſolv'd that if the Rent be annually reſerv'd, the Statute is ſatisfied by reaſon of that Word, and ſo there is a Diverſity between this Caſe and that of the Ld. Mountjoy; For there the Word Annually was wanting, the which explains the Intentions of the Makers of the Statute of 13 Eliz.

6. If a Prebendary leaſes a Park *excepting the Deer*, and after that Leaſe is ended he leaſes the Park without excepting the Deer, this ſhall not avoid the Leaſe. Arg. 3 Bulſt. 291. cites 11 Rep. 46. [Mich. 12 Jac.] in Liford's Caſe.

7. A Prebendary made a *Leaſe* of Lands Parcel of his Prebendary, *with an Exception of Oaks, Aſh* &c. and this Leaſe was confirmed, afterwards this Prebendary *made a ſecond Leaſe without and ſuch Exception* in it, this ſecond Leaſe was held void upon the Statute 13 Eliz. cap. 10. becauſe of the Want of the Exception. 3 Bulſt. 290. Paſch. 15 Jac. Smith v. Bowles.

Cro. J. 458 pl. 5. S. C. adjudged accordingly.—S. C. cited Palm. 106.—Exceptions out of a former Leaſe more large then out of a new Leaſe vitiate the new. Hardr. 325. pl. 6. Paſch. 15 Car. 2.——Ley. 74. S. P. per Hutton J. Arg. in Caſe of the Biſhop of Chicheſter v. Freeland.——And cites the Caſe of Smith v. Bowles. 13 Jac. Cro. J. 458. and was for not excepting Crab-Trees.——3 Bulſt. 290. S. C.—— For it is not the ancient Rent where more is leaſed then was before. Cro. J. 459. pl. 5. Hill. 15 Jac. B. R. Smith v. Bole.

8. Fee *payable twice a Year* where it uſed to be granted payable only once a Year, yet good. Cro. C. 16. pl. 8. Mich. 1 Car. C. B. Cook v. Younger.

Ley 72. per Yelverton J.

9. Biſhop grants a Leaſe for three Lives, viz. to A. for Life, *Remainder to B. for Life*, Remainder to C. for Life, it is not good. Cro. C. 94. pl. 21. Mich. 3 Car. C. B. Owen v. App-Rees.

10. The *Office of Regiſter* of the Bp. of R. was uſually granted before the Statute 1 Eliz. in Reverſion. It may ſtill be granted in Reverſion with the Confirmation of the Dean and Chapter; And if ſuch

Grant be *made with a Robe of* 13 *s.* 4 *d. where the uſual Grants were of a Robe, or* 13 *s.* 4 *d.* this does not vitiate the Grant of the Office, but ſhall be void only for the Fee after the Death of the Grantee. Jo. 311. pl. 24. Mich. 8 Car. B. R. Young v. Stowell.

S. C. cited by Holt Ch. J. 3 Chan. Rep. 121, 122. in Caſe of Orby v. Ld. Mohun, as a Caſe of undoubted Authority, and which never can be ſhaken, but cites it by the Name o Morris v. Atwood. —The *running of a Colt* was reſerv'd in a former Leaſe but omitted in an after Leaſe, but it was argued that this was reſerv'd to the former Leſſor only, and his Aſſigns out of the Land of the Leſſee to whom the Leaſe was firſt made, only that this Leaſe was expir'd; and that the Succeſſor cannot reſerve Paſture out of the Land of the firſt Leſſee, and that ſuch Reſervation is void, but that otherwiſe perchance it is if the Reſervation is general, and to this the Court agreed. Palm. 104. 106. Paſch. 17 Jac. B. R. Enſden v. Dennis.

11. Anno 13 Car. 2. the Petty Cannons of St. Paul's made a Leaſe to the Plaintiff and his Wife of the Rectory of St. Gregory's for 21 Years, *rendring* 40 *l. per Ann.* and the *Plaintiff covenanted further to pay Yearly a couple of Capons, or* 6 *s.* 8 *d.* in Money; and it appeared that *former Leaſes had been* made of this Rectory, *reſerving different Rents under* 40 *l. per Ann. but in the laſt Leaſe,* that was made *before the Leaſe now in Queſtion, there was* 40 *l. per Ann. Rent reſerv'd and a couple of Capons,* and that the Exceptions out of the other Leaſes were more large than out of this Leaſe; Hale Ch. Baron held that the Statute 32 H. 8. cap. 28. is a Pattern for expounding that of 13 Eliz. cap. 10. but that the *accuſtomed Rent mention'd in the Statute ought to be underſtood of the Rent reſerved upon the laſt Leaſe* and not upon the firſt; For that Rent, having been altered ſince, cannot be called the accuſtomed Rent; And in *the former Leaſe the Capons were reſerved,* and ſo Part of the Rent; *but here the Leſſee only covenanted to pay* them, but that Covenant will not bind the Wife if ſhe ſurvive her Husband. Hardr. 325. Paſch. 15 Car. 2. in Scacc. Morris v. Antrobus.

2 Lev. 61. Baily v. Munday S. C. & S. P. agreed accordingly, this Leaſe being for the Succeſſor's Advantage if the Predeceſſor dies within the 20 Days. —3 Keb. 193. pl. 4. Baily v. Man. S. C. & S. P. held accordingly.

12. In a Special Verdict in Ejectment the Caſe was, A *Vicar made a Leaſe, rendring Rent during the Term, and payable at the uſual Feaſts, or within* 10 *Days after,* which Leaſe was confirmed by the Archbiſhop, Patron of the Vicarage, and by the Dean and Chapter of Canterbury; the Queſtion was, Whether this Leaſe ſhould bind the Succeſſor? It was objected that it was void, becauſe the Rent was reſerved on the uſual Feaſts, or within 10 Days after, ſo that the Term ending at Michaelmas would be expired before the laſt Payment was due, for that was not till 10 Days after; but adjudged, that becauſe the Reſervation of Rent was during the Term, the Leſſee ſhall not have 10 Days after Michaelmas in the laſt Year. Vent. 244. Trin. 25 Car. 2. B. R. Baily v. Murin.

Ibid. per Holt Ch. J. This could not be helped by Apportionment. * Owen v. Thomas Ap prees.

13. If a Dean and Chapter have once *increaſed their Rent* they can never go back, becauſe the Statute reſtrains it. Per Holt Ch. J. 2 Vern. 543. pl. 485. Paſch. 1706. in Caſe of Orby v. Ld. Mohun.

14 A Biſhop made a Leaſe *of two Manors,* whereas the former Leaſes were of thoſe two and a third, *excepting the Third* reſerving the ancient and *accuſtomed Rent,* but not ſpecifying any; The Rent at which the third uſed to be let was 32 l. per Ann. This is a void Leaſe, not only as * Cro. Car. 94. reports it, becauſe no Rent is ſhewn in certain, but becauſe (as Vaughan Ch. J. 3 Keb. 380. in Caſe of **Threadneedle v. Lynas** mentions) three Manors were uſually let, and now the Leaſe was but of two Per Trevor Ch. J. who ſaid that taking both theſe Reaſons together, upon both which he thinks the Judgment was given, and not upon one ſingly, the Leaſe was certainly void, becauſe there never was any ancient Rent for two, but for three Manors, but if 32 l. per Ann. had been reſerved for the two upon this Leaſe, it had been undoubtedly good. 3 Ch. Rep. 109. in Caſe of Orby v. Ld. Mohun.

(R. a. 8) By Parſon &c.

Commencement. Concurrent Leaſes.

1. 18 *Eliz. cap.* 11. *S.* 2. ALL *Leaſes made by any any Dean and Chapter, Parſon, Vicar &c. where another Leaſe for Years is in being, not to be expired, ſurrendered, or ended, within three Years next after the making of ſuch new Leaſe, ſhall be void.*

S. 3. *All* Bonds and Covenants for renewing, *or making of any Leaſe, contrary hereunto, or to the* 13 *Eliz.* 10. *ſhall be void.*

2. E. G. Archbiſhop of York, made a Leaſe *for* 21 *Years* &c. *to* F. the Plaintiff, *dated* 6 *Nov.* 18 *Eliz. habendum a Datu Indenturæ,* which Leaſe was confirmed by the Dean and Chapter, there being *four Years of an old Leaſe for* 40 *Years unexpired.* Afterwards E. G. was removed to Canterbury, and then S. elected Biſhop of York. The firſt Term ended, and the ſecond Leſſee entred. S. made a Leaſe to C. who entred and ejected F. Adjudged that *the Leaſe to F. was good by* reaſon of the *Confirmation,* though without that it would not be good; and held that the ſaid Leaſe *being to commence immediately in Eſtoppel, but not in Intereſt, was* not void *by the Statute* 1 *Eliz. neither within the Letter, nor* within *the Intent of the Statute, becauſe* it is *not prejudicial to the Succeſſor,* and the Statute is ſatisfied in the Intent if it be not a longer Eſtate againſt the Succeſſor than 21 Years, or three Lives, and though the Leaſe would not be good by the Statute 32 H. 8. againſt the Succeſſor becauſe there was another Leaſe in being, yet it is not void by the 1 Eliz. but capable of Confirmation, and by its having the Confirmation ſhall bind the Succeſſor. Mo. 107. pl. 251. Trin. 21 Eliz. in Cam. Scacc. Fox v. Collier.

And. 65. pl. 140. S. C. adjudged.—— S. C. cited Le. 148. in pl. 205.—— After the Reſolution of Fox and Collins's Caſe, there have been frequent and concurrent Leaſes for Years, and alſo Attempts to make concurrent Leaſes for three Lives, but this was adjudged void in Elmer's Caſe, 5 Rep. 2. but to him is the ſame Reaſon in both Caſes; Per Hutton J. Arg. Ley. 78. Paſch. 1 Car. in Caſe of Cheſter Biſhop v. Freeman.

3. Biſhop makes a Leaſe for Years and dies; His Succeſſor makes a *Leaſe for three Lives,* (the *Leaſe for Years not ended)* the Leaſe for three Lives is void, but Judgment was given againſt the Biſhop becauſe he did not plead the Statute 1 Eliz. which is a Private Act. 5 Rep. 2. b. Trin. 30 Eliz B. R. Elmer v. Page.

Mo. 253. pl. 400. Elmer v. Geale, S. C. & S. P. held and adjudged accordingly.——Le. 59. pl. 77. Bunny v. Wright S. C. argued but nothing ſaid by the Court. —— S. C. cited by Coke Ch. J. as reſolved. 2 Brownl. 164.

4. Dean and Chapter leaſe a Houſe for *ten Years* to B. and then leaſe it for *forty Years to C.* it is void by 13 El. 10. and not warranted by 14 Eliz. 12. For this is a *Leaſe in Reverſion.* Cro. E. 564. pl. 52. Paſch. 39 Eliz. C. B. Hunt v. Singleton.

S. C. cited 3 Rep. 60. —— S. C. cited Vent. 2. 46. Trin. 25 Car. 2. B. R. and ſays the like was reſolved in C. B. 14 Car. 2. in the Caſe of Wyn v. Wild, of a Leaſe of the Dean and Chapter of Weſtminſter, and there the Court denied the Opinion in Thompſon and Trafford's Caſe, Poph. 9——Cart. 15. Mich. 16 Car. 2. C. B. Bridgman Ch. J. ſaid, that this Caſe of Popham is clearly contrary to Law, and thinks Ld. Popham was wronged in it; that as for Hunt and Singleton's Caſe, there has been Endeavours to evade it; but he thinks it impoſſible, and that he has the Record. ——S. C. of Hunt v. Singleton cited Mod. 205. Trin. 27 Car. 2. and Atkins ſaid, that he thought it a hard Caſe conſidering that the Dean and Chapter were all Perſons capable, and that a Grant ſhould hold in Force ſo long as the Dean lived, and determine then. Ellis ſaid, that in Floyd and Gregory's Caſe reported in Jones, it was made a Point, and that Jones in his Argument denied the Caſe of Hunt v. Singleton, and ſaid that he and Sir Rowland Wainſcott report-

reported it, and that nothing was ſaid of that Point; but that Ld. Coke followed the Report of Serjeant Bridgman, who was 3 or 4 Years their Puiſne, and that he miſtook the Caſe.

5. *Concurrent Leaſes* made *by Biſhops* at this Day are good if confirmed by Dean and Chapter; For no Statute alters the 32 H. 8. as to that; Per Tirrel J. and on this Ground ſtands the Difference between concurrent Leaſes made by Biſhops, and by Dean and Chapter. Cart. 12. Mich. 16 Car. 2. C. B. in Dean of Weſtminſter's Caſe.

Said to have been ſo adjudged. Le. 36. in Caſe of Leur v. Wroth

6. A Leaſe made by a Parſon, 11 Sept. to commence *at Michaelmas next*, is a Leaſe in Reverſion, and void. 2 Lev. 62. Trin. 24 Car. 2. B. R. * Baily v. Munday.

—— Co. Litt. 45. a. is, that it muſt begin from the making, and not from the Day of the making. —— D. 246. pl. 69. Marg. cites Co. Litt. 45. a.

* Vent. 244. S. C. & S. P. held accordingly per tot. Cur. and not warranted by the Statute 14 Eliz. —— 3 Keb. 46. pl. 22 Baily v. Munne, S. C. argued, ſed adjornatur. —— Ibid. 107. pl. 15. S. C. argued, ſed adjornatur. —— Ibid. 193. pl. 43. Baily v. Man, S. C. adjudged accordingly.

Vent. 246. S. P. by Hale Ch. J. in S. C.

7. By Hale Ch. J. a *Vicar* may make a *concurrent Leaſe*, the prior Leaſe being to determine within three Years, to which the others ſaid nothing, Twiſden only ſeeming to diſagree to it. 2 Lev. 62. Trin. 24 Car. 2. B. R. in Caſe of Bayley v. Monday.

8. The Statute 18 Eliz. which allows a concurrent Leaſe, ſo that there be not above three Years of a former Leaſe in being, extends only to the 13 Eliz. for it is recited therein, and makes no Alteration of the Statute 14 Eliz. and this was the Opinion of Hobart in Crane and Taylour's Caſe, fo. 269 and it has been often held that it extends not to the Statute 1 Eliz. concerning Biſhops, and two of the Judges ſeemed to be of that Opinion, (and Twiſden ſtrongly.) But of this Hale doubted and rather conceived the contrary, viz. That if the Leaſe had been to commence preſently, it had been good and a concurrent Leaſe, becauſe there was leſs than three Years in being of the former Leaſe, and that the Statute 18 Eliz. qualifies Leaſes made upon the 14 Eliz. as well as thoſe made on the 13 Eliz. becauſe the 14 Eliz. does not repeal the 13 Eliz. but is a kind of an Appendix to it, and enlarges it as to Houſes in Market Towns; and therefore the 18 Eliz. reciting the 13 Eliz. doth by Conſequence recite the 14 Eliz. alſo, and there is *ſuch a Connection between all the Statutes concerning theſe Leaſes by Eccleſiaſtical Perſons, that they have been taken into the Conſtruction of one another*; And that the Caſe of Crane v. Taylor is concerning Covenants only. Vent. 246. Trin. 25 Car. 2. B. R. in Caſe of Baily v. Murin.

Id. Raym. Rep. 84. S. C. adjudged by three Juſtices that the Leaſe was good, but Treby Ch. J. held it ill upon the Authority of Co Litt. 46. b. and the other Books cited.

9. A Prebendary made a Leaſe &c. for Life *habendum a Datu*; The Queſtion was, whether this ſhould bind his Succeſſor? and it was inſiſted, that it ſhould not, becauſe by the Statute 13 Eliz. cap. 10. thoſe Leaſes by Eccleſiaſtical Perſons are only good which are to commence from the Time of the making, but here the Time and the Day of making is excluded, and that it does not commence till the Day after, and therefore void; But this was denied on the other Side; For the Word Datus, Participially taken, is in Engliſh given, or delivered, but taken Subſtantively, is in Engliſh the Date, or Delivery, which ſignifies all one. Adjudged by three Juſtices that the Leaſe was good, but Treby Ch. J. e contra, who at firſt held it good, and then Powell J. held it ill. 3 Lev. 438. Trin. 8 W. 3. C. B. Hatter v. Aſh.

10. A Leaſe for Life to commence after another Leaſe in being is a *concurrent Leaſe*, becauſe a Freehold cannot expect, but muſt commence in Poſſeſſion preſently; Per Holt. 2 Salk. 537. Mich. 9 W. 3. B. R. in Caſe of Winter v. Lovedore.

(R. a. 9) Succeſſor. Bound.

In what Caſes by Leaſes or Grant of the Predeceſſor.

1. IF Parſon or Vicar *leaſes his Land for a Term* of Years, *and exchanges his Living*, the Succeſſor may enter; For the Eſtate is ceaſed as well by Permutation as by Death; but contrary of a Leaſe by Maſter and College who have College and common Seal; For in ſuch Caſe the Succeſſor cannot enter. Br. Leaſes, pl. 8. ſays that dictum fuit pro Lege 2 H. 4. 5.

2. If a *Prebendary makes a Leaſe for Term of Years and dies* this ſhall not bind his Succeſſor, and if he *reſigns* this ſhall not bind the Succeſſor no more than a Leaſe of a Parſon, and the beſt Opinion was, that the Leaſe is *void by his Death*, and not voidable; For ſo it is of a Parſon, therefore *Confirmation* of the Eſtate after by the Succeſſor is void; For there is no Eſtate; For it was void before by the Death or Reſignation. Br. Prebend, pl. 1. cites 11 H. 4. 17. Br. Leaſes, pl. 9. cites S. C. — Contra if there are Words of Grant in the Confirmation, but contra of Leaſe of Tenant in Tail. Br. Prebend, pl. 1. cites 11 H. 4. 17.

3. If a *Prebendary makes a Leaſe* for 21 Years by Indenture, rendering the uſual Rent, this ſhall bind the Succeſſor by 32 H. 8. of Leaſes; For where the *Statute ſays In Jure Eccleſiæ*, and *the Entry for the Prebendary is ſeiſitus in Jure Prebendæ*, yet this ſhall bind by the Equity. Br. Leaſes, pl. 62. cites 3 E. 6. and ſays that with this agrees. Hill. 1 Mar. 1.

4. If *a Parſon* makes a Leaſe *of his Glebe* for a Term of Years *to commence after his Death*, and the *Patron and Ordinary confirm* it. It ſeems that the Succeſſor ſhall be bound becauſe it is a preſent Grant, though it does not take Effect in the Life of the Grantor; But Montague doubted of the Caſe. D. 69. pl. 30. Paſch. 5 E. 6. Anon. This Caſe was urged and affirm'd for good Law per Gawdy J. and the other Juſtices in a Manner affirm'd it. D. 69. pl. 30. Marg. cites 44 Eliz. B. R.

5. An *Impropriation* is made *after the Death of the Incumbent to a Biſhop and his Succeſſors*; The Biſhop by Indenture makes a *Demiſe of the Parſonage for* 40 *Years* to begin *after the Incumbent's Death*. The Dean and Chapter confirm it. The Incumbent dies. The ſucceeding Biſhop made a Leaſe for 21 Years. It was reſolved by all the Judges upon a Reference out of Chancery, that the firſt Leaſe was void, becauſe the Leſſor had nothing in the Parſonage Impropriate during the Life of the Incumbent who ſurviv'd the Leſſor. D. 244. a. pl. 60. Mich. 7 & 8 Eliz. Bp. of Coventry's Caſe. Co. Litt. 252. b. S. P. accordingly, and in Marg. cites S. C.— D. 244. b. in S. C. ſays the ſame Point was ordered in Chancery afterwards according to the ſame Opinion in Caſe of Jobſon v. Michael for the Parſonage of Cottingham &c. belonging to the Biſhop of Cheſter, and Parcel of the Dotation of the ſaid Biſhoprick, which was ordered according to the ſaid Opinion by the Arbitrement of Dyer and Welſhe, Juſtices.

3 Rep. 7. S. C. & S. P. reſolv'd accordingly. —— Sav. 6. 138. S. C. held accordingly.

7. An Abbot made a *Leaſe for* 80 *Years* of Lands of the Poſſeſſion of the Abbey, *a Copyhold Eſtate for Life in a Stranger of the ſame Land being in Eſſe at the Time.* Adjudg'd that it was ſuch an Eſtate in being at the Time of the Leaſe as ſhould make the Leaſe for Years void by the Statute of 31 H. 8. of Monaſteries. Mo. 128. pl. 276. Paſch. 25 Eliz. in the Exchequer. Heydon's Caſe.

Mo. 107. pl. 251. S. C. Trin. 21 Eliz. which Caſe is a Leaſe for 21 Years a Datu, and then there were four Years of a former Leaſe to come. —— S. C. cited Le. 36. in pl. 44.

8. A Biſhop makes a Leaſe for 21 *Years three Years before the Expiration of a Former Leaſe* to begin preſently; it was holden a good Leaſe to bind the Succeſſor; for the Inheritance of the Biſhop is not charg'd above 21 Years in the Whole. Le. 148. in pl. 205. Trin. 31 Eliz. B. R. cites the Caſe of Fox v. Collier.

D. 370. b. pl. 62. Trin. 22 Eliz. ſays the Action was brought againſt the Executors, ſuppoſing the Manor to be diſcharg'd againſt the Succeſſor by the 1 Eliz. of Grants &c. by Biſhops, and makes a Quære, Whether by the Words of the Act the Charge upon the Land be void; and Whether Writ of Annuity or Debt only lies againſt the Executors during the Life of the Grantee or not? but no Judgment. ——— 10 Rep. 61. b. in the Biſhop of Sarum's Caſe S. C. cited [but by the Reporter as it ſeems, and ſays as to this Point] it is to be obſerv'd that tho' the Rent was iſſuing out of the Poſſeſſions, and not Parcel, yet it was void by his Death. ——— Bridgm. 31. in Caſe of The Biſhop of Chicheſter v. Freeland cites D. 370. Dr. Dale's Caſe according to 10 Rep. 61. and ſeems tranſcrib'd thence.

9. Dr. Horne, *Biſhop* of Wincheſter, *granted* to Dr. Dale during his Life, *a Rent* out of the Manor of Waltham *Pro Conſilio impendendo*; The Biſhop died, the Rent was arrear, and the Grantee brought an Action of Debt againſt his Executors; adjudged that the Grant was void by the Death of the Biſhop. Nelſ. Abr. 1092. cites 22 Eliz. Dyer 370. Dr. Dale's Caſe.

Becauſe it is ſuch an Intereſt out of which a Rent cannot be reſerv'd. Watſ. Comp. Inc. cap. 42 page 444. —— And for the ſame Reaſon a like Grant by a Biſhop, though confirm'd by Dean and Chapter is void againſt the Succeſſor by the 1 Eliz. Ibid. cites 10 Rep. 6. Biſhop of Salisbury's Caſe. ——— And And. 241 Sale v. The Biſhop of Coventry.

10. Grant of a *next Avoidance* of a Church by Dean and Chapter is not good to bind the Succeſſor by the *Statute* 13 *Eliz.* 10. Becauſe though no Profit can be made of it, yet it is an *Hereditament*, whereof the Statute intends no Grant ſhall be made. Per 2 Juſtices againſt Anderſon Ch. J. Beamond J. was abſent & adjornatur. Cro. E. 440. Mich. 37 & 38 Eliz. C. B. Dean and Chapter of Hereford v. Ballard.

Such Grant is good againſt the Biſhop that granted it, for the Statute was not made for his Benefit, but for the Benefit of his Succeſſor, that he ſhall not be prejudiced by the Act of his Succeſſor [Predeceſſor;] But they held that a Grant of Prochein Avoidance is within the Statute of 1 Eliz. and his Succeſſor may avoid it; And that this Action was within the Equity of the Statute of 4 E. 3. for it is a Chattle that ſhould go to the Executor, if the Diſturbance had not been; and for a Diſturbance in their own Time, they ſhall recover Damages to the Uſe of the Teſtator; by the ſame Reaſon for a Diſturbance in the Time of their Teſtator they ſhall recover Damages by the Equity of the Statute of 4 E. 3. And they all held that this is not a Plenarty within the Statute of Weſt. 2. for it muſt be Ex Præſentatione non ex Collatione; And the Plaintiffs had Judgment. Cro. E. 207. Mich. 32 & 33 Eliz. B. R. Smalwood & al' v. The Biſhop of Coventry and Marſh.

11. A Leaſe by a *Biſhop for three Lives*, reſerving the ancient Rent, and they make a Leaſe for 100 Years if three Men live ſo long, this is not good againſt the Succeſſor though confirm'd by Dean and Chapter, and yet out of the Words of the Statute. Cited per Croke J. Ley 74. as the Caſe of the Bp. of Hereford v. Stacy 43 Eliz.

12. An

12. An Arch-deacon having a *Parſonage appertaining to his Arch-deaconry* before the Statute of 13 Eliz. made a Leaſe for 40 Years of the Parſonage, which was confirmed after the Statute; adjudged the Leaſe and Confirmation were both good for the 40 Years. Mo. 459. pl. 636. Mich. 38 & 39 Eliz. Arkingſall v. Dennys.

Cro. E. 430. pl. 35. Denney v. Eakenſtall. S. C. it was moved that this Leaſe is Leaſe is void by the Statute 13 Eliz. For the Confirmation after the Statute ſhall not bind the Succeſſor, though the Leaſe made before the Statute ſhall bind him who made it; But the Court thereto delivered no Opinion; Sed adjornatur.

13. If a Perſon doth make a Leaſe for a certain Number of Years *if ſo long he live*, he doth thereby take upon himſelf that he will do no Act by which the Leaſe ſhall be determined but by his Death; therefore if he doth reſign or otherwiſe void the Living, an Action of Covenant will lie againſt him. Watſ. Comp. Inc. fol. 458.

Br. Falſifying Recovery, pl. 1. cites 26 H. 8. —— Br. Treſpaſs, pl. 121. S. P. cites 8 H. 6. 9.

14. But if the Clauſe be added *(and ſo long continue Parſon)* then he may reſign without Danger. Watſ. Com. Inc. fol. 458. cites Trin. 11 Jac. Brownl. 125. Wheeler v. Heyden, Per Haughton.

15. The Manor of O. of which 30 Acres of Meadow was Parcel belonged to the Abbey of O. and the Abbot uſed to have *primam veſturam* thereof, *from Lady-Day to Lammas*, and one B. had the After-Graſs &c. This Manor and Veſture came to the King by ſurrender of the Abbey, who granted to the Biſhop of Oxford and his Succeſſors primam veſturam of this 30 Acres, and afterwards the Biſhop leaſed it for three Lives, rendring Rent, and died; and whether this was a good Leaſe to bind the Succeſſor, was the Queſtion; and ruled that it was not, becauſe prima veſtura Terræ is only the firſt Cut of Graſs; For the Grantee cannot feed it; therefore it is not ſuch an Hereditament within the Statute, of which a Leaſe may be made to bind the Succeſſor. Palm. 174. Paſch. 19 Jac. B. R. The Biſhop of Oxford's Caſe.

16. If a *Biſhop ſuffers an Uſurpation to an Advowſon which he had by Purchaſe before he has preſented to it*, this ſhall not bind his Succeſſor, but that he may bring *Quare Impedit*, and allege Preſentment in the Grantor, and this ſhall be good by the Statute 1 Eliz. but he *cannot have Writ of Right* becauſe he never had Seiſin; Per Hobart Ch. J. in delivering the Opinion of the Court. Jo. 47. Mich. 22 Jac. C. B. in Caſe of Dalton v. The Biſhop of Ely.

Cro. J. 673. pl. 6 S. C. & S. P. held by Hobart; but as to the Principal Point he ſaid they were all reſolv'd that Uſurpations ſhall bind the Biſhops who ſuffer them, but not their Succeſſors, (and ſo of Deſcents;) For it is within the Statute 1 Eliz. which reſtrains Alienations and Grants by Biſhops &c.

17. *So* if *Recovery* was *had againſt the Biſhop in Ceſſavit upon Covin* this is within the Statute; Contra if without Covin; Per Hobart Ch. J. Ibid. and ſaid that this ſeem'd to him to be good Law.

18. A *Recovery* had *without Title in Quare Impedit by Default againſt a Biſhop* is aided againſt the Succeſſor by this Statute, eſpecially if there was an Aſſent of the Biſhop. Ibid. the third Reſolution in ſaid Caſe of Dalton v. The Biſhop of Ely.

19. A *Leaſe* was made *by a Biſhop to A. and B. Habendum a Die Datus Indenturæ to A. for Life*, Remainder *to B. for Life*, reſerving the ancient Rent; The *Biſhop dies*; the *Succeſſor accepts the Rent*; adjudged, that this Acceptance of the Rent ſhall bind him for his Time, ſo that he ſhall not avoid this Leaſe, which otherwiſe is voidable. Cro. C. 95, 96. pl. 21. Mich. 3 Car. C. B. cites it as adjudg'd Paſch. 5 Jac. in C. B. in the Caſe of Wheeler v. Danby.

The S. P. was in the Principal Caſe there of Owen v. Ap prees, but the Court gave no Opinion. —Herl. 22. 26. Owen v. Price. Trin. 3 Car. C. B. reports that it was reſolved that a Leaſe in Remainder is not warranted by the Statute 1 Eliz. and that it was only voidable by the Succeſſor, the Statute being made for his Benefit; And further, that the Acceptance binds the Biſhop.

20. If

Parſon leaſes for Life, it is not void by his Death, but if Succeſſor accept the Rent, he has affirm'd the Leaſe during his Time. Arg. Roll Rep. 160. —— 2 Brownl. 165. S. P. per Coke Ch. J. —— Per Doderidge J. Roll Rep. 361. in Caſe of Maund v. French. —— Bridgm. Rep. 94. S. P. in S. C. Arg. —— It is made good during the Time of the Succeſſor by his Acceptance ſo as he ſhall not avoid it, which otherwiſe was voidable. Cro. C. 94. pl. 2. Owen v. Ap-Rees.——Hetl 22. Owen v. Price. S. C. & S. P. reſolv'd accordingly.—— A Biſhop leaſes Land of the Biſhoprick for Years rendering Rent, and dies, the Succeſſor accepts the Rent, this ſhall bind him; For a Biſhop has a Fee-Simple, and may have Writ of Entry without the Aſſent of the Chapter, contra in Caſe of a Parſon or Prebendary, who cannot have but Juris Utrum. Br. Acceptance, pl. 20 cites 2 E. 6.

20. If a Parſon leaſes his Rectory or Parcel of his Glebe for Years, reſerving a Rent, and dies, and his *Succeſſor accepts the Rent*, that makes not the Leaſe good, and is not like the Caſe of Abbot, Prior, or Tenant in Tail. Hetl. 88. Paſch. 4 Car. C. B. Johnſon's Caſe.

If a Biſhop makes a Leaſe for Years, and after makes a Leaſe for Life, the Leaſe for Years being in Eſſe, and dies, the Succeſſor accepts Rent, this ſhall bind him. Per Coke Ch. J. 2 Brownl. 165. Paſch. 10 Jac. C. B. cited by Coke Ch. J. as adjudged in Caſe of Blackleach v. Small.

2 Lev. 68. S. C. adjudg'd accordingly, and likewiſe that this Covenant cannot be good to bind the Succeſſor, unleſs ſuch Covenants had been us'd to be inſerted in former Leaſes, which is not ſhewn in this Caſe. Beſides if this Covenant had been in former Leaſes, yet it cannot bind to the Payment of this new Tax made by Parliament, but ought to be intended only of ſuch as were then in Uſe, as Synodals &c. and that Hale cited a Caſe to have been ſo adjudg'd before.

21. In Covenant the Plaintiff declared, that the *Biſhop* of Salisbury, the Defendant's Predeceſſor, being ſeiſed in Fee, demiſed to the Plaintiff for 21 Years, reſerving the ancient Rent, and *covenanted* for himſelf and his Succeſſors, *to diſcharge all publick Taxes*; and that ſince the Defendant was made Biſhop, a Tax was aſſeſſed on the Land by Act of Parliament, which the Plaintiff was forc'd to pay, and the Defendant refus'd to diſcharge it; and upon Demurrer it was objected to the Form of it, for that he declared, that the Predeceſſor Biſhop was ſeiſed, and did not ſay in Jure Eccleſiæ, for he might be ſeiſed in his Natural Capacity, therefore the Declaration was held ill; As to the Matter in Law, the Queſtion was, Whether this was ſuch a Covenant to bind the Succeſſor as is incident to a Leaſe, which a Biſhop has Power to make by the Statute 32 H. 8. Hale Ch. J. ſaid that if this had been an ancient Covenant (it ſhould have been averr'd to have been us'd in former Leaſes) to diſcharge ordinary Payments, as *Penſions or Tenths* &c. and then it might bind the Succeſſor, but it is *hard to extend it to new Charges*, and that they all knew how lately this Way of Taxing came in. But the Declaration being bad for the other Matter they would not determine this; But however this Covenant ſhould prove, it would not avoid the Leaſe. Vent. 223. Mich. 24 Car. 2. B. R. Davenant v. The Biſhop of Salisbury.

(R. a. 10) Leaſes by Colleges. Good or not.

On a Leaſe made by the Preſident and Scholars of Corpus Chriſti College in Oxford, where leſs than the accuſtomed Yearly Rent was reſerved, the Leaſe was held void againſt the Leſſor himſelf, by the Statute of 13 and 18 Eliz. Cro. E. 816. pl. 5. Paſch. 43 Eliz. B. R. Dumper v. Symms. ——4 Rep. 119. b. Dumpor's Caſe S. C. accordingly.

1. 13 *Eliz. cap.* 10. *S.* 3. *ALL Leaſes, Grants, Conveyances or Eſtates, made or ſuffered by any Maſter or Fellows of any College, Maſter or Guardian of any Hoſpital (other than for 21 Years, or three Lives, from the making thereof, and whereupon the accuſtomed Yearly Rent or more ſhall be reſerved, and payable Yearly during the Term) ſhall be utterly void to all Intents and Purpoſes.*

This Act ſhall not make good any Leaſe, or any Grant againſt the private Statutes of the College.

2. 18 *Eliz.*

2. 18 *Eliz. cap.* 6. *S.* 1. *Directs a third Part of the Rent of Colleges to be reſerved in* Corn, *and paid in Kind, or after the Rate the beſt Wheat is ſold for the next Market Day before the Rent is due; And all Leaſes made otherwiſe and Collateral Bonds &c. to the Contrary ſhall be void.*

3. 18 *Eliz. cap.* 11. *S.* 2. *All Leaſes made by Colleges where a* former Leaſe is in being, *and not to Expire within three Years after making ſuch new Leaſe ſhall be void.*

S. 3. *And all* Bonds &c. for renewall *ſhall be void.*

The Statute 18 Eliz. prohibits the Maſter and Fellows of Colleges &c. to make any Leaſes for Life or Years, unleſs a third

Part of the ancient Rent at leaſt be reſerved and paid in Corn for the Uſe of the College, otherwiſe the Leaſe to be void. A Leaſe was made by a College of the Rectory of St Lawrence's Church in London. It was argued that the Statute is to be intended of Tithes in Kind, and alſo of ſuch Things to be demiſed as render Corn, Hay &c. but Tithes in London render no ſuch Thing, but only Money according to the Decree for payment of Tithes in London in E. 6th's time; and though the Statute ſays, (other Hereditenements) to the which any Tythes &c. yet they ought to be ſuch which are of ſuch Nature as Tithe-Corn, and Hay. And Manwood Ch. Baron held clearly that the Leaſe of theſe Tythes is good enough, and ſo a Leaſe of a Houſe, Mill, Ferry &c. are out of the Statute; But Shute J. contrary, for the Words of the Statute are General. Le. 19. pl. 25. Paſch. 26 Eliz. in Scacc. Kempe v. Hollingbrooks.

A Leaſe made by a College without reſerving any Corn was held void by this Statute againſt the Leſſor himſelf. Cro. E. 816. pl. 5. Paſch. 43 Eliz. B. R. Dumper v. Symms.

It ſeemed to the Court that this Statute which provides only for Colleges of the two Univerſities is a Private Statute of which the Court need not take any Notice, but ought to be ſhewn to the Court by the Party. Sav. 129. pl. 198. Paſch. 32 Eliz. in Caſe of v. Ld. Cromwell.——4 Rep. 76. a. the Reporter in a Nota there in **Holland's Caſe**, cites Claypool and Carter S. C. & S. P. adjudged accordingly in C. B. and affirmed in B. R. as to the Colleges in the Univerſities, and Eaton and Winchester, but that as to Colleges, Deans, and Chapters, Hoſpital, Parſon or Vicir having any Spiritual or Eccleſiaſtical Living, that this and the Statute 13 Eliz. cap. 10. are General Acts of which the Juſtices ſhall take Conuſance.

4. The Warden and Fellows of All-Soul's College in Oxon, made a *Leaſe for* 20 *Years*; it was objected that the Leaſe was void, and not warranted by the Statute 13 Eliz. cap. 10. which makes all Leaſes void, other than for 21 Years. It was moved that the Statute was made to abridge the long Leaſes heretofore made by Colleges, and to limit them to a ſhorter Meaſure of Time, (viz.) to 21 Years, or three Lives, & non ultra, but to as much ſhorter Time as they would; and this was granted per totam Curiam. Le. 306. pl. 427. Mich. 32 & 33 Eliz. C. B. Carter v. Claycole.

The Leaſe here mentioned was a Leaſe only to try the Title, and was made without reſerving any Rent; but the Defendant took no

Exception to it and Judgment paſſed for the Plaintiff. It was aſſigned for Error, that the Leaſe was void, but Judgment was affirmed; For to make the Leaſe void he ſhould have pleaded the Statute 13 Eliz to make it ſo, otherwiſe the Juſtices will not take Notice of it. Mo. 593. pl. 802. Carter v. Claypoole, S. C.

5. Magdalen College in Oxford made a *Leaſe to A. for* 20 *Years of a Houſe* in Southwark, to which no Land belonged, and 10 *Years after made another Leaſe for* 20 *Years*. This is good. The one Leaſe und the other do not exeeed the 40 Years comprized in the Statute; For the Purpoſe of the Act of 14 *Eliz.* 11. was, that Colleges and the like ſhould not make *Grants in Reverſion* though it be for a Year, becauſe that by ſuch Grants in Reverſion they ſhall be excluded to have their Rents of the particular Tenants for the Time. Poph. 9. Hill. 35 Eliz. Thompſon v. Trafford.

2 Le. 188. pl. 236. S. C. adjornatur.—— Vent. 246. ſays the Opinion of this Caſe was denied, 14 Car. 2. C. B. in the Caſe of Wyn v. Wild.

(R. a. 11) Leaſes.

To what Perſons. Good.

Clergymen, Aliens &c.

This Statute is a General Law. Brownl. 208 Mich. 5 Jac. in Caſe of Jennings v. Hathwaite. —— Cro. E. 601. pl. 11. Mich 39 & 40 Eliz. S. P. held accordingly.——In an Action on this Statute for taking Lands to Farm by a Spiritual Perſon, it was holden, that if any ſuch Leaſe be made at this Day to any Spiritual Perſon, ſuch a Leaſe is not void; But ſuch a Leaſe extends to ſuch Leaſes made before the Feaſt of St Michael mentioned in the ſaid Act, and not aliened before the ſaid Feaſt &c. And ſo it was ſaid it was lately adjudged in one **Underwood's Caſe.** 3 Le. 122. pl. 175. Trin. 27 Eliz. B. R. Hitchcock v. Thurland.

21 *H.* 8. *cap.* 13. FOR *the Better Maintenance of Divine Service, Preaching, and teaching the Word of God, good Example, Maintenance of Hoſpitality, Relief of the Poor, and good Opinion of the Laity towards Spiritual Perſons, it is enacted*

S. 1. *That no Spiritual Perſons, ſecular or regular, ſhall take to Farm any Lands or Tenements for Term of Life, Term of Years, or at Will, on Pain of* 10 *l. for every Month he ſhall occupy ſuch Farm, to be divided between the Crown and the Proſecutor.*

ſee further 3. Kob. 436. 1. Leon. 309.

D. 358. a. pl. 47. Paſch. 19 Eliz. S. P. but no Judgment, but ſays, that the ſame Queſtion was adjudged and ruled in B. R. in 12 Eliz. in a Caſe of Woodley v. James, that the Leaſe is not void

S. 3. *And all ſuch Leaſes made to any ſuch Spiritual Perſons, or to any other to their Uſe, for Term of Life or Years, ſhall be void.*

S. 4. *Provided that this Act ſhall not extend to any Spiritual Perſons for taking to Farm any Temporalties during the Varation of any Biſhoprick, Abbey, Priory, or other Collegiate, Cathedral, or other Conventual Church, nor to any Spiritual Perſon that ſhall tender or make any Traverſe upon any Office concerning his Freehold.*

In an Action on this Statute, the Defendant pleaded Non tenuit ad Firmam contra Formam Statuti; and gave in Evidence that he had taken to Farm for the Maintenance of his Houſe; this is good Evidence, and ſhall maintain the Iſſue; For he did not occupy againſt the Form of the Statute; For there is a Clauſe in the Statute for that Purpoſe; Arg Le. 225. in pl. 306. Mich. 32 & 33 Eliz. C. B. cites 27 H. 8. 21.——Sav. 32. pl. 75. Mich. 24 & 25 Eliz. Shute J. cites 27 H. 8. fol. 22. S. P. held accordingly by Fitzherbert and Shelly, that he might give it in Evidence; but Baldwyne Ch. J. denied it, and ſaid that he ought to plead it; Quære ——Br. Parliament, pl. 2. cites S. C. and adds a Quære; For Baldwyn did not ſay much to the contrary.——Br. General Iſſue &c. pl. 3. cites 27 H. 8 21. S. P.——2 Bulſt. 18. Mich. 10 Jac. J. S. v Martin held a good Plea in Action of this Statute, that he took the Farm only for the Maintenance of his Houſe and Family. ——See Lutw. 134. Boſwell v. Lynley the Pleadings upon this Statute.

S. 8. *Provided, that ſuch Spiritual Perſon not having ſufficient Glebe, or Demeſne Lands in his own Hands in the Right of his Church for Paſturage of Cattle, or Increaſe of Corn for the Expence of his Houſhold, or for his Carriages or Journeys, may take in Farm other Lands, and buy and ſell Corn and Cattle for the only Manurance, Tillage, and Paſturage of ſuch Farms, ſo as the Increaſe thereof be always employed only in the Expence of his Houſhold or Hoſpitality.*

S. 34. *Provided, that every Spiritual Perſon having Lands &c. above* 800 *Marks per Annum, may retain in his Occupation as much of his Lands and Tenements &c. as ſhall be neceſſary for Paſturage for his Cattle, and for Tillage of Corn for the Maintenance of his Houſe.*

S. 35. *And any Spiritual Perſon may hire a Dwelling-Houſe only, with Orchards or Gardens, in any City or Town for his own Habitation.*

(S. a) Leaſes for Years.

Of what Things they may be made in reſpect of the Eſtate out of which it is raiſed.

1. A Copyholder of Inheritance, or for Life, according to the Cuſtom of the Manor, may by the Common Law make a Leaſe for a Year of the Copyhold without the Aſſent of the Lord. 4 Rep. 26. *Melwich's Caſe.* 9 Rep. 75. b. *Combe's Caſe.* Jo. 249. pl. 4. Mich. 7 Car. B. R. in Caſe of Mathews v. Whetſton,

S. P. agreed.—— Cro. C. 233. pl. 15. in S. C. Arg. S. P.

2. But they can not make a Leaſe of it for more than one Year by the Common Law. See tit. Copyhold (G. c) and (M. e)

3. A Copyholder of Inheritance by a Cuſtom may leaſe that Land for three Years without the Aſſent of the Lord. Mich. 15 Jac. B. R. in an Ejectment between *Lee and Brown* upon a Trial at Bar ſuch Cuſtom was proved and admitted good by the Court and Counſel, and ſo was admitted in another Trial at Bar that ſame Term, between *Dell and Cockdell.* Cro. E. 469. Hill. 38 Eliz. pl 20. Wells v. Partridg, S. P. and Anderſon held the Action well maintainable, but then the Plaintiff muſt ſhew the Cuſtom; for otherwiſe it is not good.

4. If a Copyholder leaſes for two or more Years, without any Cuſtom to warrant it, or Licence of the Lord, yet it is not merely void, but the Leſſee may maintain an Ejectment againſt Strangers. Hill. 38 Eliz. B. R. agreed between *Hatt and Arrowſmith.* It ſeems it is intended to be by Indenture. Poph. 105. Hall v. Arrowſmith, S. C. but S. P. does not appear. —— Ow 72.

S. C. but S. P. does not appear. —— Cro. E. 461, 462. in pl. 8. Haddon v. Arrowſmith, S. C. Arg. admits that it has been adjudged that Leſſee for Years of a Copyhold made without Licence of the Lord, being a common Perſon, might maintain an Ejectment becauſe he is Leſſee againſt all but the Lord, though when the Queen is Seignioreſs it is otherwiſe; for the Copyholder cannot diſſeiſe the Queen, and therefore it cannot be a good Leaſe.

5. So if the Copyholder of the King leaſes for two or more Years, without Warrant, yet it is not void, but the Leſſee may maintain an Ejectment againſt Strangers. Hill. 38 Eliz. B. R. between *Hatt and Arrowſmith.* Ow. 72. Haddon v. Arrowſmith, S. C. —— Poph. 103. S. C.

but S. P. does not appear in thoſe Reports. See the Notes at pl. 4.

[What Eſtate in the Leſſor is ſufficient to enable him to grant a Leaſe for Years.]

6. If a Man grants a Rent-charge to another and his Heirs, and covenants by the ſame Indenture to levy a Fine of the Land, which ſhall be to the Uſes following, ſcilicet, that if the ſaid Rent be Arrear at any Feaſt &c. and no Diſtreſs upon the Land, or Diſtreſs taken, and a Replevin ſued, then it ſhall be lawful to the Grantee and his Heirs to enter into the Land, and retain it till Satisfaction of the Arrearages of the ſaid Rent, and afterwards he levies a Fine accordingly, and after the Rent is Arrear, and no Diſtreſs upon the Land Cro. J. 510. pl. 22. S. C. & S. P. reſolved accordingly by all the Juſtices, that the Leaſe was good until the

Rent was paid, and * Fol. 847. it is Quaſi a Conditional Inheritance which ſhall go to

Land or Replevin is ſued, the Grantee enters into the Land according to the Uſe limited by the Fine and Indenture, and retains it, he has ſufficient Eſtate by this upon which to make a Leaſe * for Years of the Land, and the Leſſee to maintain an Ejectment upon his Leaſe, Mich. 16 Ja. B. R. between *Havergil and Hare* upon a ſpecial Verdict adjudged per tot. Cur. and they would not argue it, but over-ruled it upon Argument at the Bar.

his Heirs and Aſſigns, but always determinable upon the Payment of the Rent ——— 3 Bulſt. 250. 254. S. C. & S. P. reſolved that the Grantee had an abſolute Poſſeſſion, and of which he might well make a Leaſe for Years, and that ſo is the Book of 27 H. 8. fol. 5. ——— Poph. 126. S. C. but the Point as to the Leaſe does not appear.

[Of what Things a Leaſe or Grant may be for Years.]

S C. cited and denied to be Law by Baron Nicholas, Hardr. 49.

7. A Leaſe for Years of the Office of Marſhalſey of the King's-Bench cannot be made for the Inconvenience that then it ſhall go to the Executor, Adminiſtrator, and Ordinary &c. Co. 9. 96. b. *Sir George Reynell's Caſe* Reſolved.

Hill. 1655. For by the ſame Reaſon that it could not be granted for Years it was not grantable in Fee, there being the ſame Inconvenience. ——— Hardr. 357. Hill. 15 & 16 Car. 2. Hale Ch. B. ſaid, that before the Caſe of Sir Geo. Reynel 9 Rep. the Law was taken otherwiſe, as in 30 Eliz. ——— S. C. cited Arg. 2 Mod. 120. ——— 6 Mod. 57. Mich. 2 Ann. B. R. Sutton's Caſe, the Court held that albeit a Leaſe for Years abſolutely of this Office was void, yet a Leaſe of it for Years determinable upon the Life of the Leſſee, is good; For the Danger of the Office's going to Executors or Adminiſtrators is avoided, and that it is the ſole Reaſon why the Office is not abſolutely grantable for Years—Cro. C. 587. Mich 16 Car. B. R. in Caſe of Meade v. Lenthall cites Sir Geo. Reynold's Caſe, and the S. P. adjudged in that Caſe accordingly. ——— Jo. 463. pl. 2. S. C. accordingly.—See tit. Officers and Offices (E) pl. 1. and the Notes there.

3 Le. 130. pl. 184. Wroth v. the Counteſs of Suſſex S. C. argued. Sed adjornatur.——Ibid. 144. pl 194. S C but ſame Point does not appear.——4 Le. 65. pl 159.

8. The Manor of D. was *aſſured* by the Earl of S. *by Act of Parliament* to his Wife *for her Jointure*, the *Reverſion in Fee to the Earl, with Proviſo for him to make Leaſes for 21 Years*, rendering the Antient Rent. *He makes a Leaſe for 21 Years*, rendering &c. *and before the End of that Term makes another Leaſe by Indenture to the Leſſee for 21 Years*, bearing Date 30 Mar. *to begin at Mich. following*. It was adjudged a void Leaſe, becauſe for the Time it is a Leaſe in Reverſion, and it being a Power given to him, it ſhall be taken ſtrictly; and if he might make a Leaſe to commence 20 Years after, the Wife ſhall never have Benefit of her Jointure, which the Statute did not intend, and Jointures are favoured in Laws. Cro. E. 5. Paſch. 24 Eliz. B. R. Suſſex (Counteſs of) v. Wroth.

S. C in totidem Verbis as 3 Le. 130.——Le. 35. pl. 44. Lepur v. Wroth. S. C. argued by Popham Attorney General, but no Judgment or Opinion of the Court.——S. C. cited as adjudged that the Leaſe was void. Mo. 199. in pl. 348. —— S. C. cited Mo. 494. as adjudg'd a void Leaſe.

Keb. 154. pl 95. S. C. —S. C. cited Arg. Skinn. 538. as adjudg'd.

9. *Leſſee* of a future Intereſt does not *enter* by Virtue of the Term, but *before*, by which he is a Diſſeiſor, *and continues after the Term* commenced; Leſſor ouſts him, he may *aſſign* his Term without Entry. Lev. 45. Mich. 13 Car. 2. B. R. Hennings v. Brabaſon.

Raym. 135. 155. S. C. adjudged.—Saund. 112. S. C. and Judgment affirm'd in the

10. Rent granted in Fee, with Proviſo, that if behind, the *Grantee may enter and retain till* ſatisfied of the Profits; Grantee of the Rent may make Leaſe *to try the Title* in Ejectment. 1 Lev. 170. Trin. 17 Car. 2. B. R. Jemmot v. Cooley.

Exchequer Chamber.——Sid. 223. 262. 344. S. C. but ſtates it as a Rent granted for Years, and reſolv'd per tot. Cur. that the Grantee may make ſuch Leaſe.

11. *Biſhop's Lands* not let for 21 Years paſt, if they may be leaſed afterwards? 1 Lev. 212. Paſch. 19 Car 2. B. R. Pemble v. Stern. Sid. 316. pl. 3. S. C. the Court inclin'd that it was a good Leaſe, and that it is hard to tie it to the Words of the Statute 32 H. 8. cap 28. where the Intent is purſued, which is only to preſerve the Revenue; Sed adjornatur.——Ibid. 416. pl. 17. S. C. adjornatur.——Raym. 165. S. C. but no Judgment.

12. If the *King lets Land, Parcel of the Dutchy of Cornwall*, the Leaſe is void when a Prince is born; But if he preſents to Advowſon the Clerk continues. 1 Chan. Caſes 215. Mich. 23 Car. 2. cites the Dutchy of Cornwall's Caſe.

13. Leſſee *re-demiſes his whole Term* to Leſſor, *reſerving Rent*, (tho' Debt lies upon Contract) it is an abſolute Surrender, and not upon Condition; Surrenderor cannot enter for Non-performance, nor can it be revived. 2 Mod. 174. Hill. 28 & 29 Car. 2. C. B. Loyd v. Langford.

14. A. deviſed a *Term for* 99 *Years* to Truſtees *for Payment of Debts and Legacies, and ſubject thereunto to B. for Life*, (who was A's Father) Remainder to the Plaintiffs, who were A's Siſters. The *Debts &c. were paid* by Sale of Timber and Wood; yet a Leaſe was decreed to be made by Truſtees to J. S. of Part of the Capital Meſſuage and Demeſnes at 170 l. per Ann. for *nine Years certain*, though oppos'd by the Reverſioners of the Eſtate for Life. 2 Vern. 647. pl. 576. Hill. 1709. Gibſon v. Cromwell.

(T. a) How; And by what Words a Leaſe for Years may be made.

1. RAſtall, 13 Eliz. cap. 20. 244. Leaſes 6. Enacts, that all Leaſes made by Eccleſiaſtical Perſons by the Abſence of the Leſſor by 80 Days in the Year ſhall be void; yet 14 Eliz. cap. 11. Leaſes 7. Becauſe Bonds and **Covenants of ſuffering others to enjoy Eccleſiaſtical Livings are not in Law taken to be Leaſes, though they are tantamount**, it is enacted that Bonds, Contracts and Covenants, ſhall be within it. See tit. Reſidence (B).

2. **If a Man** deviſes Land to one and the Heirs Males of his Body begotten for 5000 Years, **this is Leaſe for Years, and not Eſtate Tail, becauſe it is expreſsly ſaid that it ſhall be for Years, and the Words ſhall limit the Eſtate, ſo that it ſhall determine by Default of Iſſue. 10 Rep. 87. Lobeis's Caſe.** See (H) pl. 2.——See tit. Deviſe (B. b) pl. 5. S. C. and the Notes there.

3. *Leaſe* was made *to W. and his Heirs for* 17 *Years*, and it was adjudged only an Eſtate for Term of Years, for after the term ended the Leſſor brought Aſſiſe againſt the Aſſignee of the Heir of the Leſſee, and recovered, and Damages. Br. Eſtates, pl. 32. cites 11 Aſſ. 21.

4. Though the Word Reverſion be not Satis Aptum *to commence a Leaſe of the Land* &c. yet becauſe this is not but *Contract* and Agreement to make a Chattel to paſs, it ſhall be favourably conſtrued for the Grantee. D. 125. b. pl. 44. Mich. 2 & 3 P. & M. in Caſe of Throgmorton v. Tracy.

Sid. 102. pl. 8. Goodiar v. Clarke, S. C. adjudged per tot. Cur.

5. A Leaſe for 500 Years made for raiſing Daughters Portions, *to commence after the Death of Baron and Fame without Iſſue Male*, is a good Leaſe in its Creation. Lev. 35. Trin. 13 Car. 2. B. R. Goodin v. Clark.

præter Mallet, that it was a good Leaſe by way of future Intereſt, and that it ſhould commence after the Death with Heir Male.——Keb. 162. pl. 61. S. C. adjudged.——S. C. cited per Holt Ch. J. who ſaid he could not agree to this Opinion, but Powell J. held the Leaſe good in Point of Creation. Holt's Rep. 624, 625. pl. 2. Trin. 5 Ann. in Caſe of Andrews v. Stroud.

(T. a. 2) Conſtruction of Leaſes.

1. A Leaſes an Houſe to B. *to do with it at his Pleaſure.* B. may uſe the Houſes, but he cannot deſtroy them or pull them down; Per Doderidge J. 2 Roll R. 74. cites 17 E. 3. 18 E. 3.

2. Leaſe of Lands by Deed for Years, and in the ſame Deed Leſſor *covenants and grants to Leſſee*, that he ſhall take convenient *Houſe-boote &c. in all his Wood called M.* &c. which Wood was *no Parcel of the Land leaſed* by the Deed, but other Land; this is a good Grant, and Leſſee ſhall have it during the Term, and Executors ſhall take it as Aſſignees to Leſſee, and this Grant does not reſtrain, but he ſhall have Houſe-boote &c. in the Land leaſed alſo. Mo. 6. 7. pl. 23. Paſch. 3 E. 6. Anon.

Hetl. 53. Mich. 3 Car. C. B. Grange v. Dixon, in totidem Verbis, and ſeems to be only a Tranſlation of Daliſon.

3. Leaſe by Baron and Feme and another Feme by Indenture; Leſſee covenants *to find ſufficient Man's Meat, and Horſe Meat*, to the Baron and Feme and the other Feme, or to their Servants, at their coming to London, in his Houſe in Southwark. Baron and Feme died. The other Feme *takes Baron.* He is not bound to find Suſtenance for the Baron, but only for the Feme, or for her Servants, and not for both at the ſame time, becauſe the Covenant was in the Disjunctive; but Dubitatur if he is to find them for one Meal only at their coming, or all the Time of their Stay. Dal. 44. pl. 31. 4 Eliz.

And. 151. ſeems to be S. C.

4. Leaſe to two *Durante Vita ipſorum & alterius eorum diutius vivent' abſque Impetitione vaſti durante Vita ipſorum*, this Liberty runs with the Eſtate and ſhall endure as long. 3. Le. 151. pl. 202. Hill. 29 Eliz. C. B. Rolt's Caſe.

5. *Pro Termino Vitæ eorum et cujuſlibet ipſorum alteri poſt alterum diutius viventi*, reſolved they ſhall take jointly, not by Remainder. Mo. 637. pl. 876. Trin. 43 Eliz. C. B. Mellow v. May.

6. If *Leſſee ſeal his Part*, and *not the Leſſor*, nihil operatur, neither in reſpect of the Intereſt, nor in reſpect of the Covenants; for the Covenants depend on the Leaſe, and if there is no Leaſe there is no Covenant, and conſequently no Breach of Covenant. Yelv. 19. Mich. 44 & 45 Eliz. B. R. Soprani &c. v. Skurro.

7. Leaſe of Lands, and that he *cut Buſhes without Deſtruction*, in the Waſte or Common, this muſt have a reaſonable Conſtruction, and Leſſee may take conveniently and ſufficiently for his neceſſary Uſe, and no more; Per Doderidge J. 2 Roll R. 74. Hill. 16 Jac. B. R.

8. Leaſe of a Houſe and Lands to A. for 99 Years, *Remainder to B. for 99 Years*; Provided, that *if the Leſſees do not inhabit* in the ſaid Houſe let during the whole Term, that then the Leaſe ſhall be void; Per Roll, Ch. J. thoſe in Remainder were not bound to inhabit before the Remainder falls to them, but reddendo ſingula ſingulis they ought to

to inhabit ſucceſſively one after another. Sty. 176. Mich. 1649. Ratcliff v. Dudeny.

9. A Leaſe for Years at Common Law is no Leaſe *before actual Entry* nothing paſſeth; Per Levins; Arg. Cumb. 249. Paſch. 6 W. & M. in B. R. in Caſe of Smart v. Williams.

A Leaſe *for Years* ſtands only in Point of *Contract*. Lev. 145. Mich. 16 Car. 2. B. R. in Caſe of Maſon v. Tredway. Savil 33. ſays it was ſo held

Term. Mich. 25 Eliz —— Savil 55. Per Shute J. in pl. 117. S. P. —— Per Popham Ch. J. Ow. 102, 103. Paſch. 36 Eliz. in Caſe of James v. Portman. S. P.

(U. a) [Leaſe.]

By what Words.

1. IF A. covenants with B. by Indenture to levy a Fine **of certain Land within a Year after,** to the Uſe of B. and his Heirs, Proviſo that **if** 100 **l. be paid to B. at the End of** 13 **Years, that it ſhall be to the uſe of A. and his Heirs, and by the ſame Indenture A.** covenants and grants **for him, his Heirs, Executors and Aſſigns, with B. his Heirs, Executors and Aſſigns, that he, his Heirs, Executors and Aſſigns,** ſhall quietly have, hold, and enjoy the Premiſſes from **ſuch a Day** for 13 Years, and ſo yearly from henceforth for ever until the ſaid 100*l.* be paid according to the Intent, without Let of A. or the lawful Let of any other, rendering 14 d. Rent, **and B. covenants that he will not do Waſte. If no Fine be after levied, this Covenant and Grant for enjoying ſhall not be a Leaſe for** 13 **Years, for it has Reference to the Fine which ought to be levied, which by the Intent of the Indenture ought to raiſe all the Eſtate intended. Tr.** 5 **Ja. B. R. adjudged between** *Evan and Thomas.* Cro. J. 172. pl. 13. S. C. held accordingly per tot Cur. —— S. C. cited Arg. 2 Mod. 280.

2. *Leaſe for Life* &c. *provided, that if the Leſſee die within* 60 *Years* then next following, that in ſuch Caſe *his Executors and Aſſigns ſhall have and enjoy the Land as in the Title and Right of the Leſſee until* 60 *Years*, to be computed from the Date of the Indenture, *are expired.* The Court held that this was not a Leaſe, but only a Covenant &c. Dyer 150. a. pl. 83. Trin. 3 & 4 P. & M. Parker v. Gravenor. And. 19. pl. 38. Gravenor v. Parker, S. C. held accordingly, becauſe nothing of the ſaid Term was limited to the Leſſee for Life, as Remainder to him and his Executors. —— Bendl. 72. pl. 115. S. C. held accordingly. —— S. C. cited 1 Rep. 155. a. that it is no Leaſe, but only a Covenant for the Uncertainty. —— S. C. cited Mo. 247. in pl. 388. —— Ibid. 480. S. C. cited that the Word (Proviſo) did not import a Grant, but an Agreement, and ſo ſounds in Covenant, and not in Demiſe. —— S. C. cited Hob. 35. accordingly.

3. Feme Leſſee for Years takes Baron and dies; he in Reverſion demiſes for Years, to commence *after the Term demiſed to the Baron where it was demiſed to the Wife*, and by Act in Law transferred to the Baron, yet by reaſonable Conſtruction it was reſolved, the Land was by the Wife demiſed to the Baron to make the Leaſe have a good Beginning. 6 Rep. 36. a. b. cites Pl. C. 192. a. [Anno 1 Eliz.] Wroteſley v. Adams. D. 177. b. pl. 35. Hill. 2 Eliz. S. C. —— S. C. cited by Archer J. Cart. 149.

4. Grant of the *Reverſion Habend' the Land for Years a Fine Termini* &c. countervails a good Leaſe of the Thing. D. 178. a. pl. 37. Hill. 2 Eliz.

5. Articles between A. and B. A. *covenants, grants and agrees that B. ſhall have the Land for ſix Years*, and in Conſideration of this *B. covenants and grants* for him, his Heirs and Executors *to pay the yearly Rent of* 10*l.* to A. his Executors and Heirs. Reſolved it is a Leaſe, and Cro. C 207. pl. 1. S. C. adjudged, and the Rent ſhall go to

the Heir with the Reverſion, and not to the Executor. —— A. covenants by Deed that B. ſhall have the Land for 6 Years is not a Leaſe, though a Leaſe by Deed is a Covenant. Br. Leaſe, pl. 21. cites 21 H. 7. 36.

and a good Reſervation of Rent. Jo. 231. pl. 2. Hill. 6 Car. B. R. Drake v. Monday.

Lev. 35. Goodin v. Clark, S. C. adjudged —— Keb. 462. pl. 61. S. C. adjudged for the Plaintiff.

6. A. conveyed Land to the Uſe of himſelf for Life, Remainder to his Son and the Heirs Male of his Body, and if he dies without Iſſue Male of his Body, that then *his Daughters ſhall have his Land for* 100 *Years*; Adjudged per tot. Cur. præter Mallet a good Leaſe by Way of future Intereſt. Sid. 102. pl. 8. Hill. 14 & 15 Car. 2. B. R. Goodier v. Clerk.

Sid. 428. pl. 13. S. C. and ſays Nota, it was ſaid by ſome, that this Licence ſhall be pleaded as a Leaſe, and cites 5 H 7. 1. —— 2 Keb. 561. pl. 60. S. C. and per Curiam this is a Leaſe, and ſhould be ſo pleaded. —— Br. Leaſes, pl. 30. cites 5 H. 7. 1. S. P. per Curiam accordingly.

7. It was inſiſted, that a *Licence to enjoy from ſuch a Time to ſuch a Time* is a Leaſe, and ought to be pleaded as a Leaſe, and not as a Licence. As to the Pleading Twiſden ſaid, he had known it doubted whether it may not; but as to its being a Leaſe, or a certain preſent Intereſt, he ſaid it was true that 5 H. 7. 1. is that it is ſo. Mod. 14. Trin. 21 Car. 2. B. R. Hall v. Sebright.

(X. a) What Words will make a Leaſe for Years.

* S. C. cited 3 Bulſt. 252. —— Br. Covenant, pl. 26 cites 21 H. 7. 37 Contra by Fineux, who ſaid that a Leaſe for Years may be a Covenant, but that a Covenant cannot be a Leaſe for Years, and that conſequently a Covenant to have Land for ſo many Years is no Leaſe. —— Br. Leaſes, pl. 60. cites 37 H. 8 and 1 E 6. and ſays it was admitted 1 E 6. in Chancery, that where J. convenit & conceſſit to W. S. that he ſhould have 20 Acres in D for 20 Years, that this was a good Leaſe; For this Word (conceſſit) is as ſtrong as dimiſit or locavit, and Mich. 37 H. 8. the ſame was agreed accordingly by ſeveral.

1. If a Man covenants and agrees with another that he ſhall have certain Land for certain Years, ſcilicet, from ſuch a Year to ſuch a Year, under ſuch Rent, this is a good Leaſe for Years. By Rep. 14 Jac. *Sir William Eſſex.* Trin. 5 Jac. B. R. * *Tooker v. Squier* agreed. Hill. 12 Jac B. adjudged between † *Tiſdale and Sir William Eſſex.* adjudg'd. Mich. 4 Car. B. R. adjudged between ‡ *Geary and Read,* which Intratur Paſch. 4 Car. 432. Hobart's Rep. 48. Same Caſe.

† Hob. 34. pl 39. S. C the Words were that Haberet, occuparet & gauderet, and adjudged that this was a Leaſe; for thoſe are perfect Words to give an Intereſt. —— Roll Rep. 397. pl. 23. S. C. and admitted by Judgment that the Words (he ſhall have the Land for ſo many Years) is a good Leaſe. —— Mo. 861. pl. 1183. S. C. reſolved that the Words (have, occupy and enjoy) is a good Leaſe. —— 3 Bulſt. 204. S. C. and per Coke Ch. J. this is a good Leaſe, and Judgment accordingly; But he took a Difference between ſuch Covenant made by one that is Owner of the Land, and where it is made by a Stranger that has nothing in the Land; that in the firſt Caſe it will amount to a Leaſe, but not in the laſt. —— Brownl. 23. S. C. but S. P. does not appear. —— Same Difference taken Le. 136 in pl. 136. Mich. 30 Eliz.

‡ Cro. C. 128 pl. 3. Geary v. Reaſon, ſeems to be S. C.

The Words (covenant, grant and agree that one ſhould have Land for ſo many Years) are apt Words to make a Leaſe for Years and enure as a Leaſe; Reſolved Cro. J. 91, 92. pl. 19. Mich. 3 Jac. B. R. Whitlock v. Horton. —— Noy 14. Whitlock v. Chartwell S. C. adjudged. —— Noy's Max. 67. S. P. for Conceſſit is of ſuch Force as Dimiſit.

Cro. E 486. pl. 2 S. C. held by all the Juſtices to be a good

2. If Articles of Agreement indented are made, ſealed, and delivered between A. and B. which are ſuch, ſcilicet, Inprimis, It is agreed that A. doth let ſuch Land to B. for five Years from Michaelmas after, provided that the Leſſee ſhall pay therefore at Michaelmas and our Lady-

Lady-Day 100 l. by even Portions during the Term. And there was alſo another Covenant that a Leaſe ſhould be made and ſealed by the ſaid A. before the Feaſt of All-Saints enſuing, according to the Effect of thoſe Articles; Though here be a Covenant for the ſealing of a Leaſe after, according to the Articles aforeſaid, yet inaſmuch as the Words of the firſt Covenant are, that A. doth let the *Land in the Preſent Tenſe, and he has Time by this to make the Leaſe after the Leaſe is to commence by the firſt Article, this is a preſent Leaſe and Reſervation. M. 38 & 39 Eliz. B. R. adjudg'd in Debt for the Rent between *Harrington and Wiſe.*

Leaſe, and Judgment accordingly. —— Mo. 459. pl. 638. S. C. and *Fol. 848. ruled to be a preſent Leaſe —— Noy 57

S C. and by the Covenant that he may make the Leaſe before the Feaſt of All-Saints, it appears that it was but for *further Aſſurance, and not to deſtroy the preſent Leaſe.*

3. If a Man covenants with another to permit and ſuffer him to have, hold, and occupy certain Land for a certain Time, this is not any Leaſe; for the Words permit and ſuffer ſhew the Intention to be only a Covenant. Trin. 5 Ja. B. R. per Cur. between *Looker and Squier.*

S. C. cited 3 Bulſt. 252. —— 2 Roll Rep. 121. cites S. C. as adjudged Trin. 4 Jac.

—— S. C. cited Arg. 2 Mod. 81. —— (S. b) pl. 10. S. C.

4. If Articles of Agreement are drawn between A. and B. which are ſealed and delivered, in which is contained in this Manner, ſcilicet, Inprimis, The ſaid A. is contented to demiſe the Parſonage &c. to the ſaid B. from Midſummer next for ſix Years, with theſe Words after in the Articles, viz. the Rent reſerved is 100 l. per Ann. a Reentry for Non-payment of the Rent, a Covenant for Reparation, a Covenant to do ſuch a Thing; And to theſe Articles the Parties put their Seals; This is not any Leaſe but a Covenant, for it appears upon all the Covenants that they were but Inſtructions to make a Leaſe, and not to have the Effect of a Leaſe; and the Word (contented) does not intend the preſent but the future. M. 40 & 41 El. B. R. adjudged between *Pleaſaunt and Higham.*

5. If one ſays to J. S. *you ſhall have a Leaſe of my Lands in D. for* 21 *Years, paying* 10 *s. per Ann. Make a Leaſe in Writing, and I will ſeal it*; this was agreed to be a good Leaſe by Parol though no Writing be made of it, for the Intent of the Leſſor is ſufficiently expreſſed, and the making of it in Writing is but for further Aſſurance. Note. Cro. E. 33. pl. 17. Trin. 26 Eliz. B R. Maldon's Caſe.

Mo. 8. pl. 31. Paſch. 3 E. 6 S. C. in totidem Verbis. —— Dal. 7. pl 2. Mich. 4 E. 6. S. C. in totidem Verbis. ——— But where the Words were, *I promiſe that you ſhall have*, after your Term ended in the ſame, a like Leaſe for 21 Years, as you have in the ſame, is only a Promiſe, and not a Leaſe. And. 136, 137. pl. 187. Paſch 27 Eliz Moon v. Williams. ——— Mo. 220. pl. 357. S. C. ——— But ſee now the Stat 29 Car. 2. cap. 3. of Frauds and Perjuries.

6. If *I agree to let my Land* this is no Leaſe; Per Wray Ch. J. Cro. E. 156. pl. 39. Mich. 31 & 32 Eliz. B R.

7. An *Agreement to take a Houſe* at 50 l. a Year, and the Leſſee to repair, *and that the Leaſe ſhould be drawn by St. Thomas's Day, and then to begin, and another Agreement by Notes to let for ſeven or eleven Years at the Leſſee's Election, and the Leaſe to be engroſſed*, but it never was engroſſed. The Court agreed that this is no Leaſe, but a Tenancy at Will. 3 Keb. 68. pl. 9. Mich. 24 Car. 2. B. R. Burges v. Bowman.

(X. a. 2) What amounts to a Leaſe.

1. A *Licence to occupy* is a Leaſe; per Hobart Ch. J. Hob. 35. cites 5 H. 7. 1. though 10 E. 4. ſeems to make a Doubt that the Leſſor may alſo occupy with him; But 21 H. 6. 37 Paſton's Opinion, that if one licenſes me to ſow the Land it is no Leaſe, and therefore if I ſow the Land another ſhall reap it; and to this Opinion Hobart agrees.

2. Leaſe *for* 1000 *Days* is a Leaſe for Years. Finch. 17. b.

Dal. 34. pl. 24. S. C. in totidem Verbis.—S. C. cited and relied upon by Powell J. 2 Vent. 57. in the Caſe of Wright v. Wyvel, Trin. 1 W. & M. in C. B. to which it was anſwered, that the Caſe there was of little Authority; For it did not appear how that Matter came in Queſtion, or in what Court, or in what Action, and ſaid only fuit tenus 3 Eliz.

3. A Man made his *Will* in ſuch Manner; *I have made a Leaſe for 21 Years to J. S. paying but 10 s. Rent*; This is a good Leaſe by the Will, for this Word *(I have)* ſhall be taken in the Preſent Tenſe, as the Word (Dedi) is in a Deed of Feoffment. Mo. 31. pl. 101. Trin. 3 Eliz. Anon.

Cro. E 143. pl. 10 S. C. held accordingly.—— Le. 315. pl. 439 Hare v. Okeley S. C. held accordingly —— Gouldsb. 77. pl. 9. S. C. held accordingly.—— A. leaſes to B. for three Crops, it is a good Leaſe for three Years; Per Haughton J. Roll R. 319. in pl. 29. cites 23 E. 3. Fitzh. Account, 130.

4. *Expoſing Land to Halves* for a Crop is no Leaſe of the Land; But otherwiſe if it be for 2 or 3 Crops; So that for breaking the Cloſe the Owner only may bring Treſpaſs, but for ſpoiling the Corn by a Stranger they ought to joyn, being Tenants in Common thereof. Cro. E. 143. pl. 10. Trin. 31 Eliz. C. B. Hare & al. v. Celey.

5. In an *Eject' Firm'* the Caſe was thus, V. *leaſes Bl. Acre* to A. *for 20 Years* rendring a Rent &c. And *afterwards* leaſes Wh. Acre, and the Rent and Reverſion of Bl. Acre to F. by Demiſe, Grant, and to Farm let for 99 Years, Habend' Wh. Acre, the Reverſion of Bl. Acre, the Rent, and Premiſes for 99 Years, rendring Rent &c. A. never Attorns; the 20 Years expire, and F. enters in Bl. Acre, and by the Court well, for that ſhall enure as a Leaſe by the Words Demiſe &c. Noy 153. Fitch v. Vaughan.

6. There were Articles drawn between A. and S. (viz.) *Articles* agreed upon &c. *Imprimis A. doth demiſe his Cloſe to S. to have it for 40 Years, and a Rent reſerved with a Clauſe of Diſtreſs &c. in witneſs whereof &c.* and afterwards there was written in the ſame Paper a *Memorandum*, that *theſe Articles are to be ordered by Counſel of both Parties, according to the due Form of Law*; and becauſe the Intent of both Parties appeared by that Memorandum, and the Leaſe was drawn by the Counſel, but never Sealed, (for the Parties diſagreed about Fireboot) it was ruled upon Ejectione Firmæ by the Court, that the Articles were not a ſufficient Leaſe, and the Jury found accordingly without departing from the Bar. Noy 128. Sturgion v. Dorothy Painter.

7. If one grants to J. S. *the Profits of his Land*, and makes *Livery*, this ſhall be a Leaſe for Life; Per Coke Ch. J. 3 Bulſt. 101. Mich. 13 Jac. in Caſe of Blamforde v. Blamforde.

3 Salk. 108. pl 8. S. C. adjudged upon De-

8. *Covenant was to pay annual Rent of 60 l. and repair.* Plaintiff ſays *Defendant entered*, but does not aver a Leaſe made. Defendant pleads, he ought not to have Rent, for no Leaſe made. Per Holt Ch. J. in mutual

mutual Covenants, where the Performance of one does depend upon another, the precedent Covenant muſt be performed firſt. Per Eyres and Dolben, the *Covenant and Entry amount to a Leaſe*; and ſo was **Harrington and Wiſe's Caſe.** Per Holt, it has been held aliter ever ſince; Judgment pro Quer'. 12 Mod. 1. Mich. 2 W. & M. in B. R. Copley v. Hepworth. murrer that theſe Articles did not amount to a Leaſe.

9. A. *licences* B. to *enter and take the Profits*; it is a Leaſe at Will, and if the Licence was for a Year, it is a Leaſe for a Year; otherwiſe of a Licence *to Hunt*, and if A. licence B. *to come upon his Dock, and carry on his Trade*, it is a Leaſe; becauſe it is all the proper Profits of a Dock; Per Powell J. 2 Salk. 588. pl. 3. Paſch. 4 Ann. B. R. in Caſe of the Queen v. Winter.

10. If a *Licence* is granted to a Man *to uſe my Ground*, or *my Yard*, he has thereby an Intereſt in it, ſo that the Licence is not revocable, but it amounts to a Leaſe at Will, and this ſeem'd to be the Opinion of the Court, and that he thereby had ſuch a Poſſeſſion as not to be turned out by a *Revocation*, but by an *Ejectment*. 11 Mod. 42. pl. 1. Paſch. 4 Ann. B. R. Anon.

(X. a. 3) What ſhall be ſaid a Leaſe, or Bargain and Sale &c.

1. A Seiſed of the Manor of B. by Indenture *bargained, and ſold to C. All thoſe her Woods, Underwoods and Hedgerows, as have been accuſtomably uſed to be felled and ſold ſtanding, and being in, upon, and within the Manor of B.* to have and to hold all the ſaid Woods &c. *to the ſaid C. from &c. during the Natural Life of the ſaid A.* And C. covenanted &c. with A. to pay to A. her Executors &c. Yearly, during the ſaid Term, 10 l. C. can have but one Cut, though A. lives many Years after. 3 Le. 7. pl. 19. Trin. 4 Eliz. Rot. 1620. Andrews v. Glover. Mo. 15. pl. 57. Mich. 3 & 4 Eliz. C B. Gower v. Andrews S. C. —— And. 7. pl. 15 S. C. and thinks the Words to be only a Bargain and Sale, and no Leaſe; For the Words (then growing,) determines that the Land is not let, and if the Land is not let, then the Wood growing after the Cut of what grew at the Time of the Sale cannot paſs. —— Bendl. 112. pl. 148. S. C and the Pleadings and the Court held, that the Defendant could have but one Cut. ——3 Le. 54. pl. 79. Mich. 15 Eliz. C. B. Anon, S. P. held accordingly by three Juſtices, but Dyer e contra. —— Ibid. 56. pl. 82. S. C. in totidem Verbis. —— 4 Le. 36. pl. 100. S. C. in totidem Verbis.

2. *Leaſe for Years to B.* rendring Rent, and after Leſſor grants the *Reverſion to C. for 99 Years*, rendring the antient Rent, *to have from the Day of the Leaſe* without Impeachment of Waſte, this is a Leaſe by way of *Grant of a Reverſion*, and to paſs as a Reverſion; But per Catline, if Leſſor had *granted the Reverſion, and alſo demiſed the Land for 99 Years*, it ſhould paſs as a Leaſe to begin firſt after the former Leaſe determined. 3 Le. 17. pl. 40. Mich. 14 Eliz. Anon. 4 Le. 23. pl. 73. 14 Eliz. B. R. The Biſhop of Rocheſter's Caſe, S. C. in totidem Verbis. —— 3 Le. 61. pl. 90. S C. in totidem Verbis.

3. A. was ſeiſed of the Manor of D. whereof Part was in Demeſne, and part in Leaſe, and did *demiſe bargain and ſell* the ſame to W. and others for 17 Years after his Death; the Leſſees may Uſe this either as a common Leaſe, or as a Bargain and Sale, but not both ways. 2 And. 202. pl. 19. Heyward's Caſe. 2 Rep. 35. a. Paſch. 37 Eliz. in the Court of Wards S C.

4. A.

4. A. *leaſes to B. for* 10 *Years*, and after he *demiſes and grants* that Land *to C. for* 20 *Years*, that is a good Leaſe for 10 Years preſently; But *if C. happen to have Attornment*, then he ſhall have the Reverſion preſently, and thoſe two Eſtates ſhall be in him, and ſtand divided; Per Cook Ch. J. Noy 153. in Caſe of Fitch v. Vaughan.

8 Rep. 93. b. 94. a. Fox's Caſe, S. C. held accordingly.

5. A. made a *Leaſe for Life to B.* rendring 20 l. per Ann. Afterwards A. by Indenture in Conſideration of 50 l. *demiſes and grants the Reverſion* to have *from the Day of the Date for* 99 *Years* rendring 10 l. per Ann. It is a good Bargain and Sale, and B. ſhall have the Rent reſerv'd on the Leaſe to A. 2 Brownl. 291. Hill. 7 Jac. C. B. Smallman v. Powis.

6. If a Man demiſes and grants his *Houſe and Utenſils* there, this is only a Demiſe of all; but if ſuch a *Demiſe had been firſt, and the Grant by a ſubſequent Clauſe*, there the Utenſils ſhould *paſs, disjoined* from the Thing leaſed, but not where it is all in *one and the ſame Clauſe*; So if A. make a Leaſe to B. of Land for Years, and afterwards he grants or ſells the *Trees* on the Land to the Leſſee with Liberty to cut them down at any time during the Term, and then B. ſurrenders his Leaſe to A. yet B. may cut down and take the Trees during the Years for which the Leaſe was made; And the Difference is, where the Trees are *conjoined*, and where Disjoined from the Term in Point of Intereſt; In the firſt, if he ſurrenders before he takes the Trees the benefit is loſt; Otherwiſe where they are disjoined, there the Reference ſhall be to the Effluction of the Term in the number of Years, As where Leſſor grants to Leſſee Trees growing on the leaſed Land, in this Caſe Leſſee may well cut and take them after a *Surrender of the Leaſe* made by him; Per Croke J. 2 Bulſt. 8. Mich. 10 Jac. in the Caſe of Billingly v. Herſy.

(X. a. 4) What a Covenant only, or a Leaſe.

Ow. 97. Perryn v. Allen S. C. & S. P. by Anderſon, quod Walmſley conceſſit.

1. AN Agreement or *Covenant between A. and B. that J. S. ſhall have ſuch Land for Years* cannot amount to a Leaſe, it being made between *Strangers*; So if A. covenants with B. *that his Executors ſhall have ſuch Land for* 21 *Years*, this cannot amount to a Leaſe, for they are in this Degree as Strangers; Per Anderſon Ch. J. Cro. E. 173. pl. 1. Hill. 32 Eliz. C. B. in Caſe of Porey v. Allen.

——But if A. covenants and grants with B. that B. ſhall have his Land for ſo many Years, it is a good and abſolute Leaſe; But if A. covenants and grants with B. that B. ſhall enjoy &c. it is not a Leaſe, becauſe it ſounds only in covenant; Cro. J. 172. pl. 13. Trin. 15 Jac. B. R. in Caſe of Evans v. Thomas Tanfield ſaid it had been ſo adjudged in Pleaſance's Caſe. ——A Negative Covenant by Mortgagee not to intermeddle for ſeven Years is no Leaſe. Cro. J. 659. pl. 9. Hill. 20 Jac. B. R. Poweſley v. Blackman.——Ow. 49. Mich. 32 & 33 Eliz. Anon. S. P.

2. If A. covenants and grants that J. S. *ſhall have his Land until* 10 *l. be levied*, this amounts to a Leaſe till the Money is paid; Arg. 3 Bulſt. 252. Mich. 14 Jac.

3. If a A. *licences J. S. to hold* his Land, this amounts to a Leaſe; Arg. 3 Bulſt. 252 cites 5 H. 7. 1.

S. C. cited 2 Le. 7 in Cranmer's Caſe. —— 3 Le 22. cites D. 150. Parker v. Gravenor, S. C.

4. Leaſe for Life by Deed, Proviſum eſt quod *if Leſſee die within the Term of* 60 Years next enſuing, that *his Executors and Aſſigns ſhall have this* as in the Right and Title of the Leſſee *pro termino totidem Annorum* as ſhould amount to the Number of 60 Years from the Date of the Indenture, it was held per Cur. that this is but a Covenant, and not a Leaſe. 3 Bulſt. 163. cites D. 150. Parker v. Grovenor.

——3 Le. 154. per Wray Ch. J.——3 Le. 196. per Rhodes J. S. C. cited. —— No

No Leaſe for Years was made by this Proviſo either in the Leſſee nor by Remainder in his Executors, becauſe nothing of the Term was limited to Leſſee for Life, as Remainder to him and his Executors. And. 19. pl. 38. Gravenor v. Parker.——If it ſhould be a Demiſe there was no Perſon to take, For it is appointed to the Executors and Aſſigns of Leſſee, who are not in Rerum Natura, nor Parties to the Deed; Arg. Mo. 480. cites D. 150.——S. C. cited by Gawdy J. Cro. E. 841. in pl. 18.

5. A. *covenants* with B. *to make a Conveyance by Fine* to him of Land, *provided if he pay B.* 100 *l. at the End of* 13 *Years*, then to the Uſe of the Fine to be the Cogniſor, and covenants that *B. ſhall enjoy* the Land for 13 Years, and for ever after, if the 100 l. be not paid. The Aſſurance was not made, and this was adjudged no Leaſe for 13 Years, becauſe it was the *Intent of the Parties* to make an Aſſurance only in nature of a *Mortgage*, which is but a Covenant; Arg. 2 Mod. 80. cites Cro. J. 172. [pl. 13. Trin. 15 Jac. B. R.] Evans v. Thomas. For if a Fine had been levied or Feoffment made, it had not been a Leaſe Cro. J. 170. in S. C.

6. It was admitted Arg. that where *Words are doubtful* and ſuch as may admit of diverſe Conſtructions, whether as the Words Covenant, Grant, and agree &c. whether they will amount to a Leaſe or not, there they ſhall be *taken as a Covenant* to prevent a *Forfeiture*; So alſo if they *are only Inſtructions*; As if a Man by Articles ſeal'd and deliver'd is contented to demiſe ſuch Lands, and a Rent is reſerved, and covenants to repair &c. 2 Mod. 81. Paſch. 28 Car. 2. C. B. in Caſe of Richards v. Sely.

(Y. a) What ſhall be a good Leaſe for Years for Uncertainty.

1. IF a Man poſſeſs'd of a Leaſe for Years grants all his Term after his Death, this is a good Grant; For it is as much as if had ſaid, that he granted ſo much of his Term as ſhall be to come at the Time of his Death, which had been good as it ſeems. Contra Paſch. 43 Eliz. B. R. between *Fuel and Lingley*. A. a Termor grants all his Term by Deed to B. a Tempore Mortis of A. Adjudged that the Habendum is void, and the Term paſſes preſently, for the Premiſſes make a preſent Grant, and the Habendum is repugnant; But where A. without any Habendum grants to B. all his Term which ſhall be to come at the Time of his Death, the Grant is utterly void; Per Dyer Ch. J. Pl. C. 520. Hill. 20 Eliz. in Caſe of Welkden v. Elkington. —— D. 272. a. pl. 30. Paſch. 10 Eliz. S. P. adjudged accordingly.

If one grants his Term after his Death it is not good; otherwiſe if by way of Leaſe. 3 Bulſt. 108. cites 7 E. 6. Br. Grants 154.

2. So a Man poſſeſs'd of a Term to commence after the Death of J. S. by Indenture recites it, and grants the Premiſſes Habendum all his Intereſt of the ſaid Term after his Death, it is a good Grant; For it is all one with the Grant before. Contra Paſch. 43 Eliz. between *Fuel and Lingley*, adjudg'd.

3. If a Man makes a Leaſe for ſo many Years as he ſhall live, it is void for the Uncertainty. Co. Litt. 45. b.

4. If Leſſee for Years grants to another ſo many of the Years as ſhall be come at the Time of his Death, it is void for the Uncertainty how many will be to come at his Death. Com. 520. b. 7 E. 6. Brook Grants 154. Co. 1. * *Rector Chedington* 155. per Curiam. Br. Leaſes, pl. 66. cites S. C. —— S. C. cited Arg. Godb. 25. —— 3 Le. 86.

Arg cites S. C. —— 2 And. 12. cites S. C. —— Godb 25. in pl. 35. Arg. cites Com. 520. by Popham, that it is a void Grant, becauſe no Intereſt paſſes during the Life of the Grantor.

A. has a Leaſe for 40 Years, and grants to W. N. ſo many of the Years as ſhall be arrear at the Time of his Death; Per Hales J. and others, this Grant is void for the Uncertainty, and it is not like to a Leaſe for Life and four Years over, for this is certain that his Executors ſhall have four Years after his Death, but in the other Caſe the Grantor may live all the 40 Years, and ſo nothing will be arrear at his Death. Br. Leaſes, pl 66. cites 7 E. 6. —— Lev. 45. Mich. 13 Car. 2. B. R. in the Caſe of Caponhurſt v. Caponhurſt, S. P. admitted, and Judgment accordingly. —— Raym. 27. S. C. and S. P. admitted.

* Mo. 478. pl. 684. Lloyd v. Wilkinſon, S. C.

If a Termor deviſes, that after the Death of a Stranger J. S. ſhall

5. If Leſſee for Years **by his Will** deviſeth ſo many of the Years as ſhall be left at the Time of his Death, **it is good, becauſe the Will takes Effect by his Death, and no Intereſt paſſeth before.** 7 E. 9. **Brook Grants 154.**

have the Land for ſo many Years as ſhall be then to come, this is good by Deviſe, becauſe he might have done ſo by Demiſe in his Life. Mo. 635. pl. 871. Hill. 34 Eliz. C. B. in Caſe of Rayman v. Gold. —— S. P. accordingly, becauſe in ſuch Caſe it is certain how many Years he is to enjoy it; Arg. Show. Parl. Caſes 203. in Caſe of Jermin v. Orchard.

Mo. 478. pl. 684. Lloyd v. Wilkinſon, S.C.

6. If Leſſee for ninety Years demiſeth the Land to another for 70 Years after his Death **it is good; becauſe it is a certain Term.** Mich. 34, 35 **El. adjudged. Co. 1.** *Rector Chedington* 155.

* Mo. 478. pl. 684. Lloyd v. Wilkinſon, S. C. and Ibid. 480. in S. C. cites Dyer, 3 & 4 Ph. & Ma. Fol 150. Parker v. Gravener. —— And. 19. pl. 38. Gravenor v. Parker, the Court held, that no Leaſe for Years was made by this Proviſo in the Leſſee, nor by Remainder in his Executors, becauſe nothing of the ſaid Term was limited to the Leſſee for Life, as Remainder to him and his Executors —— Bendl 72. pl 115. S. C. accordingly. —— S. C. cited Hob 35. —— S. C. cited by Rhodes J. 3 Le. 196. in pl. 244. Hill. 29 Eliz. —— 4 Le. 193. in pl. 303. Rhodes J. cites S. C.

7. **If A. leaſeth to B.** for Life **with ſuch** Proviſo, **Proviſum eſt,** that if the Leſſee dies within the Term of 40 Years, that his Executors and Aſſigns ſhall have the Land for ſo many of the Years as ſhall amount to 40 Years to be accounted from the Date of the Indenture; **this is not any Leaſe, but only a Covenant, for the Uncertainty.** Dy. 3, 4 **Bar. 150. Co. 1.** * *Rector Chedington* 155.

8. **If a Man leaſes Land to another** Habendum a Morte ſua for 40 Years **it is a good Leaſe.** 7 E. 6. **Brook Grants 154.**

9. The Years ought to be certain when the Leaſe is to take Effect in **Intereſt or Poſſeſſion, but before it may depend upon an Uncertainty, viz. on a Poſſible Contingency. Co. Litt. 45. b. Co. 6. The** *Biſhop of Bath* 35.

Fol. 849.

10. If A. grants **to B.** that when B. has paid 20 l. to A. he ſhall have a Leaſe for 21 Years **in Blackacre, and afterwards B. pays the 20 l. he ſhall have a good Leaſe for 21 Years from thence next following. Co. Litt. 45. b. Co. 6. The** *Biſhop of Bath* 35.

S P. accordingly, if J. S. names the Years in the Life of

11. **If A. leaſeth to B.** for ſo many Years as J. S. ſhall name, **and afterwards J. S. names the Years, it is a good Leaſe for ſo many Years as J. S. names. Co. Litt. 45. b. Co. 6. 35. b.**

A. But if the Leaſe had been for ſo many Years as my Executors ſhall name, that can never be made good in my Life; Arg. 3 Le. 86. in pl. 125. cites Pl. C. 273. 6 Eliz. by Weſton J. in Caſe of Say v. [Smith and] Fuller.

12. **Although there does not appear any Certainty in the Leaſe of the Years, yet** if by Reference **to a Certainty** it may be made certain, **it is a good Leaſe. Co. Litt. 45. b. Co. 6. 35. b.**

13. **If A. leaſeth Land** to B. for ſo many Years as B. hath in the Manor of D. **and** B. has a Term of 10 Years, **it is a good Leaſe for 10 Years. Co. 45. b.**

14. A

14. A. leaſes Land to B. *till B. has levied* 20 *l.* it is a good Leaſe. 3 Bulſt. 252 ſays it was ſo adjudged 3 Mariæ, though before it was a Point undetermin'd, cites Br. Novel Caſes, fol. 102. pl. 468. and Br. Tit. Leaſes, pl. 67.

15. Leaſe for *ſo many Years, as Land in Execution by Statute Merchant ſhall be in Execution* is not good for the Uncertainty. Finch. 44. b.

16. A. has a *Meadow in the Pariſh of H. which extends into two Counties B. and W.* but the Meadow lies in W. and is called by the Name of Calleys. A. makes a Leaſe to J. S. by the Name of *Calleys in the County of B.* and held good. D. 292. a. pl. 72. Trin. 12 Eliz.

17. A leaſes to B. *Habendum from the Death* of J. S. *till Mich.* 1600; If J. S. dies before Mich. 1600. the Leaſe is good; though the *Commencement* is *uncertain*, yet it has a *certain End.* Pl. C. 523. Hill. 20 Eliz. in Caſe of Welkden v. Elkington.

But where the Commencement, Continuance and End, are uncertain, it is void, As if a Leaſe be made till Iſſue En ventre ſa mere comes to Age, it is void. 6 Rep. 35. b. Trin. 3 Jac. C. B. in Biſhop of Bath's Caſe.

18. Miſrecital of the *Date of a Leaſe* of a common Perſon is not material, becauſe there is a particular Time appointed from which the Leaſe is made. D. 93. b. pl. 28. Marg. cites Hill. 30 Eliz.

19. Land was *demiſed to J. S. for* 90 *Years if he ſhould ſo long live, and if he died within the Term, that then his Wife ſhould have it Durante toto reſiduo termini prædicti*; J. S. dies during the Term; It was held by Walmſly and Windham, contra Anderſon, that the Limitation of the Term was void for the Uncertainty; and the Word (Term) ſhall be taken for the Intereſt and not for the Time; and adjudg'd that the Wife took nothing. Cro. E. 216. pl. 15 Hill. 33 Eliz. B. R. Green v. Edwards.

Mo. 297 pl. 441. S. C. but that is of a Leaſe made to the Wife for 80 Years, if ſhe ſo long live, and the Reſidue to go to the Son; and adjudged void as to the Son, becauſe there is no Reſidue of the Term which is determined before. — And. 258. pl. 266. S. C. agreed by all the Juſtices. —— Le. 218. pl. 300. S. C. held accordingly. — 1 Rep. 153. b. cites S. C. adjudged in C. B.

20. Termor may demiſe the Land for certain Years if Leſſee ſo long live, and may demiſe the ſame Land to another to commence *after the Death* of the firſt Leſſee, and good. Mo. 635. pl. 871. Hill. 34 Eliz. C. B. Rayman v. Gold.

21. Leaſe *for Life to A. and* Leaſe *to B. for* 10 *Years*, the Leaſe for Years is not void, becauſe it may, by Death of the Tenant for Life within the Years, have Effect. Arg. Mo. 344. pl. 466. Paſch. 35 Eliz.

22. If a Leaſe be made *to ſuch Perſon as J. S. ſhall name*, it is void for the Uncertainty of the Perſon of the Leſſee. Mo. 666. pl. 911. Mich. 44 Eliz. in Caſe of Spark v. Spark.

23. *Two ſeveral Leaſes to two ſeveral Perſons* of the *ſame Land* for the *ſame Term*, and both *to commence at the ſame Time*, and both Leaſes deliver'd at the ſame Time to both Leſſees are void Leaſes to both. Jenk. 256. pl. 49.

24. Leaſe to commence *after Eſtate Tail* is good. Sid. 102. pl. 8. 14 & 15 Car. 2. B. R. Godiar v. Clarke.

25. B. by Deed reciting, that whereas J. S. had demiſed to him ſuch a Houſe and Land &c. he granted and aſſign'd to Defendant the ſaid Houſe and Premiſſes, with the Appurtenances, together with the ſaid recited Leaſe, and all Writings &c. concerning the ſame Habend' after the Death of the Grantor and his Wife for and during the Reſidue of the ſaid Term unexpired. The Court held this Aſſignment void; For *Grant of a Leaſe for Years Habend' after Death* is void. And Diverſity was taken where one *grants his Term for ſo many Years as ſhall be arrear at*

1 Salk 346. pl. 1. Germain v. Orchard, S. C. adjudged accordingly in B. R —— Freem. Rep. 500. pl. 674. German v.

Orchard, S. C. held accordingly in B. R. — But this Judgment

at his Death, and a Grant *for four Years or more in certain Habend' after his Death*, the firſt is void, the ſecond good; and cites 1 Co. 155. And Judgment per tot. Cur. that the Aſſignment was not good. 12 Mod. 11. Mich. 3 W. & M. in B. R. Germin v. Orchard.

was afterwards reverſed in the Exchequer Chamber, and that Reverſal affirmed in the Houſe of Lords, as appears in 1 Salk. and 12 Mod. — Skinn. 528. to 546. pl. 8. Jerman v. Orchard, S. C. in Cam. Scacc. with the Arguments there. — Show. Parl. Caſes 199.

26. Termor for Years grants for a leſs Term to *commence after his Death*, as if H. poſſeſs'd of a Term for 20 Years grants the Tenements for 19 Years to commence after his Death, this will be good for ſo much of the 20 Years as ſhall be unexpir'd at the Time of his Death. 2 Salk 413. Ruled by Holt Ch. J. at Dorcheſter Lent Aſſiſes 10 W. 3. Gree v. Studley.

Vaugh. 185. S. P. obiter, in Caſe of Bedell v. Conſtable.

27. *Leſſee for* 2000 *Years grants* the Land *to B. without mentioning any Term*, it is void for Uncertainty. 2 Vern. 684. pl. 609. Trin. 1712. Kittley & al' v. Duck & Ux.

(Z. a) When a Leaſe ſhall be ſaid to commence.

S. P. Arg. Bridgm. 21. — S. P. Arg. Bulſt. 27.

1. IF a Man leaſes for 21 Years, without any mention at what Time it ſhall commence, it ſhall commence immediately, ſcilicet, from the Delivery; for then the Words take Effect. Co. Litt. 46. b.

1 Rep. 153. b. 154 a. cites Pl. C. 198 the ſame Diverſity as in this pl. and pl. 4. that the Years are not determined but by Effluxion of Time, ſo that Terminus Annorum includes as well the Eſtate as Intereſt in the Land, and by Grant of the Term the Eſtate and Intereſt for Years paſſes, and that 35 H. 8. Br. Expoſition de Parols, pl. 44 is according to this Diverſity, where it is agreed that if A. leaſes to B. for 10 Years, and covenants that if B. pays 106 l. to A within the ſaid 10 Years, that B. ſhall have Fee; if B. ſurrenders his Term to A. and afterwards pays the 100 l. within the 10 Years, he ſhall have Fee; but otherwiſe where he covenants that if he pays that 100 l. within the aforeſaid Term of 10 Years. ——— 2 Le. 106. in pl. 134 cites S. C. of Wroteſley v. Adams, that if the firſt Leſſee takes a new Leaſe, which is a Surrender of the former Leaſe, the ſecond Leaſe ſhall begin preſently; For the Intent of the Leſſor was that no mean Time ſhall be between the End and Beginning of the ſaid Eſtates ——— S. C. cited by Gawdy J. Cro. E 199 in Caſe of Veale v. Roberts, that the ſecond Leaſe ſhall begin when the firſt expired by Surrender or other Means.

2. If a Man makes a Leaſe for 21 Years to A. and after makes another Leaſe to B. for 21 Years, to commence, a Fine & Expiratione prædicti Termini 21 Annorum, and after A. ſurrenders his Eſtate for Years, the Leaſe made to B. ſhall commence preſently. Co. Litt. 45. b. 1 Rep. 155. *Rector of Chedington's Caſe.*

4. But if the Leaſe made to B. had been limited to commence Poſt Finem & Expirationem prædictorum 21 Annorum, and after A. ſurrendered his Term, yet the Eſtate made to B. ſhall not commence till the firſt Years ſhall end by Effluxion of Time; for there is Diverſity between the Term of 21 Years and 21 Years. Co. Litt. 45. b. 1 Rep 155. *Rector of Chedington's Caſe.*

N. B. There is no pl. 3. in Roll.

5. If an Indenture of Leaſe bears Date which is impoſſible, as 30th of February or 40th of March, and the Term for Years is limited to commence from the Date, this ſhall commence from the Delivery as if no Date had been. Co. Litt. 46. b.

6. I

6. If a Man by Indenture of Leaſe recites a Leaſe * which is not, or which is void, or miſrecites the Leaſe in a Point material, which is in Eſſe, to have from the End of the firſt Leaſe, this ſhall commence from the Delivery. Co. Litt. 46. b.

* S. P. For in Judgments of Law a void Limitation of the Commencement and no Limitation is all one. 6 Rep. 36. —— Br. Leaſes, pl. 62. cites 3 E. 6. S. P. —— Jenk. 305. pl. 79. S. P.

7. In Ejectione Firmæ if Plaintiff declares upon a Leaſe made by J. S. 20th of Auguſt for 20 Years a Feſto Annunciationis Beatæ Mariæ Virginis ultimo præterito ante Datum hujus Indenturæ &c. and no mention is made of any Indenture nor Date of it in the Declaration, this Leaſe ſhall commence from the ſaid Feaſt of the Annunciation before the 20th of Auguſt; becauſe if the Words (ante Datum hujus Indenturæ) had not been in the Declaration the Leaſe would ſo commence, and the Addition of the ſaid Words ſhall not hurt it, but ſhall be void. P. 40 Eliz. B. R. *Darcet's Caſe* adjudged, this being moved in Arreſt of Judgment.

8. If a Man leaſes for Years to B. and after by Indenture recites the Leaſe made to B. but miſtakes the Date, and then demiſes the Land to C. Habendum from the Expiration or other Determination of the firſt Leaſe for certain Years; this Leaſe made to C. ſhall commence immediately, inaſmuch as there is not any ſuch Leaſe upon which it is limited to commence. Hill. 10 Car. B. R. between *Miller and Manwaring*, per Cur. adjudged in a Writ of Error upon a Judgment at Cheſter which concerned *Sir Randal Crew*. Intratur Trin. 10 Car. Rot. 321.

The ſecond Leaſe commences in Enumeration of Years preſently, tho' not in Intereſt till after the End of the former Leaſe. Jo. 355. S. C. by the Name of Miller v. Johns. Vent 83. —— Cro. C. 397. S. C. adjudged and affirmed in Error. —— S. C. cited per Cur. Lev. 234. cites S. C. —— S. C. cited by Vaughan Ch. J. Vaugh. 80, 81. —— S. C. cited by Archer J. Cart. 149.

9. If a Leaſe be made for 31 Years, which commenced Anno Domini 1531, and after in Anno Domini 1535, the Leſſor reciting the ſaid Leaſe, makes a new Leaſe by Deed by theſe Words, Noveritis me dictis 31 Annis finitis & completis dediſſe & conceſſiſſe omnia præmiſſa to J. S. Habendum & * Tenendum a Die Confectionis Præſentium (Termino prædicto finito) uſque ad finem Termini † 31 Annorum tunc immediate ſequentium plenarie complendorum; This Leaſe ſhall commence in Computation from the Expiration of the firſt Leaſe for 31 Years, and ſhall continue for 31 Years after the Expiration of the firſt Leaſe; for if this ſhould commence from the Day of making of the Deed then there would be but four Years to come after the Expiration of the firſt Leaſe, which was contrary to the Intent of the Parties, and for this ſhall be interpreted that he ſhall have this for 31 Years after the Day of the Date and the Expiration of the firſt 31 Years, ſcilicet, after both. Dubitatur D. 9 Eliz. 261. 28. Curia de Banco contra Curiam de Banco Regis.

S. C. cited Arg. Le. 199. —— S. C. cited All. 76. Fol. 850.

† This in Roll is miſprinted. (30.)

10. In an Ejectione Firmæ if the Plaintiff declares of a Leaſe made by A. to him of certain Land Habendum from Michaelmas laſt paſt before the Date of the Indenture aforeſaid for ſix Years, and there is no mention of any Indenture before, this ſhall be taken to be a Leaſe from Michaelmas before, inaſmuch as it does not appear that there was not any Indenture. Paſch. 15 Car. B. R. between *Elme and Leaves* per Cur. adjudged, this being moved in arreſt of Judgment after a Trial at Bar upon ſuch Declaration. Intratur Trin. 14 Car. Rot. 1253.

Hob. 18. pl. 33. S. C. —— Jenk. 292. pl 36. S. C. —— S. C. cited Bridgm. 103. —— S. C. cited by Roll. All. 77. —— Sty. 119. cites S. C.

11. If an Indenture of Demiſe bears Teſte 4 May 10 Jac. and is delivered the 5th May 10 Jac. and the Words of the Habendum are, Habendum from the Feaſt of the Annunciation of the Bleſſed Virgin Mary then laſt paſt, for the Term of 21 Years then next enſuing the Date of the ſaid Indenture, this Leaſe commences in Computation from the Lady-Day before the Date, and in Intereſt the 5th Day, which is the Day next after the Date, and ſo all the Words of the Indenture ſhall take Effect the 5th Day, being the Day of the Delivery of the Deed. Hobart's Reports, Caſe 32, between *Moore and Muſgrave* adjudged in the Exchequer, and affirmed in Writ of Error. This was the Caſe by Record, though it be otherwiſe falſely printed in the Book.

All. 75. S. C adjudged. But Roll ſaid, that if in the principal Caſe the Leaſe had been made To Have and to Hold from the Day of the Date, from henceforth for ſeven Years, then the Plaintiff had declared right —— Sty. 118. S. C. adjornatur.

12. If an Indenture of Demiſe bears Date the 25th March, 15 Car. and it is delivered the Day of the Date, and the Habendum is to have and to hold from and after the Day of the Date of theſe Preſents, for and during the Term and Time of ſeven Years, from henceforth next and immediately following, fully to be compleat and ended; this Leaſe commences in Computation from the Delivery of the Deed, which was the Day of the Date, and in Intereſt the next Day after the Date. and ſo all the Words ſhall take Effect; for it appears that he ſhould not have the Poſſeſſion till the next Day after the Date, inaſmuch as the Words are, Habendum & Tenendum from and after the Day of the Date, but that the ſeven Years ſhould commence by Computation from the Delivery, ſcilicet, from henceforth, which refers to the Limitation of ſeven Years. Trin. 24 Car. B. R. adjudged in arreſt of Judgment between *Corniſh and Cawſey*. Intratur 23 Car. Rot. 1434. upon a Special Verdict, where he declared upon a Demiſe by Indenture dated 25 March, and upon a Demiſe till Habendum a Die Datus for ſeven Years, and adjudged againſt the Plaintiff, being for Rent reſerved.

13. A. makes a Leaſe to B. for 10 Years, to begin preſently, and afterwards A. grants a *ſecond Leaſe to C.* by Deed, of the ſame Land, *for 10 Years, to commence at Michaelmas next.* B. the *firſt Leſſee purchaſes the Fee*, ſo that the Term is drowned. C. the ſecond Leſſee may enter after Michaelmas, and enjoy the Term &c. by the Opinion of all the Court in C. B. except Brown J. D. 112. a. pl. 49. Hill. 1 & 2 P. & M.

14. A. made a Leaſe for Years *to begin at the Feaſt of our Lady Mary* for 21 Years, without ſhewing the Certainty of which Feaſts, the *Annunciation*, *Purification &c.* yet the Leaſe is good enough, and the Leſſee may determine the Certainty of the Beginning of the Term by his Entry at which of the ſaid Feaſts the Term ſhall begin; Per Anderſon Ch. J. but Periam J. doubted of it. Le 227. pl. 308. Paſch. 33 Eliz. C. B. Anon.

Ibid. Marg. ſays it was agreed per Cur. in C. B. Mich 32 & 33 Eliz. that it ſhould begin at ſuch of the Days as firſt ſhould happen.

15. *Leaſe to A. B. and C. for* 20 *Years*, and afterwards *to B. and C. for* 30 *Years*, to commence from and *immediately after the End of the* 20 *Years*, *or* immediately from and after the *Death of A.* if he happens to die within the 20 Years. A. died within three Years after the new Leaſe; Whether the new Leaſe ſhall begin immediately after the Death of A. or at the End of 20 Years *at the Election* of B. and C. the Juſtices doubted. D. 312. b. pl. 89. Trin. 14 Eliz. Anon.

16. Leaſe to *three for their Lives* afterwards Leſſor reciting this Leaſe grants to J. S. a Leaſe for 40 *Years*, *to commence after the Surrender*, *Forfeiture*, *or Death of the three*, *or either of them*; The Grantee has *Election*

Election to have his Leaſe commence after the Death of one of the three, and make the other two attorn to him, and then he ſhall have the Rent, or elſe to have it commence after the Death of all three, and then he ſhall have the 40 Years after; but if he chuſes the firſt Commencement, his Term may run out during the two other Lives. D. 376. b. Marg. pl. 27. cites M. 25 & 26 Eliz. C. B.

17. A Leaſe for Years *made by one Jointenant to commence after his Death* is good; Arg. 2 Roll Rep. 171. cites it as adjudged 37 Eliz. Herring v. Barton.

18. The *King* made a Leaſe under the Exchequer Seal, to begin immediately *after the Forfeiture, Surrender*, or Expiration of a former Term, and the *Leſſee is outlawed*; the ſecond Leaſe ſhall not commence, it is a Prerogative Forfeiture, and not ſuch as mentioned in the Leaſe; Arg. Show. 482. cites Ow. 116. [Mich. 29 & 30 Eliz. in Scaccario. Knowles] and Powell.

But if the Reverſion had been in the King where the Term is extinguiſhed by a Forfeiture, the ſecond Leaſe will commence; Per Holt Ch. J. Show. 486.

19. A. Tenant for *Life, Remainder to B. and C. in Fee* of a *Copyhold*; *B made a Leaſe to J. S.* A. B. and C. *ſurrenders* the ſaid Land, *one third Part to the Uſe of B. for Life of A. Remainder to the right Heirs of B.* and of another third Part to the Uſe of B. for Life, the Remainder to A. the Remainder to J. N. and of another third Part to the Uſe of C. and his Heirs; Afterwards *Partition* was made between them, and the Land where &c. was allotted to J. N. who afterwards ſurrendered to the Uſe of the Plaintiff; and this being found by Verdict it was held that Judgment ought not to be given for the Plaintiff; for the Leſſee of B. had the firſt Poſſeſſion, and that Leaſe is to begin after the Death of A. who was Tenant for Life, and when A. *Tenant for Life, and he in Reverſion join in a Surrender*, thereby the Eſtate for Life in that Part is Extinct in B. who has the Inheritance, and then his Leaſe took Effect for a third Part, ſo that the Parties here are Tenants in Common, between whom Treſpaſs doth not lie. Le. 174. pl. 243. Hill. 31 Eliz. B. R. Dove v. Williot.

20. Habendum *from the Sealing and Delivery*, or Habendum for 21 *Years next following* the Beginning of the Leaſe, is preſently, and ſuch Leaſe ſhall end the Time and Hour as it began. 4 Le. 144. pl. 255. Trin. 31 Eliz. B. R. Higham v. Cook.

21. If an Indenture be made *to a Monk and J. S.* for 21 Years, *Habendum to the Monk for 21 Years*, and *after* the End of that *to J. S. for 21 Years*, J. S. ſhall have it preſently; Arg. Le. 198. pl. 279. Mich. 31 & 32 Eliz. in the Exchequer-Chamber, in Ld. Paget's Caſe.

22. A. makes a Leaſe to B. of certain Lands for 21 Years, and afterwards makes another Leaſe to C. of other Land for 21 Years, and afterwards makes a Leaſe of both the ſaid Lands to D. for 30 Years, to begin after the End of the ſaid two Leaſes. The third Leaſe ſhall begin *reſpectively after the End of each* of the ſaid two Leaſes; and the *Leſſee ſhall not wait for the End of both*, that his Leaſe may begin; for the Grant ſhall be taken moſt ſtrongly againſt the Grantor. Jenk. 272. pl. 90. cites 5 Rep. 7. Juſtice Windham's Caſe.

5 Rep. 7. a. b. Mich. 31 & 32 Eliz. B. R. S. C. adjudged. —— Mo. 191. pl. 340. Paſch. 26 Eliz. S. C. & S. P. held by two Juſtices accordingly, but Anderſon e contra cites Juſtice Windham's Caſe; but they all agreed that by Surrender of both the firſt Terms together the new Leaſe ſhall commence. —— 10 Rep. 85. b. cites S. C. —— S. C. cited 2 Le. 106. in pl. 134 —— S. C. cited Litt. Rep. 164. —— S. C. cited Cro. E. 199. in pl. 21. —— Saund. 184. cites S. C.

23. *So* where A. *covenants to ſtand ſeiſed to* the Uſe of *B.* his Couſin, of certain Land *for Life*; *and of other Land to* the Uſe of *another Couſin in Tail*; *and* afterwards to ſtand ſeiſed *to* the Uſe of *a third Couſin in Fee*

Fee after the two former Eſtates are ended; The Eſtate of the third Couſin ſhall begin reſpectively after the ſaid two Eſtates are ended; Adjudged and affirmed in Error. Jenk. 272. pl. 90.

24. Leaſe to A. for Years, Remainder to B. for Years; The *Leaſe of A. comes to the King*, and afterwards the Reverſion. Clerk J. ſaid, that B's Leaſe ſhould begin preſently, and cited the Caſe 1 Eliz. **Wrotesly v. Adams**, where a Leaſe for Years is made to A. and afterwards a Leaſe in Reverſion is made to B. for Years; *Leſſee for Years obtains an Eſtate for Life* from Reverſioner in Fee; the *Leaſe for Years in Reverſion* ſhall begin preſently; But Manwood Ch. B. held that the firſt Leaſe was not extinct. 4 Le. 9. pl. 51. Mich. 33 Eliz. in Scacc. Anon.

25. *Leaſe for Life to a Perſon not in Being*, and Leaſe *to another to commence from the Determination of the firſt Term, commences preſently*; Per Treby Ch. J. 12 Mod. 288. Paſch. 11 W. 3. in Caſe of Scattergood v. Edge, cites Mo. 486. and 520. Holcroft's Caſe [Paſch. 38 Eliz.]

Ejectment of a Leaſe made 20th Auguſt, from Mich then laſt paſt Ante Datum Indenturæ, and he neither ſhewed the Deed nor the Date of it. After Verdict this was alleged in Arreſt of Judgment, that no Certainty appeared by the Declaration when the Leaſe ſhould commence, no Date of the Deed being expreſſed; but per tot. Cur. it is well enough; for when he declares of a Leaſe made the 20th Auguſt for 20 Years from Michaelmas laſt paſt, if he had ſtaid there, it had been clearly good; then the Addition Ante Datum Indenturæ ſhall be void, and the Beginning is certain enough. Cro. E. 606. pl. 5. Paſch. 40 Eliz. B. R. Darrel v. Middleton.

26. A Leaſe was *a Feſto* Sancti Mich. Archangeli, without ſaying, adtunc *Proximi ſequentis*; It was urged that no Time was limited when the Leaſe ſhould begin; but the Court over-ruled this, as being of no Force, and it being alleged to be, by Force whereof, he entered the next Day. 3 Bulſt. 164. Paſch. 14 Jac. Brett v. Cumberland.

6 Rep 34. b. the Biſhop of Bath's Caſe, S. C. accordingly. —— S. C. cited Litt. Rep. 364. 370 — 4 Mod. 278. cites S. C.

27. A. leaſes to B. *for 60 Years*, *Proviſo that if B. die* during the 60 Years that *A. might re-enter*; A. afterwards leaſes *to C. Habend' cum poſt Mortem ſive per Mortem Surſum-reddi:ionem ſeu forisfacturam B. vacari acciderit* for 60 Years; B. dies within the 60 Years. A. did not re-enter; Per two Juſtices, This Leaſe ſhall never commence now, but is void. By three Juſtices, it ſhall begin when the firſt Term is determined by *Effluxion of Time* Poſt Mortem of the Leſſees, which needs not be immediately Poſt Mortem, and there is a Difference where a Remainder is limited *Poſt Mortem*, that ought to be immediately without any Interim; But otherwiſe it is when a Leaſe is appointed to commence *cum Vacari contigerit Poſt Mortem* &c. For then it ſhall begin Quandocunque or Quocunque Modo Vacari contigerit Poſt Mortem, and ſo by ſuch Conſtruction no Eſtate ſhall be deſtroyed, but the Intent of the Parties is preſerved, and Judgment for Plaintiff by three Juſtices againſt two, that the Leaſe was good. Cro. J. 71. pl. 3. Paſch. 3 Jac. C. B. Fiſh v. Bellamy.

If in ſuch Caſe a private Surrender is made by the firſt Leſſee, whether the ſecond Leaſe ſhall commence preſently, or not till after Notice? Per Coke, it was adjudged not to begin till after Notice 27 Eliz. Gurney's Caſe. But per Tanfield, the ſame Caſe was ruled contrary; ſo Quære. Ow. 108. —— 3 Le. 95, 96. pl. 138. Trin. 26 Eliz. B. R. Gurney and Saers, S. C. Some conceived that Gurney, without Notice given him of the ſaid Surrender, ſhould not be prejudiced by the Condition aforeſaid; and of their Opinion was Wray clearly. —— 4 Mod. 75. S. C. cited as adjudged that it ſhould not be prejudicial to him in Reverſion.

28. Leaſe for Years, to commence *after the Surrender, Forfeiture, Determination, or End* of a former Leaſe, Leſſee has *no Election* to have the ſecond Leaſe either upon the Surrender, or Forfeiture, or End, which he ſhall elect, but which of them firſt ſhall happen; and then the ſecond Leaſe, which before conſiſted in Intereſſe Termini, ſhall commence in Poſſeſſion; For the Words (which of them ſhall firſt happen) are *implied* in Law. 6 Rep. 36. Trin. 3 Jac. C. B. The Biſhop of Bath's Caſe.

29. If

29. If a Leaſe be made by Indenture bearing Date 26 Maii &c. *to have and to hold for* 21 *Years from the Date, or* from the *Day of the Date* it ſhall begin on 27th Day of May. Co. Litt. 46. b.

A Leaſe to commence a Datu includes the Day of the excludes the

Date. Adjudged by three Judges, contra Treby Ch. J. but ſays Note that a Die Datus Day. 2 Salk. 413. pl. 1. Trin. 8 W. 3. C. B. Haths v. Aſh.

30. If the Leaſe bears Date 26th Day of May; to have and to hold *from the making* hereof, *or* from *henceforth*, it ſhall begin from the Day on which it is delivered; for the Words of the Indenture are not of any Effect till the Delivery, and thereby "from the making or from henceforth," take their firſt Effect; But if it be (*a Die Confectionis*) then it ſhall begin the next Day after Delivery; If the *Habendum* be *for the Term of* 21 *Years, (without mentioning when it ſhall begin)* it ſhall begin from the Delivery; for there the Words take Effect as is aforeſaid. Co. Litt. 46. b.

31. If an Indenture or Leaſe *bears a Date which is void or impoſſible*; as the 30th of February or 40th of March; if in this Caſe the Term be limited *to begin from the Date, it ſhall begin from the Delivery*, as if there had been no Date at all. Co. Litt. 46. b.

32. And *ſo* it is, if a Man by his Indenture of Leaſe either *recites a Leaſe which is not, or is void, or miſrecites a Leaſe in Point material, which is in Eſſe, to have and to hold from the ending of the former Leaſe*, this Leaſe ſhall begin in Courſe of Time from the Delivery thereof. Co. Litt. 46. b.

33. If a Leaſe be made to commence at a Feaſt, or *Time, at which it cannot*, it ſhall commence preſently. D. 93. b. pl. 28. Marg. cites Mich. 5 Jac.

A void Limitation, and no Limitation, are of the ſame

Effect; A Leaſe for Years to begin upon a void or impoſible Limitation begins immediately, ut Res valeat, and to avoid Repugnancy in the ſame Deed. A Limitation of an Uſe after the End of a Term for ſo many Years (where there is a Limitation of Years upon a void Eſtate) to begin after the Term for Years is ended, ſhall begin immediately. It is otherwiſe if it be to commence after thoſe Years, without mentioning the Term. Jenk. 248. pl. 27. cites 35 H. 8. Br. Caſes 257. —— As Habend' from the 40th Sept. Vent. 137. in Caſe of Tailour v. Fitzhgerald.

34. Leſſee for 100 Years leaſes for 40, and then leaſes to a ſecond, *habend' for* 21 *Years from the End* of the ſaid Term of 40 Years *to begin and be accompliſhed from theſe Preſents*; it is a good Leaſe in Reverſion for 21 Years, and the laſt Words void. D. 261. b. Marg. pl. 28 cites Paſch. 8. Jac. C. B. Cradock's Caſe.

Becauſe when by the firſt Words of the Limitation it is a good Leaſe to begin

after the Term for 40 Years, it ſhall not be made void by any ſubſequent Words. Godb. 166. pl. 233. Paſch. 8 Jac. C. B. Seaman's Caſe, ſeems to be S. C.

If the Limitation is not certain when the Leaſe ſhall begin, it ſhall be taken moſt beneficial for the Leſſee; Per Coke Ch. J. Godb. 166. in Seaman's Caſe cited D. 261. [b. pl. 29.]

35. A. ſeiſed of a *Manor* and having *Bona Felonum* within it makes a Leaſe of Parcel for Years, and after makes a *ſecond Leaſe* of the ſame Lands to commence *after the Determination, Surrender, or Forfeiture of the firſt*. The *firſt Leſſee was Felo de ſe*. The Lord enters for a Forfeiture. The ſecond Leſſee may enter upon him; Per Crook J. And per Harvey J. by the Leſſor's Entry the Leaſe for Years is merged in the Freehold; But if the Lord had *aliened the Manor before*, ſaving to him the Liberty, and after had entred for the Forfeiture, the ſecond Leſſee could not enter; for it is not any Determination of the firſt Leaſe. And per Crook J. if the Leſſor had *infeoffed the firſt Leſſee* of the Manor it would have determin'd the firſt Leaſe, and the ſecond Leſſee might have enter'd. Het. 55. Mich. 3 Car. C. B. Northen's Caſe.

36. A Grant mentioned a Leaſe for 99 *Years to commence ad Feſtum Mich. after a Term of* 50 *Years* be determined; It was objected that it ſhould be *a Feſto*; But per Cur. it is all one; For there ſhall be no Fraction of a Day, and it ſhall begin inſtantly from the Determination of the former Leaſe, and Judgment accordingly. Cro. C. 502. pl. 2. Trin. 14 Car. B. R. Loyd v. Gregory.

2 Sid 165. pl. 4 Hill. 1659. B. R. Clarke v. Candle S. C. adjornatur. ——3 New Abr. 430. cites Mich. 6 Geo. 2. in Canc. Iriſh v. Reeves, where B. had a Leaſe for 21 Years of Copyhold Land to commence after the Determination of the Eſtate which A. at that Time had therein, and the Widow of A. being intitled to her Free Bench, and happening to out live her Husband 21 Years, it was held by Ld. Chancellor that the Eſtate of the Wife was only an Excreſcence out of the Husband's Eſtate, which did not determine till after the Wife's Death, at which Time the Leaſe made to B. ſhould commence and continue for 21 Years.

37. A. Copyhold was granted to A. B. and C. for their Lives to be enjoy'd ſucceſſively as they are named; Then the Lord granted a leaſe for 40 Years to commence *after the Death*, Surrender, Forfeiture, or other *Determination of the Eſtate of A. B. and* C.—A. and B. die.—C. marries and dies. The Wife holds for her Life by the Cuſtom as her *Frankbank*, and dies. Whether the 40 Years ſhall Commence from the Death of C. or his Widow. Twiſden and Windham held that the Leaſe ſhould not commence till after the Death of the Wife. Sed adjornatur. Lev. 20. Hill. 12 & 13 Car. B. R. Chantrell v. Randall.

38. If *Miſrecital* be *in a material Point in a Leaſe* which is *in Eſſe*, this Leaſe ſhall begin from the Delivery; cites Ld. Coke. If the Recital be immaterial it ſhall not hinder, As where it is only a flouriſh in Things circumſtantial; Per Archer J. Cart. 149. Mich. 18 Car. 2. C. B. in Caſe of Foot v. Berkley.

39. When a Leaſe is made to commence from an *Impoſſible Date*, or which is the ſame thing *from the End of a Leaſe miſrecited* which is no more than referring to Nothing, it ſhall begin preſently; Per Cur. Vent. 83. Trin. 22 Car. 2. B. R. in Caſe of Foot v. Berkley.

Vent. 84. reports in the ſame Caſe, that Walter Ch. B. reported ſuch Caſe to be adjudged, and that it was reſolved it ſhould begin preſently, and not from Chriſtmas, for that was the Feaſt of the Nativity, and to take it from the Nativity the Time would have been effluxed many Times over.

40. It was affirmed in the Caſe of **Foot v. Berkley**, that Walter Ch. B. reported that it was adjudged 20 Eliz. that a Leaſe to commence from the *Nativity of our Lord God laſt paſt*, omitting *(Feaſt)* ſhould commence immediately; But Twiſden ſaid, that a Leaſe to commence *from the Nativity of our Lord God*, or from the *Nativity of our Lord God next enſuing*, omitting (Feaſt) is void; But the Reporter ſays Quære if it ſhould not commence immediately. Sid. 461. pl. 2. Trin. 22 Car. 2. B. R.

And ſays it is there put for a Rule, that the Continuance is not always certain by the enumeration of Years only, but by Reference to a Thing of expreſs Certainty at the Time of the Leaſe made. Ibid

41. It is a Rule in Law, that every Leaſe for Years ought to have a *certain Beginning*, *Continuance and End*; Per Archer J. Cart. 148. Mich. 18 Car. 2. in Caſe of Foot v. Berkley, cites 6 Rep. 34. b. Biſhop of Bath's Caſe.

It ought to have a certain Beginning, and a certain End, either expreſſed or referred to ſome thing which may make it ſo; But when it is to begin from the End of a miſrecited Leaſe it ſhall begin preſently, for it is no more than to refer it to nothing; Per Cur. Vent. 83. Trin. 22 Car. 2. B. R. Foot v. Berkley.

2 Keb 796. pl. 32. S. C. held accordingly and it being after Verdict, albeit there

42. In Ejectment the Plaintiff declared of a *Demiſe* to him *per quoddam Scriptum Obligatorium* &c. *Habend' a Die Datus Indenturæ prædictæ*. It was objected, that here was no Time when the Leaſe ſhould commence; For it was Habend' after the Date of the ſaid Indenture, whereas there was no Indenture before, but only Scriptum Obliga-

Obligatorium; but reſolved, that that *Scriptum ſhall be intended an Indenture*; And though called Scriptum Obligatorium, which is improper, yet it may be ſaid that every Deed obligeth; *Or if it ſhall not be intended Indented, then* the Leaſe *ſhall begin preſently*, as if it had been Habend' from [an impoſſible Date as] 40th of Sept. Vent. 137. Trin. 23 Car. 2. B. R. Tailor v. Fitzgerald. were no Indenture, it well enough, and Judgment affirmed.

43. Where the Commencement is *uncertain*, As a Leaſe made the 10th of Oct. *Habend' from Nov.* 20 *for five Years*, but nothing to aſcertain what Nov. he meant, whether laſt paſt, or next enſuing, per two J. this Uncertainty vitiates the Leaſe, and is not like an *impoſſible* Limitation. Per two J. it ſhall commence from the Time of the Delivery. But Judgment was after given againſt the Leaſe when one of the two latter Juſtices was abſent. Mod. 180. pl. 13. Paſch. 26 Car. 2. C. B. Anon.

44. Habendum *a Datu* is incluſive, but *a Die Datus* is excluſive of the Day; Per three J. contra one. 1 Salk. 413. pl. 1. Trin. 8 W. 3. C. B. Haths v. Aſh. A Demiſe to hold for 20 Years from the Day of the Date ſcript' Indenturæ prædict' (when there is no Indenture) yet the Demiſe is good, and begins preſently. 2 Keb. 796. Trin. 23 Car. 2. B. R. in Caſe of Taylor v. Fitzgerald.

45. A Leaſe was made to commence from a Day to come, viz. *from the Feaſt of St. John Baptiſt* &c. the Day itſelf is always excluded; Admitted. 8 Mod. 54. Trin. 7 Geo. in Caſe of Macdonel v. Weldon.

(A. b) For how many Years the Leaſe ſhall be ſaid to be made.

1. **If a Parſon leaſes Tythes to another** for three Years, and at the End of thoſe three Years for other three Years, and ſo from three Years to three Years **during the Life of the Leſſor, this ſhall be a Leaſe for 12 Years. Hill. 13 Ja. B. R. reſolved between** *Newbury and Rathbone.* Roll Rep. 287. pl. 6. S. C. and Coke Ch. J. thought it a Leaſe for 12 Years.

——3 Bulſt. 158. Wrathbone v. Newbery. S C. & S. P. held clearly per tot Cur. —— A Leaſe was made for three Years, and ſo from three Years to three Years if B. live, the Court conceiv'd this a Leaſe for ſix Years only, and not a Leaſe for nine Years. 3 Keb. 760. pl. 46. Paſch. 29 Car. 2. B. R. Tyrringham v. Green. ——Ibid. 768. pl. 6, Trin. 29 Car. 2. B. R. the S. C. adjudg'd.

2. **If a Man leaſes** from three Years to three Years, till nine Years, **it is a good Leaſe for nine Years. Paſch. 1 Ja. B. adjudged** *Wilcolk's Caſe.* 6 Mod. 215. Trin. 3 Ann. B. R. per Holt Ch. J. Obiter S. P.

3. **If a Man leaſe Land** for a Year, and ſo from Year to Year, Quam Die ambabus Partibus placuerit, **it is a Leaſe for two Years at leaſt. 6 Rep. 35. b.** *Biſhop of Bath's Caſe* **implies it; Brook Tenant per Copy a volunt &c. 17. in Abridgment 14 H. 8. 10. Contra. M. 3. Ja. B.** Fol. 851. It is a Leaſe for three Years Per Winch. J.

Winch. 32. Anon.—Lutw. 214, 215. Trin. 7 W. 3. Bellaſyſe v. Burbridge. S. P. and agreed per Curiam that it is a good Leaſe for two Years at leaſt according to 6 Rep. 35. b Biſhop of Bath's Caſe. 3 Cro. 775. Agard v. King. Sid. 427. Goſtwick's Caſe. 1 Mod. Rep. 3.—Leaſe for a Year, and ſo from Year to Year Quamdiu &c. is a Leaſe for two Years, and afterwards at Will. 1 Salk. 413. pl. 2. cites it as adjudged

adjudged 5 W. 3. C. B. in Caſe of Bellaſis v. Burbrich, and S. P. adjudged. Mich. 9 W. 3. C. B. Stonefull v. Hicks.—S. P. Per Pollard, but Moore, Brook, Lee and Greenvill e contra. Br. Leaſe, pl. 22. cites 21 H. 7. 38.——It is not a Leaſe for two Years or at Will, but a Leaſe for every particular Year; and yet you may diſtrain for 10 Years Rent at the End of 10 Years, becauſe one Leaſe ſprings ſo out of another, and out of the ſame Contract, as that when one Year is ended, there is an End of that Leaſe; and when the Leſſee enters on another Year it is another Leaſe for a Year, & ſic Toties Quoties. Per Holt Ch. J. 11 Mod. 203. pl. 4. Hill. 7 Ann. B. R. Legg v. Strudwick. ——It is a Leaſe for every particular Year, and after the Year is begun Defendant cannot determine the Leaſe before the Year is ended. 2 Salk. 413. pl. 4. Anon. Per Holt Ch. J.——Reſolv'd according to the Opinion of Holt, that after the two Years it is not a Leaſe at Will. 2 Salk. 414. Legg v. Strudwick.

It was debated, If it was a ſeveral Leaſe for every Year, and ruled that an Action might be brought, ſuppoſing he held for 21 Years, if in Truth by Force of the ſaid Demiſe the Leſſee occupied the Land ſo long. Arg. Godb. 129. cites 14 H. 10.

A. demiſes Lands to B. for a Year, and ſo from Year to Year, this is not a Leaſe for two Years and afterwards at Will; but it is a Leaſe for every particular Year, and after the Year is begun Leſſee cannot determine the Leaſe before the Year is ended. Per Holt Ch. J. at Lincoln Summer Aſſiſes, 1699. 2 Salk. 413. —— Kelw. 65. b. Trin. 20 H. 7.——But he may determine it immediately when the firſt Year is ended, or before. Kelw. 163. pl. 5. Mich. 3 H. 8.——De Anno in Annum for 1000 Years, adjudg'd a good Leaſe but for two Years. Arg. Mo. 372. in pl. 506. Mich. 36 & 37 Eliz.

4. **But in this Caſe** after three Years **at moſt it is but an Eſtate at Will. 6 Rep. 35. b.** *Biſhop of Bath's Caſe.*

5. **If a Parſon leaſes** for a Year, and ſo from Year to Year ſo long as he ſhall continue Parſon, **this is a good Leaſe for two Years at leaſt if he ſhall continue Parſon. Co. Litt. 45. b.**

6. But after two Years **in the laſt Caſe it is but an** Eſtate at Will. **Co. Litt. 45. b.**

Pl. C. 273. b. 274. a. S. P. cited by Dyer to have been held accordingly in his Remembrance, and the Reaſon was, for that there was no Certainty of Years beyond the two Years.

7. **If a Man demiſes Land** for ſuch a Term as both Parties pleaſe, **it is an Eſtate at Will. 6 Rep. 35. b.** *Biſhop of Bath's Caſe*, **becauſe the Term is utterly uncertain.**

Per Brook a Leaſe for Term of Years without ſaying for how many, is only an Eſtate at Will.

8. If one leaſes his Land *for Term of Years*, the Leſſee ſhall have the Land, by thoſe Words, for two Years and no more. For every Leaſe muſt expreſs a Term certain, and when it ſhall commence, and when it ſhall determine, and (in this Caſe) where the Years are not expreſs'd certain, it cannot be for either more or leſs than two Years. Br. Leaſe, pl. 13. cites 14 H. 8. 10. per Fitzherbert. Quære, Becauſe the Contrary was held by Fitzherbert. Br. Leaſe, pl. 22. cites 21 H. 7. 38.

9. Leaſe *from three Years to three Years*, and ſo on *to three Years during* all the Time of *the natural Life* of Leſſor, it is only Eſtate for nine Years, if Leſſor ſo long live; and it ſeems there ought to be Livery to make it an Eſtate for Life. D. 24. a. pl. 151. Mich. 28 H. 8. Anon.

10. A *Leaſe for* 30 *Years* was made *by Husband and Wife, if they ſo long ſhould live, and if they die &c. that the Land ſhould remain to A. their Son, during the Term aforeſaid.* And it was holden by Wray J. that if the Husband and Wife do die within the Term, that the Son ſhould have the Land De novo for 30 Years; But Gawdy was of Opinion, That he ſhall have it for ſo many Years, which after their Death ſhould be * expired. 2 Le. 200. pl. 252. Mich. 25 Eliz. B. R. Anon.

* It ſeems this Word ſhould be (unexpired.)

11. *A Leaſe was for* 40 *Years* by *C. C.* to J. S. In the Covenant for quiet Enjoyment, it was mentioned for 80 *Years aforeſaid.* The Word (aforeſaid) is *Surpluſage*, and the Leaſe ſhall not extend to more than 40 Years; Per Manwood and Shute. Sav. 71. pl. 147. Mich. 26 Eliz. Anon.

12. Deviſor makes a Leaſe *till* Deviſee ſhall *attain his full Age* of 21: Deviſor dies; Deviſee is *nine Years old*; Leſſee has not an abſolute Leaſe for 12 Years, for if Deviſee dies the Leaſe determines. 3 Rep. 19. b. Hill. 29 Eliz. B. R. Boraſton's Caſe.

13. If a Leaſe be made for *two Years, and after Leſſor lets to another for four Years* by Parol, this is but a Leaſe for two Years, though the firſt Leſſee ſurrenders. For he had no Power to contract for the two firſt Years at the Beginning; But otherwiſe it is when the Eſtate is determinable upon an uncertainty. Cro. E. 160. pl. 49. Mich. 31 & 32 Eliz. B. R. Per Gawdy in the Caſe of Dove v. Williott.

14. Leaſe for 60 Years, Proviſo *if Leſſee dies within* 30 *of the* 60, *that the Leaſe ſhall ceaſe after the next Year enſuing the* 30. If Leſſee dies within the 30, it is a Leaſe for 30 Years, and one Year after. 2 And. 72. cites 34 Eliz. Leonard v. Penant.

15. Leaſe *from Year to Year ſo long as both Parties pleaſe*; the Teſtator (the Leſſee) *occupied for two Years* and paid the Rent, *and Part of the third Year* occupied it *and died.* And for Rent of the third Year Action was brought; Per Gawdy and Fenner J. though at firſt it was a Leaſe certain but for two Years, yet when he occupied it Part of the third Year it is a Leaſe certain for that Year alſo; ſo as neither the one or the other can determine the Will that Year which he had enter'd upon. But Popham held it a Leaſe at Will after the two Years, and that then it ended by Death of the Leſſee; Et adjornatur. Cro. E. 775. pl. 6. Mich. 42 & 43 Eliz. B. R. Agard v. King.

Br. Leaſes, pl. 53. cites 14 H. 8. 16. S. P.—— Such Tenant cannot after the Commencement of the Year determine his Will to the Prejudice of the Leſſor for his Rent. 2 Jo. 5. Trin. 21 Car. 2. C. B. in Caſe of Timberley v. How.——S. P. by Holt Ch. J. 6 Mod. 215. Trin. 3 Ann. B. R.——If the Leſſor would not have the Leſſee occupy the ſecond Year, he ought immediately when the firſt Year is ended, or within the firſt Year to give the Leſſee Notice; For it would be unreaſonable that when the Leſſee has occupied in the ſecond Year, and has manur'd the Land, and then, when he has been at Coſts, to ouſt him of the Land &c. Kelw. 163. a. b. pl. 5. Mich. 3 H. 8.

16. If a Man *demiſes his Land for Years*, this is a good Leaſe for two Years; For it ſhall be taken good for ſuch Number with which at leaſt the Plural Number will be ſatisfied, and this is with two Years; Per Cur. 6 Rep. 35. b. 36. a. Trin. 3 Jac. C. B. in the Biſhop of Bath's Caſe.

Ibid. 35. a. cites 14 H. 8. 10. b and 21 H. 7. 38. b.

17 A Leaſe for *three Years*, and after for *three Years, and ſo from three Years to three Years, until* 10 *Years* are expired, it is a Leaſe but for nine Years, and the *odd Year* ſhall not be accounted, becauſe that does not happen to be determined by three Years, and ſo if it had been for 20 Years &c. Noy 143. Anon.

18. A Leaſe was made *to A. for Life, and the Life of his Wife, Or of his Son.* A. and the *Son died*; Cited by Coke Ch. J. adjudg'd in C. B. and B. R. in **Cox's Caſe**, that the Term ſhould not be determin'd, but that the *Wife ſhould have and enjoy the ſame*, and upon this Reaſon only, viz. That the *(Or)* there diſjoin'd all, and made it ſeveral. 2 Bulſt. 293. Mich. 12 Jac.

19. A Parſon made a Leaſe of his Rectory to J. S. *for three Years, and ſo from three Years to three Years, and ſo from three Years to three Years during his Life.* The whole Court was clear of Opinion that this was

Roll Rep. 287. pl 6. Newberry v. Rathbone. S. C. and

Coke Ch. J. thought it ſhould be a Leaſe for 12 Years.

was a good Leaſe for 12 Years. Doderidge J. ſaid, that if he had ſaid, and ſo from the ſaid three Years for three Years, it had been a Leaſe but for nine Years; but the ſame being as is before expreſſed, it ſhall be a good Leaſe for 12 Years. 3 Bulſt. 158. Mich. 13 Jac. Wrathbone v. Newbery.

2 Show. 31. S. C. reports it a Leaſe for 21 Years to the ſame Perſon, and after in the ſame Leaſe a Covenant that Leſſee ſhall have the Lands

20. Leaſe (recites a Leaſe which is not) for 21 Years, To have from the End of the ſaid Term &c. and afterwards is a Covenant, that after the ſaid 21 Years he ſhall have the Land for 21 Years, and ſo from 21 Years to 21 Years, till 99 Years are paſſed; Thence next enſuing ſhall be compleat and ended. The Leſſee ſhall have 21 Years beſide the 99, and the Term ſhall be good for the 99 though no Numbers of 21 will center in 99; But the odd Years at laſt ſhall be rejected. 2 Lev. 242. Hill. 31 & 32 Car. 2. B. R. Mancheſter College v. Trafford.

for 21 Years more after the Expiration of the ſaid Term, and ſo from 21 to 21 till 99 Years be compleat and ended, and adjudg'd to be good, and two Leaſes, and not one, viz. for 21 Years, and alſo for 99 Years beſides.

21. Leſſee for 20 Years grants the Tenements for 19, *to commence after his Death.* This will be good for ſo much of the 20 Years as ſhall be unexpir'd at the Time of his Death. 2 Salk. 413. pl. 3. cites it as ruled by Holt Ch. J. at Lent Aſſiſes at Dorcheſter 10 W. 3. Gree v. Studdley.

22. A. *Leſſee for* 1000 *Years grants the Land to B.* generally, *mentioning no Term,* it is void for the Uncertainty. 2 Vern. 684. pl. 609. Trin. 1712. Kireley & al' v. Duck & Ux'.

23. Lands demiſed to J. S. *for a Year, and ſo from Year to Year as long* as both Parties pleaſed, by a Parol Demiſe reſerving Rent, and that the Leſſee ſhould not go away without giving a *Quarter's Warning*; Per Holt Ch. J. The Agreement about the Quarter's Warning is only collaterally binding the Leſſee's Perſon; in this Caſe, if at the Year's End Leſſee had given up Poſſeſſion without any Warning, he would be liable to pay one Quarter's Rent by Virtue of the Agreement. But if he had given a Quarter's Warning he might quit. But if he had once entred on the ſecond Year he would be bound for all that Year, and ſo a Quarter's Warning, and ſo on; The ſame if the Leaſe had been by Deed. 6 Mod. 215. Trin. 3 Ann. B. R. Dod v. Monger.

It was held per Fitzherbert and Brook, that this is only a Leaſe at Will for the Uncertainty, but Poilard J. and Brudenell Ch. J. e contra.

24. If a Leaſe be *for a Year, and ſo from Year to Year as long* as both Parties pleaſe, it is a Leaſe, binding but for one Year. But if Leſſee, without Countermand of Leſſor enter on the ſecond Year, he is bound for that Year, and ſo on. But if Leaſe be for a Year, and ſo from Year to Year *till ſix Years expire,* it is a certain Leaſe for ſix Years; If it be for a Year, and ſo from Year to Year *as long as both Parties agree till ſix Years ſhall expire,* it is a Leaſe for ſix Years, determinable at every Year's End, at the Will of either Party; Per Holt Ch. J. 6 Mod. 215. Trin. 3 Ann. in Caſe of Dod v. Monger.

For per Brudenall, Retainer of a Servant for a Year, and ſo from Year to Year as long as both Parties pleaſe, is a Retainer for ſo many Years as he ſerves, and Debt lies for the Salary by the Statute, and that the Principal Leaſe is good till it be diſcharged; For when one Year is ended and another is entered upon, the Leſſor cannot diſcharge the Leſſee, nor the Leſſee cannot quit till another Year, and if he intends to quit at the Year's End he muſt give Notice of it before the End of the Year, and the Uncertainty in the Principal Caſe is no Impediment. For if one leaſes till the Defendant has levied 20 l. it is good notwithſtanding the Uncertainty &c. Br. Leaſe, pl. 13. cites 14 H. 8. 10.

(B. b) Leaſes.

To whom it may be made in reſpect of Eſtate.

1. ONE Jointenant may leaſe for Years to the other, becauſe though before he occupied per mie and per tout, yet now he ſhall have all without Interruption, and the Leſſor cannot hinder him. 11 H. 6. 34. Co. Litt. 186. a. S. P. —— Ow. 102. S. P. For there is no need of any Livery.

(B. b. 2) Leaſe for Years.

To attend the Inheritance.

1. A Leaſe made to attend the Inheritance was *decreed to the Uſe* of him that had the Inheritance. Chan. R. 36. 5 & 7 Car. 1. Huddleſtone v. Lamplugh. Though in a Deed of Aſſignment no Truſt was expreſſed, yet Aſſignee of Aſſignee having declared it to be a Truſt repoſed in her, and that it was her Father's Eſtate, and having given Bond to perform the Truſt, and after Marriage her Husband doing the ſame, and the Defeaſance in which was a Power of Revocation being ſuppreſſed, it was decreed a Truſt. Fin. R. 356. Paſch. 30 Car. 2. Goodwin v. Cutler.

2. A Leaſe in Truſt ſeperate from the Inheritance, and *mortgaged and aſſigned to a Purchaſor was* not allowed to be impeached. Chan. Rep. 246. 16 Car. 2. fo. 799. Digby v. Morgan.

3. A. purchaſed Land and takes *the Fee in his own Name, and the Term in a Truſtee's.* The Term ſhall attend the Inheritance though not ſaid in the Aſſignment it ſhould do ſo. Vern. 1. Hill. 1680. Tiffin v. Tiffin. 2 Chan. Caſes 49. 55. S. C.—— Otherwiſe if the Term had been in his own Name. Vern. 341 in Caſe of Thruxton v. The Attorney General. Mich. 1685.—In the laſt Caſe Term does not ſo attend as to prevent Dower, or to ſtave off a Debt; For ſuch Term ſhall be Aſſets if it attends a Fee-Simple, but otherwiſe of a Fee-Tail; Per Hale Ch. B. Hardr. 489. pl. 3. Mich 20 Car. 2. in Scacc. Attorney General v. Sands.

4. An attending Term was *decreed to be ſevered* in Favour of an *Heir* unintendedly *diſinherited*, and for want only of a Deſcription he being an Infant en ventre ſa mere, and ſo in Favour of the Heir's Aſſignee. Fin. R. 160. Mich. 26 Car. 2. Nurſe v. Yarworth. 2 Mod. 8. S. C. in Canc. decreed.—— And ſo in Caſe of Creditor. Fin. Rep. 358. Paſch. 30 Car. 2. Foot v. Clerk and Venner.

5. A Term to attend the Inheritance will follow the Inheritance, and attend it in the Hands of a *Purchaſor of the Inheritance* and be attracted by it. Fin. 350. Paſch. 30 Car 2. The Earl of Pembroke v. the Earl of Middleſex & al'. But if Leſſor or Purchaſor levies or accepts a Fine of the Lands, the Truſtees of the Term are thereby barr'd, and cannot after claim any thing, but yet the Term is not ſo barr'd but that Puiſne Incumbrances may be let in upon the Purchaſor; For a Fine bars no Eſtates not intended by the Parties to be barr'd; Per Holt Ch. J. Carth. 103. Mich. 1 W. & M. B. R. in Caſe of Smith v. Pierce.

6. The

6. The *Aſſignment* of a Term for Years, *and the Grant of the Inheritance* of the ſame ought to be *as large the one as the other*. Fin. R. 347. Paſch. 30 Car. 2. The Earl of Pembroke & al'. v. the Earl of Middleſex, Hawles, & al'.

2 Chan. Rep. 243. S. C.— 2 Chan. Caſes 160. Rich v Rich, S. P.

7. A *Freeman of London* poſſeſſed of a Term in his own Name purchaſes the Inheritance in the name of a Truſtee, and there is *no Declaration of the Truſt* that the Term ſhall attend the Inheritance, yet this Term ſhall attend the Inheritance, and not be *ſubject to the Cuſtom*. Vern. 104. pl. 92. Mich. 1682. Douſe v. Derivall.

8. A. ſeiſed in *Tail, and a Term in Truſtees to attend* the Inheritance, levies a *Fine*, and by Deed *ſubjects the Land to a Debt* of 1000l. but declares that after the Debt paid the Land to be to the old Uſes, and *deviſed the Land for Payment of all his Debts*; Decreed the Land liable to all the Debts in general; ſed tamen Quere; For it ſeems he was but Tenant in Tail of the Inheritance, and ſo could not charge it by his Will unleſs it be intended he had ſtill a Power of doing it lodged in him by reaſon of the Fine, notwithſtanding he had declared that after Payment of the 1000l. it ſhould go to the former Uſes. Vern. 99. pl. 86. Mich. 1682. Turner v. Gwynn.

9. If a Term be *expreſsly declared by Deed* to be attendant on the Inheritance, there ſuch a Term ſhall not be made *Aſſets* in Equity; But otherwiſe it ſhall be if either in the Party himſelf, or in a Truſtee, but with this Difference, that the Heir ſhall have the Benefit of the Surplus of the Truſt of a Term, and not the Executor after Debts paid; Per North Keeper. Vern. 188. pl. 188. Mich. 1683. Chapman v. Bond.

10. If there be a Term raiſed of *Gravelkind Lands* to attend the Inheritance, Equity will diſtribute this Term among all the Heirs in Gavelkind pro Rata; Arg. Vern. 357. in pl. 353. Hill. 1685.

11. Where lands *eſcheat* to the King he ſhall have the Benefit of a Term to attend the Inheritance. Vern. 340. pl. 333. Mich. 1685. Thruxton v. Attorney General.

12. A ſeiſed in Fee of Lands limits a Term to Truſtees for 100 Years upon *ſuch Truſt as he by Deed or Will ſhould appoint*, and for want of ſuch Appointment to attend the Inheritance, and afterwards by a Nuncupative Will gives All to J. S. and being a Baſtard dies without Iſſue, this will not paſs the Truſt of the Term. Vern. 340. pl. 333. Mich. 1685. Thruxton v. The Attorney-General.

2 Chan. Caſes 172. S. C.— Show. Parl. Caſes 69 Lady Radnor v. Vandebendy, S. C.

13. A Term was kept on Foot to protect a Purchaſe, Equity will not remove it in Favour of a *Dowreſs* who has recovered at Law, and the Bill diſmiſſed in Chancery, and after in Dom.' Proc.' Vern. 356. pl. 353. Hill. 1685. Lady Bodmin v. Vandebendy.

in Dom' Proc' and the Diſmiſſion affirmed. ——A Dowreſs ſhall not have the Aſſiſtance of a Court of Equity to ſet aſide a Term for Years againſt a Purchaſor, though a Jointreſs ſhall, but againſt an Heir at Law a Dowreſs has been let in. Chan. Prec. 65. Mich. 1696. Lady Radnor v. Rotheram.

14. A Leaſe *created by the ſame Settlement* by which the Inheritance was ſettled, only on a particular Purpoſe, and then to wait on the Inheritance, ſhall never be applyed to any other Purpoſe in Equity, but is as a *Non-Ens*; Arg. 2 Chan. Caſes 172. Hill. 1 Jac. 2. in the Caſe of Bodmin v. Vandebenden.

1 Salk. 154. Beſt v. Stamford, S. P. —2 Vern. 520. S. C. —— Ch. Prec. 253. S. C.

15. A Term *raiſed on Truſt* for any particular Purpoſes, and without any Mention of attending the Inheritance after ſuch *Truſts ſatisfyed*, ſhall ſink into the Inheritance; Arg. N. Ch. R. 168. Mich. 1690. in Caſe of Bladen v. The Earl of Pembroke.

16. When

16. When the *King's Receiver* is ſeiſed of the Inheritance, and there is a Term for Years attending the Inheritance, the Term is *bound* as well as the Inheritance; But if he is poſſeſſed of a *Term in Groſs*, and it is aſſigned before an actual Extent, the *Aſſignment* is good againſt the Crown. 2 Vern. 389. pl. 358. Mich. 1700. Nichols v. How and Porter & al'.

17. Lands ſettled *to the Uſe of the Wife of A. during her Life*, Remainder *to B. in Tail* &c. *with a Power for A. and his Wife to revoke the Uſes and limit others. A. having Occaſion for Money* to purchaſe a Place, *prevailed with his Wife to join* with him *in raiſing of it* by Virtue of the Power, *upon a Promiſe it ſhould be repaid out of the Profits of the Place*, and *takes the Aſſignment of the Mortgage-Term to himſelf, and left the Money charged to his younger Children.* Decreed for the younger Children, but reverſed for the Debt, being the Debt of A. and he having covenanted to repay it the Term ſhall attend the Inheritance. MSS. Tab. Jan. 8th, 1702. Earl Huntington v. Counteſs.

18. *Mortgagee* of a Term for 500 Years in his own Name took *another for* 2000 *Years in a Truſtee's Name* to avoid a Merger, and then *purchaſed the Inheritance in his own Name.* Afterwards he deviſed the ſaid Lands by Will to W. for Life, Remainder in Tail, and made J. S. Executor and died. The Will had not three Witneſſes, ſo could not not paſs a Freehold; So the Queſtion was, If the *Executor* ſhould take the Term for 500 Years as a ſeperate Intereſt from the Inheritance? But decreed Per Baron Gilbert Commiſſioner, that it is a Term to attend the Inheritance. Per Raymond Ch. J. Commiſſioner, where ſuch a Term comes to an Executor *by Implication* as a Chattle Intereſt, viz. by a Deviſe of all his Chattles, or where it *veſts in an Adminiſtrator generally* without making any Will, there the Term ought to be aſſigned to attend the Inheritance, but he doubted in this Caſe of a *Volenteer Heir and a Volunteer Deviſee*; He made a *Difference* where a Term is *expreſsly limited to attend*, and where the Attendance is *only by Conſtruction of Law*, that in the firſt Caſe it will not paſs by an *expreſs Deviſe of it* to another, but in the other Caſe it will; But in the principal Caſe there was no Intention of the Teſtator appeared to paſs this as a ſeparate Intereſt from the Inheritance, and on this Foot they both decreed as above. 9 Mod. 124. Hill. 11 Geo. in Canc. Whitchurch v. Whitchurch.

And though in this Caſe the Executor had conſented voluntarily to the Deviſe of the Term, yet the Maſter of the Rolls held that it would not alter the Caſe; For if ſo, the Executor might make it a good or void Deviſe as he pleaſe; and obſerved, that Teſtator's Intention was not to paſs the Term only but the Inheritance alſo, which was expreſsly deviſed, and though it was ſaid to be extremely hard, that becauſe ſo much could not paſs as was intended, therefore the Deviſee ſhould be deprived of what might lawfully paſs, and which was leſs than was intended him, or becauſe all could not paſs, therefore nothing ſhould. However, his Honour decreed the Executor and Deviſee to join in aſſigning the Term to the Plaintiff the Heir at Law, but no Coſts on either Side, and this Decree was afterwards affirmed as here. 2 Wms's Rep. 236. Trin. 1724. Whitchurch v. Whitchurch.

(B. b. 3) Leaſes.

By Eſtoppel.

1. A. Makes a *Gift in Tail* to B. and after *Donor makes a Leaſe to C. for* 21 *Years*, and then *B. dies without Iſſue within the Term*, yet the Leaſe, if by Parol only, ſhall not take Effect, for it was utterly void at the firſt; becauſe an Eſtate Tail being a State of Inheritance

may in Intendment of Law continue for ever; But if ſuch Leaſe be by Indenture it makes an Eſtoppel. See Went. Off. Executor 231.

Mo. 20. pl. 69 Hill. 2 Eliz S. P. held accordingly. — Dal. 26. pl. 41. S C. in totidem Verbis.

2. *Tenant for Life leaſes for Years, and purchaſes the Reverſion* and *dies within the Term*, the Leaſe is determined, and the Heir in Reverſion may ouſt the Leſſee, and conſeſs and avoid; *But* if a *Leaſe for Years* be made *by one that has Nothing in the Land at the Time*, and afterwards purchaſes the Land, and then the Leſſor dies; If it be by Indenture the Heir ſhall be eſtopped to avoid it; Per three Juſtices. Hetl. 91. Paſch. 4 Car. C. B. Rothwell's Caſe.

If Leſſee for 10 Years leaſes for 20 Years and afterwards purchaſes the Reverſion it ſhall bind him for no more than ten Arg Vent. 358.

3. A. leaſes for Years by Indenture, and *has Nothing* in the Land, but *afterwards purchaſes the Land and aliens it*; Though this be a good Leaſe for Years againſt A. and his Alienee, yet the Jury may find the Truth, and if they do the Court ſhall adjudge it to be a void Leaſe. Cro. C. 110. pl. 2. Paſch. 4 Car. C. B. in Caſe of Iliam v. Morris.

4. If I have a *future Leaſe* to commence 10 Years hence after J. S. and I make a *Leaſe for five Years*, preſently againſt me it is good by Eſtoppel; Per Bridgman Ch. J. Cart. 159. Mich. 18 Car. 2. C. B.

The Difference is where the Party that makes the Eſtate has a *Legal Eſtate*, and where *a Defeaſible Eſtate only*; For in the latter a Leaſe may work by Eſtoppel, though an Intereſt paſſed, ſo long as the Eſtate (out of which the Leaſe was derived) remained undefeated; Per Pemberton Ch. J. Vent. 358. Anon but ſeems to be S. C.

5. A Leaſe made by one that *has a tortious Reverſion* is good, *if before the Commencement* of the Leaſe the Tort be *purged*, and the Leſſor has a rightfull Eſtate. See Skinn. 3 pl. 3. Mich. 33 Car. 2. B. R. in Caſe of Pauling v. Hardy.

* Arg Pl. C. 433. b. 434. in Caſe of Smith v. Stapleton. — Per Coke Ch J. Noy 153.

6. Leaſe to A. for 20 Years, and about a Year after to B. for 20 Years; If there was an * *Attornment to the ſecond Leaſe*, then it amounts to a *Grant of the Reverſion* of the Leſſor; But if no Attornment, then it is a *Leaſe by Eſtoppel*. 3 Salk. 152. pl. 3. Holman als' Gilman v. Hore.

† The Leaſes to B. and C. were both by Indenture,

7. *So* † where a Man makes a Leaſe to B. for 20 Years, and about a Year after makes another Leaſe to C. for 20 Years, this is a Leaſe by *Eſtoppel*, and the Rent is payable for the whole Term. Ibid.

and in Debt for Rent by the Leſſor brought againſt C. and pleaded in Bar, that before the making the ſaid Leaſe to C. the Plaintiff made a Leaſe of the Premiſſes to B. 3d May, 25 Car. 2. for 20 Years, to commence preſently, by Virtue of which Leaſe the ſaid B. before any Rent due on the ſaid Leaſe to C. viz. 1 May, 36 Car. 2. entered and was poſſeſſed, and alleged in Fact that the ſaid Leaſe to B. was ſtill in Being, and not determined, and ſo Defendant ſtood liable to the Action of B. for all the Iſſues &c. of the Premiſſes by him received; and adjudged upon Demurrer, that C. was eſtopped to plead as above. Carth. 247. Mich. 4 W. & M. in B. R. Hilman als' Gilman v. Hore. —— 1 Salk 275. S. C.

Nota, In the Caſe above, if the Leaſe to C. had been by Deed Poll or Parol, the Plea above had been a good Bar. Carth 248. the Reporter cites Le. 33. 59. and Pl. C. 421. b. 433. Smith v. Stapleton.

8. But if he *enters on B. and then makes a Leaſe to C. who is turned out by B.* this is no Leaſe by Eſtoppel, but only a *future Intereſt* for the laſt Year. Ibid.

9. A Leaſe for Years may *operate* and take Effect as to Part by Eſtoppel, and as to the Reſidue by paſſing a real Intereſt, is very plain from the common Caſe of concurrent Leaſes, which are all of them as

to

to Part good by Eſtoppel, and a Rent reſerved thereon; Per Holt Ch. J. 1 Salk. 275. pl. 1. Mich. 4 W. & M. in B. R. Gilman v. Hore.

10. It was ruled by Holt Ch. J. at the Summer Aſſiſes at Warwick, 11 W. 3. upon a Trial at Niſi Prius, that if *A. not having any Thing in certain Land, demiſes it by Indenture to B.* and afterwards *A. purchaſes the Land*, this will be a good Leaſe by Eſtoppel. Ld. Raym. Rep. 729. Hermitage v. Tomkins.

11. *But if it appears by Recitals in the Leaſe, that A. had Nothing at the Time* of the Demiſe, and afterwards he purchaſes the Land as aforeſaid, that will not enure by Eſtoppel. Ibid.

(B. b. 4) Leaſes.

Good in Part.

1. A. Made a Leaſe for Years reſerving Rent, and then grants, demiſes, and then to farm lets *Reverſionem Domus* for Years, and the Rent, *to have &c. the Reverſion and Rent from a Time paſt*; if the *Leſſee cannot get Attornment*, yet it is a good Leaſe in Reverſion, and ſhall take Effect after the End of the firſt Leaſe. Brownl. 30. Anon.

2. Where a Perſon hath *Power to leaſe for 20 Years*, and he leaſes for 30, the Leaſe for 30 ſhall be good for 20 in *Equity*; Reſolved. Chan. Caſes 23. Trin. 15 Car. 2. Pawcey v. Bowen. 3 Chan. Rep 11. S. C. & S. P. ſaid to be ſo ſettled ſeveral Times in this Court. —— Nelſ. Chan. Rep. 87. S. C. accordingly.

3. *Biſhop's Leaſe* if it *exceeds the Statute* cannot be good for any Part, becauſe the Statute ties it up to an expreſs Form, otherwiſe perhaps had it been that if Biſhops ſhould make Leaſes for any Number of Years not exceeding ſuch a Number; Per Holt Ch. J. 1 Salk. 189. pl. 7. Hill. 13 W. 3. B. R. in the Caſe of Smartle v. Penhallow.

4. *Parol Leaſe for four Years* is not good for three Years upon the Statute of Frauds and Perjuries; Arg. 6 Mod. 65. Mich. 2 Ann. B. R. in Caſe of Smartle v. Penhallow.

5. *Tenant for Life with Power to make Leaſes of all Land anciently demiſed, reſerving the Ancient Rents, and of other Lands reſerving the beſt improved Rents*, makes a General *Leaſe of all the Lands reſerving Rent in the very Words of the Power*. Ld. Ch. Juſtice Holt held the Leaſe and Reſervation good as to the Lands that were anciently demiſed, but void as to the other Lands; but Ld. Ch. J. Trevor and Ld. K. Cowper e contra held the Leaſe void. 2 Vern. 531. pl. 447. and 542. pl. 485. Paſch. 1706. Orby v. Ld. Mohun. 3 Chan. Rep. 102. to 150. S. C. adjudged void accordingly by Ld. K. Cowper and Trevor Ch. J. contra to Holt Ch. J. —— Gilb. Equ. Rep. 45 to 64. S. C. held accordingly. —— Chan. Prec. 257. pl. 210. S. C. held accordingly.

(B. b. 5) Leaſes.

Intereſſe Termini, or Leaſe In Futuro.

See tit. Jointenants (U) pl. 1.

1. AN Intereſſe Termini *amounts to* an Alienation, and is not a meer Incumbrance; Arg. Show. 382. cites Littleton S. 289.

Or he may forfeit it; Arg. Pl. C. 423. in Caſe of Bracebridge v. Cook.

2. If a Man makes a Leaſe to commence at Mich. Before the ſaid Feaſt, the Leſſee may *grant* the Leaſe. Pl. C. Arg. 142. b. in Caſe of Browning v. Beſton, cites M. 22 E. 4. 37. B. Grants, 100.

Bendl. 85. pl. 130. S. C. accordingly. — For by this Livery it cannot paſs as Remainder. And. S. 9. pl 18. Okeden v. Sendy S. C.

3. Leaſe of a Manor, Habendum from Mich. laſt paſt for 20 Years, and further by the ſame Indenture it was *covenanted*, accorded, bargained and agreed, *that after the Expiration of* 20 *Years the Leſſee, his Wife and Son, ſhould have, hold, occupy and enjoy* the ſaid Manor to them, habendum for their Lives and the longeſt liver of them, and they make a *Letter of Attorney to give Livery* according to the true Meaning and Effect of the preſent Act, Grant and Leaſe, this is a good Leaſe with Remainder for Lives, if the *Deed was delivered by the Attorney and Livery made at one Time*; But if the Deed be firſt delivered by the Leſſor to the Leſſee, and after Livery of Seiſin by the Attorney, there the Livery is void. Mo. 14. pl. 54. Hill. 2 Eliz. Helier v. Okeden.

But it may be merged. Brownl 40.

4 Intereſſe Termini * *cannot be granted* or *ſurrendred*; Per Manwood. Godb. 2. Paſch. 17 Eliz. C. B. Anon.

——10 Rep. 53. Lampet's Caſe.——Ibid 67. b. in Church-Wardens of St. Saviour's Caſe.—

* It may be Aſſigned; Arg Show. 381. cites 1 Inſt. 46.

5. A *future Leaſe*, and a Leaſe *in Reverſion* are *ſynonimous*; Per Bridgman Ch. J. Cart. 15. Mich. 16 Car. 2. C. B. in the Dean and Chapter of Weſtminſter's Caſe, cites 8 Rep. Whitlock's Caſe, 4 Rep. Rawlins's Caſe, 19 Eliz. Dyer fol. 357.

Le. 171. pl. 239. S. C. and by Cook it is a good Grant, tho' to begin at a Day to come; For it is but a Chattle, and ſo was the Opinion of Wray Ch. J. For a Leaſe for Years may expect its Commencement.

6. A. lets to B. for 30 Years, and the *next Day lets it to C. for* 40 *Years, to commence at Mich. next after the Date.* The Tenant attorns. Whether this be a good grant of the Reverſion being to commence at a Day to come? Per Gawdy, a *Reverſion for Year* cannot commence at a Day to come; For then the Grantor ſhall have a leſſer Eſtate in himſelf; Per Wray, the Reverſion being for Years is a Chattle which may expect, and if I have a Rent in Fee I may grant it for Years to commence at Mich. for an *Eſtate doth not paſs but an Intereſt*; Per Coke, it has been adjudged, that if a Man grants his Term from Michaelmas, it is good; For it is a Leaſe from Mich. Cro. E. 152. pl. 30 Mich. 31 & 32 Eliz. B. R. Palmer v. Thorp.

Poph. 4. pl. 3. Anon. but ſeems to be S. C. held accordingly.

7. Baron and Feme, during the Coverture, *Jointenants for* 60 *Years.* Baron by Deed lets all the Land for 70 Years to commence immediately *after his Death.* Baron dies. Feme ſurvives. Adjudged a good Leaſe to charge the Poſſeſſion of the Feme; For here a good Term is created in Intereſt,

Intereſt, though not in Poſſeſſion. Cro. E. 287. pl. 2. Mich. 34 & 35 Eliz. B. R. Grute v. Locroft. —— Ibid. 97. S. P. and ſeems to be S. C. cited as adjudged, and ſays, that the like Caſe by the Opinion of Clench and Walmſley was decreed to be good in Chancery. —— Mo 395. pl 514. S. C. cited as adjudged, and ſays that the like Caſe was decreed in the Dutchy Chamber by the Advice of Clench and Walmſly J. and Brograve Attorney of the Dutchy, that where two Jointenants were in Fee, and the one made Leaſe to commence after his Death, the Leaſe was good againſt the ſurviving Jointenant. —— 1 Rep. 155. a Gawdy J. cited the Caſe of Growte v. Locroft; Adjudged that the Leaſe was good and the Reaſon of the Diverſity between this Caſe and the Caſe of 7 E. 6. was becauſe in Locroft's Caſe he demiſed the Land Habend' after the Death of Leſſor for 70 Years, in which there was ſufficient Certainty, but in 7 E. 6. he granted ſo much of his Term as ſhould be arrear at the Time of his Death, which was all uncertain in the Grant itſelf, which Diverſity put by Gawdy J. was agreed by Popham Ch. J. & totam Curiam. —— 3 Bulſt. 108. Mich. 13 Jac. Coke Ch. J. cites Locroft's Caſe put in the Rector of Chedington's Caſe, and Br Grants pl. 154. 7 E. 6. and Br. Caſes fol. 95. pl. 437. that if one grants his Term after his Death, this is not good, but if it be by way of Leaſe it is good. —— —— Cart. 155. S. C. cited by Tirrel J. that if a Termor demiſeth the Land to another to begin after his Death, it is good, for there is ſufficient Certainty; but if it had been ſo much of his Term as ſhould be behind at his Death it is otherwiſe.

8. A. *Tenant in Tail, Remainder to his Right Heirs* has Iſſue a Son, and makes a Leaſe for 21 Years to commence *after the Death of his Son without Iſſue*, and dies, and the Son dies without Iſſue; It was ruled that this was no good Leaſe to Iſſue out of the Remainder to his Right Heirs, becauſe of the Intendment at the Time of the Grant of the perpetual Continuance of the Eſtate Tail; Arg. Roll R. 357. cites 3 Jac. Bevin's Caſe.

9. He that has but an Intereſſe is not to *pay the Rent reſerved*, for there is no Term nor Reverſion till it commences; Per three Juſtices, contra Kelynge Ch. J. Vent. 91. Trin. 22 Car. 2. B. R. Lion v Carew. Lev. 294. Langan v. Carne S C. as to a Heriot reſerved, and adjudged not payable; Per three Juſtices contra Keyling Ch. J. —— 2 Saund. 165. Lanyon v. Carne, S. C. adjudged accordingly. —— Sid. 437. pl. 2. Hangon v. Carve, S. C. adjudged accordingly.

10. A future Leaſe is not of the ſame *Validity* and Force to all Intents and Purpoſes as one in Poſſeſſion; It is eſteemed in Law as an Intereſt, and an Intereſt *aſſignable*; It is not a meer Choſe en Action, For that cannot be aſſigned; Nor as a meer Poſſibility, For that cannot be barred; It is *forfeitable*, and may be ſurrendred or *extinguiſhed* by Acts done on the Land, or which touch the realty, though in ſome Caſes in a different Manner than ſome other particular Eſtates, Arg. Show. 379. Paſch. 4 W. & M. in Caſe of Symmonds v. Cudmore. It is capable of a Confirmation. Ibid. 381. cites Mo. 66. Where a Biſhop makes ſuch a future Leaſe to be confirmable by the Dean and Chapter. —— Such Leaſe may be granted over before Entry of ſuch Leſſee, though after the time of Commencement a Stranger enters by Tort, but if he had entred and been ouſted afterwards he cannot grant his Term till Re-entry. Cro. E. 15. pl. 4. Paſch. 25 Eliz. C. B. Bruerton v. Rainsford. —— But if he had been ouſted as a Diſſeiſor, by entring before the Term, though he continued in after Term began, and then Leſſor ouſted him, he might aſſign without Entry. Lev. 47. Mich. 13 Car. 2. B. R. Henings v. Brabaſon.

11. Leſſor made a ſecond Leaſe, and before the firſt expires levies a Fine, the Reverſion was expectant on the firſt Leaſe; For the ſecond continued only an Intereſſe Termini and does *not alter the Reverſion*, but it remains entirely expectant on the firſt Leaſe as it did before the ſecond was made. 1 Salk. 90. pl. 1. Trin. 5 W. 3. B. R. Gwam and Ward v. Roe. Skinn. 387. pl 23. Quarn v. Roe, S. C. the ſecond Leſſee was not in Poſſeſſion, and therefore his Eſtate was not ſevered from the Reverſion at the Time of levying the Fine of the Reverſion. —— The Reverſion of the Term paſſed as included in the Poſſeſſion. 3 Salk. 51. S. C.

12. A. poſſeſſed of a Term for 100 Years grants the Land Habendum *for* 40 *Years to commence after his Death*, this is a good new Leaſe. Ld. Raym. Rep 737. S. P. held 2 Salk.

accordingly by Holt Ch. J. at the ſame Aſſiſes, and ſeems to be S. C.

2 Salk. 413. pl. 3. Gree v. Studley, per Holt Ch. J. at Dorcheſter, Lent Aſſiſes. 10 W. 3.

S. P. held accordingly by Roll Ch. J. at the ſame Aſſiſe. Ld. Raym. Rep. 737. Anon. but ſeems to be S. C.

13. A. poſſeſſed of a *Term for* 20 *Years grants the Tenants for* 19 *Years to commence after his Death*; this will be good for ſo much of the 20 Years as ſhall be Unexpired at the Time of his Death; Per Holt Ch. J. at Dorcheſter Lent Aſſiſes, 10 W. 3. 2 Salk. 413. Gree v. Studley.

14. It being inſited, that a Term for Years *to commence after Leſſor's Death without Iſſue*, may be created *by one ſeiſed in Fee*; It was anſwered that a Man may carve ſuch Term out of his Inheritances, but one that was *poſſeſſed of a Term of* 2000 *Years* cannot carve any future Term out of his Term for Years, to commence *after the Determination of an Eſtate Tail.* 2 Vern. 684. pl. 609. Trin. 1712. Kirſley v. Duck.

15. *A. Mortgagee of a* 500 *Years Term* afterwards *took another Security for* 1000 *Years in the Name of B.* of the ſame Lands, in Truſt for himſelf, *to commence from the Making, and* then *purchaſed the Inheritance in his own Name.* It was inſiſted, that the Intermediate Term of 1000 Years was a ſubſiſting Term, and not merg'd in the Inheritance, and that it *operated as a Grant of the Reverſion, and not as* a Grant of *a future Intereſt*, but being to commence from the Making did paſs the Reverſion for 1000 Years; Quod fuit Conceſſum per Cur. at the Rolls. 2 Wms's Rep. 236. Trin. 1724. Whitchurch v. Whitchnrch.

(B. b. 6) Eſtate. What ſhall be ſaid One; And what ſeveral Eſtates and Leaſes; And to what Purpoſes.

For he to whom the Remainder is limited, and the Tenant for Life who takes by the firſt Livery, are one and the ſame Tenant in Law. Br. Entre Congeable, pl. 17 cites S.C. —— And it makes but one and the ſame Degree as to the bringing Writ of Entry ſur Diſſeiſin. Br. Done &c. pl. 7. cites S. C.

1. LEASE is made *for Life to A. Remainder to B.* then *A. dies*, and *B. agree to the Remainder.* B. ſhall be in the ſame Plight as A. was, *as to being impleaded &c.* Br. Done &c. pl. 7. cites 50 E. 3. 21.

2. If *a Termor* or Guardian *leaſes for Life Remainder over*, and he in *Remainder agrees*, he ſhall be *Diſſeiſor* as well as the Tenant for Life. For it is all one Eſtate in the Law. Br. Done, pl. 7. cites 50 E. 3. 21.

Br. Done, pl. 7. cites S. C.

3. In Aſſiſe it was agreed, that if a *Seigniory* be *granted for Life*, the *Remainder over* &c. the *Tenant aliens in Mortmain*, the *Grantee* for Life *and* he in *Remainder ſhall have but one Entry*, viz. one Year to enter; For it is but one and the ſame Eſtate; Quod nota. Arg. Br. Mormaine, pl. 8. cites 50 E. 3. 21. 22.

4. A Leaſe was made *for a Year & Sic de Anno in Annum*, and it was debated if it were a ſeveral Leaſe for every Year, and it was ruled that

that an Action might be brought, and *declare that he held for* 21 *Years, if in Truth he held ſo long* the Land by Force of the ſame Demiſe. Arg. Godb. 129. cites 14 H. 8. 10.

5. If a Man *leaſes for* 60 *Years, and ſo from* 60 *Years to* 60 *Years till* 240 *Years are ended*, this is all one and the ſame Leaſe; But Contrary where it depends in Covenant to grant 60 Years when the firſt Term is determin'd; and ſuch Leaſe to an Abbot and his Succeſſors is Mortmain by theſe Words, Colore Termini. Br. Leaſes, pl. 49. cites 29 H. 8.

6. If Rent is reſerv'd in Groſs in a Leaſe, and afterwards there is a Severance, viz. ſo much for Bl. Acre, and ſo much for Wh. Acre, this *Diviſion of Rent in the Leaſe* does not make ſeveral Leaſes. Dal. 54. pl. 31. Per Brown and Weſton. 5 Eliz. and Judgment accordingly.

7. A. Leaſes an Acre of Land *to B. and C. Habend' the one Moiety to B. and the other to C.* This is a ſeveral Leaſe. Agreed per Welſh. Mo. 64. pl. 175. Trin. 6 Eliz. Anon.

8. Leaſe *to A. B. and C. for their three Lives*, and the Life of the Survivor, and after the Habend' as before, provided always, and it is covenanted between the Parties, that *A. ſhall take all the Profits during his Life, and then B.* during his Life &c. yet reſolv'd this is a joint Eſtate. Le. 317. pl. 346. Mich. 30 & 31 Eliz. B. R. Scovel v. Cavel.

It is a joint Eſtate, and the Proviſo ſhall not ſever it. Cro. E. 107. S. C. ——

Mo. 267, 268. S. C. by Name of Leverſage v. Cable; But it was ſaid per Coke a Counſel, Arg. that perhaps an Action of Covenant lies upon it. Le. 318. in S. C.

9. Tenant in Tail ſeis'd of a Manor with three Acres thereof in Demeſne, makes a Leaſe of the three Acres, *and* alſo of the Manor Habendum the three Acres, and alſo the Manor for 21 Years, * rendring Rent for the three Acres and all other the Premiſſes therewith demis'd 5 l. Per Cur. when the Leaſe is *of the three Acres and of the Manor*, though the Manor comprehends the three Acres, yet in Conſtruction of Law they ſhall be taken as ſeveral Demiſes. Owen. 119. Hill. 37 Eliz. B. R. Tanfield v. Rogers.

Yielding for the ſaid 3 Acres &c. 5 l. and yielding for the ſaid Manor &c. 10 l. It was reſolved that theſe were ſeveral Reſervations, and ſo the Leaſe good for the three Acres &c. and it ſeems that the ſeveral Reſervations, and the ſeveral Words in the Habend', make it as ſeveral Leaſes, but ſaid it was not very material whether they were ſeveral Leaſes, ſince there are ſeveral Reſervations; and Judgment accordingly. Cro. E. 340. pl. 7. Mich. 36 & 37 Eliz. B. R. in S. C.

10. A Leaſe is made *of the Griſt, and alſo of the Mill*, reſerving by the Year 5 s. and alſo for the other, 10 s. They are ſeveral Leaſes. Per Fenner J. Owen 119. Hill. 37 Eliz. B. R. in Caſe of Tanfield v. Rogers cites 10 Aſſiſe.

11. If *Tenants in Common join* in a Leaſe for Years to bring an *Ejectment* and Count quod cum dimiſiſſent, it is ill; For it is a ſeveral Leaſe of their Moieties, and they ſhould declare Quod cum one of them demis'd one Moiety, and the other the other Moiety, and good. Brownl. 39, 40. Anon.

Brownl. 134. in Caſe of Craddock v. Jones, S. P. — Cro. J. 166. pl. 4. Trin. 5 Jac. B. R. Mantle v. Wallington, S. P. per two Juſtices contra one. —— So of Parceners. Mo. 682. pl. 939. Mich. 42 & 43 Eliz. B. R. Milliner v. Robinſon.

Leaſe made by two Tenants in Common are ſeveral Leaſes. Brownl. 39, 40. —— Ibid. 134. S. P. in Caſe of Cradock v. Jones.

12. If *there are two ſeveral Tenants of ſeveral Lands, and they join in a Leaſe for Years by Indenture*; Theſe are ſeveral Leaſes and ſeveral Confirmations of each of them from whom no Intereſt paſſes, and work not by Way of Concluſion in any Sort, becauſe ſeveral Intereſts paſs from them. Co. Litt. 45. a.

13. Leaſe

* 2 Lev. 241. S. C. in which are thoſe Words, and by reaſon of the Word (Thence) inſtead of (Hence) the Court held accordingly, and ſo it was adjudged.

13. Leaſe for 21 Years, and afterwards it is further covenanted, and A. does *further covenant* &c. *That B ſhall have the ſame for* 21 *Years more* after the Expiration of the ſaid Term, *and ſo from* 21 *to* 21 *till* 99 *Years* * [*thence next enſuing*] be compleat and ended. Adjudged to be two Leaſes, the firſt for 21 Years, the ſecond for 99 Years. 2 Show. 31. pl. 22. Hill. 30 & 31 Car. 2. B. R. Mancheſter College v. Trafford.

(B. b. 7) Leaſes. Remainder.

1. A *Leaſe* was made *for* 40 *Years to A. if he ſhould ſo long live*; and *if he ſhould die within the ſaid Term*, that *then E. his Wife ſhould have it for the Reſidue* of the ſaid Years; Per Cur. the Limitation to E. is void, for that the Term ended by the Death of A. and then there was no Reſidue to remain to the Wife. Dy. 7. pl. 8. Trin. 28 H. 8. Anon.

2. Leaſe *for Years in Remainder* may be *on a Leaſe for Life in the ſame Perſon*. Per Manwood J. 3 Le. 22. in Cranmer's Caſe, ſays it was ſo agreed D. 150. [a. pl. 83. Trin. 3 & 4 P. & M.] in Caſe of Parker v. Gravenor.

Yelv. 85. S. P. cited per Popham, in the Caſe v. Sydenham.

3. Leaſe to two, *Remainder to the Survivor* and to his Executors for 40 Years; They *both join'd in a Grant* of it, yet the Grant was meerly void, becauſe the Term was not veſted in any of them. Cro. E. 841. cited per Popham as adjudg'd 17 Eliz.

* Primogenito Proli, and that at that Time (of the Leaſe) they had no Iſſue, but afterwards had Iſſue a Daughter. Cro. E. 121. Stephens v. Lawton.

4. In an Ejectione Firmæ upon Iſſue joined the Caſe in a Special Verdict was, that a Leaſe by Indenture was made by A. *to B. and M. his Wife et* * *primogenito habend' to them, et diutius eorum viventi ſucceſſive* for Term of their Lives, and then Husband and Wife had Iſſue a Daughter; The Queſtion was, If the Daughter had any Eſtate? And three Juſtices held that ſhe had no Eſtate, becauſe ſhe was not in Being at the Time of the Leaſe made, and a *Perſon* that is *not in Eſſe cannot take any Thing by Livery*, for Livery ought to carry a preſent Eſtate, where the Eſtate is not limited by way of Remainder, and cites 18 Ed. 3. 3. 17 Ed. 3. 29 & 30. adjudged. But it was ſaid at Bar, that if the Eſtate had been conveyed by Way of Uſe, it is otherwiſe. And the ſaid Juſtices held clearly that the Word Succeſſive would not alter the Caſe. And Judgment was given for the Plaintiff accordingly. Ow. 40, 41. Mich. 29 Eliz. Stephens v. Layton.

And. 258. S.C. becauſe the Son is not Party to the Leaſe, and he cannot take by way of Remainder.——Held good per Dyer and Weſton Juſtices, where the Son was Party. Mo. 43. pl. 133.—— Per Anderſon, if the Son had been Party, this peradventure might have been good to him, not by way of Remainder, but by immediate Grant and Demiſe for ſo many Years as ſhould be to come, and Durante Termino ſhall not be taken for the Intereſt, but for the Time, which Walmſley and Windham did expreſsly deny, for they held, that it is at firſt void for the Uncertainty, when, or whether it ſhall commence. Cro. E. 217. Green v. Edwards.

5. Leaſe for 80 Years *if the Wife tam diu vixerit*, and if ſhe die that the Son ſhall have the Land for *the Reſidue of the Term* then to come; adjudg'd void as to the Son, becauſe there is no Reſidue of the Term which before is determined. Mo. 297. pl. 441. Paſch. 32 Eliz. B. R. Green v. Edwards.

6. A. leaſes to B. for 99 Years, if he live ſo long, to commence after the Death of C. who was Tenant for Life, and by the ſame Deed Vult & concedit, that *after the Death* of the Survivor *of the ſaid B. and C. it ſhall remain to the Executors and Aſſigns of B. for* 40 *Years*. C. died. It was agreed, that if the Leaſe was *to B. for* 99 *Years if he live ſo long, and if he died within the Term that it ſhould be to his Executors and Aſſignes for* 40 *Years*, then the Term for 40 Years did not veſt in B. but in his Executors by Purchaſe, becauſe it is a Conditional Limitation, and a meer Poſſibility to veſt; for there is a Condition precedent that it ſhall not be a Leaſe unleſs he died within the Term, which perhaps might not be, for he might ſurvive the Term. Cro. E. 841. pl. 17. Trin. 43 Eliz. B. R. Spark v. Spark.

In the Principal Caſe B. granted the Leaſe for 40 Years, rendring Rent and died Inteſtate. Adjudg'd that Debt lies not for the Adminiſtrator of B. for the Rent, becauſe the Executors and Aſſignes were to take by Purchaſe the Term for 40 Years, and the Term never was in B. himſelf to grant, and there is no Executor to take, and no Aſſignee can take. Mo. 666. S C. —Ow. 125. Sperke v. Sperke. S. C. adjudg'd, that the Adminiſtrator ſhall hold it as a Thing veſted in the Inteſtate.

7. But if it had been limited to the Executor *for payment of Debts of* B. &c. it ſeems then by the apparent Intent it ſhall be an *Intereſt* in B. and in the Executor to the Uſe of B. But in the principal Caſe this Contingent of 40 Years never was in B. but if B. had made an Executor ſuch Executor ſhould take by Purchaſe. Per Gawdy and Yelverton J. and all agreed, That Debt lay not for the Adminiſtrator. But Popham and Fenner thought that B's *Executor ſhould never take*, becauſe the Eſtate * ended before the Intereſt commenc'd or aroſe to the Executors, ſo that it cannot *take Effect as Remainder*, for this muſt depend on the former Eſtate. But if it takes Effect at all it muſt be *by Virtue of the Grant of the Leſſor*, and this cannot be becauſe they are *not Parties to the Deed*. And therefore if a Man leaſes for Life, and grants by the ſame Deed that J. S. ſhall have for 20 Years, this will not avail J. S. becauſe he is not Party. Yelv. 9. Mich. 44 & 45 Eliz. B. R.

S. C Nota. The Chief Reaſon was, Becauſe the Term for 40 Years is only a Poſſibility. Ibid.

* The Reporter makes a Quære of of this, becauſe if B. makes Executor in the Inſtant of his Death the Remainder takes Effect in the Executor, and cites 7 H. 4. Ibid.

8. The *firſt Taker of* the pretended *Entail* of a Chattel, or of the Uſe of a Chattel, may diſpoſe thereof as long as he has ſuch Iſſue as ſuch Eſtate Tail limits the ſame unto. Pollex. 24. 26 June 8 Jac. Tatton v. Molineux.

9. A *Truſt of* a Term for Years granted *to A. for Life, and then to M.* his *Wife for Life, and afterwards to the Iſſue of their two Bodies*, and upon Default of ſuch Iſſue *Remainder to B.* is void, and on A's Death the whole Term veſts in the Iſſue, and if ſuch Iſſue dies without Iſſue and Inteſtate, the Reſidue belongs to the Adminiſtrator of the Iſſue, and ſo Finch C. diſcharged a former Decree made by himſelf, and ſaid he grounded his former Opinion upon **Wild's Caſe**, but that that Reſolution would not hold, if inſtead of *Children* the Word *Iſſue* had been in that Caſe. Fin. Rep. 279. Hill. 29 Car. 2. Warman v. Seaman and Leving & al'.

Pollexf. 112. to 123. S. C. decreed accordingly, ſays the Limitation was, that the Truſtees ſhould permit M. to receive the Profits during her Life, and that for ſo much of the Term as ſhould [not] be expir'd at her Death, the Truſtees on Requeſt ſhould aſſign all their Right and Title to the Iſſue of the Body of M. and for want of ſuch Iſſue, then upon the like Requeſt the Truſtees ſhould aſſign their Intereſt unto B.——2 Chan. Caſes 209, 210. S. C. decreed accordingly.

(B. b. 8) Leaſes. Renewed.

By whom; And who ſhall have the Benefit thereof.

Chan. Caſes 71. S. C. accordingly. —— S. C. cited 2 Vern. 97. pl. 89. per Curiam, Paſch. 1689. in Caſe of Vandenanker v. Desborough.

1. A. Leaſed for 40 Years to B. and *covenanted with Leſſee and his Aſſigns to renew* the Leaſe. B. became a Bankrupt, and after the *Commiſſioners of Bankrupts aſſigned this Covenant* to the Plaintiff, who by Bill againſt A. prayed the Benefit of it, and to compel a Renewal. But by the Opinion of two Juſtices the Bill was diſmiſſed. N. Chan. Rep. 102. Anno 16 Car. 2. Drake v. the Mayor of Exeter.

2. If an *Executor in Truſt* renews a Church Leaſe it ſhall go to the Benefit of the Ceſtuy que Truſt; Agreed per tot. Cur. Chan. Caſes 191. Mich. 22 Car. 2. in Caſe of Holt v. Holt.

3. Leſſee for Years ſubject to a Truſt deviſed *Reſiduum Bonorum*; the Eſtate would but pay the Debts if all ſold; *Executor* pays the Debts and renews the Leaſe for a further Term, it being a *Church Leaſe*, and offered to account if any Profits would ariſe out of the old Term, and it was urged that by paying Debts to the Value the Property is alter'd, and veſted in him in his own Right. Ld. Keeper decreed the Executor to account for the new as well as the old Leaſe, and ask'd, If the Executor acquainted the Church with his Caſe, and declared that he would renew and take it for the Time of the old Term, to the Benefit of the Creditors and Executorſhip, and the reſt for himſelf. 2 Chan. Caſes 207. Mich. 27 Car. 2. Anon.

4. By the *French Law* no Church-man can make a Leaſe to any but the old Tenant, unleſs he be firſt refuſed by the *old Tenant*; Per Ld. Keeper. 2 Chan. Caſes 208. Mich. 27 Car. 2. Anon.

2 Chan. Rep. 113. S. C. decreed.

5. A. *mortgages* a College Leaſe to B. for 4000 l. and ſecured the Money likewiſe by *Statute* to B. A. dies and makes C. Executor. The *Executor renews* in his own Name ſeveral Times till the Original Mortgage Leaſe expired by Efflux of Time. Decreed that B. paying the ſeveral Fines, Gratuities and Charges which C. had expended on Account of the Renewal &c. ſhall hold the Premiſſes till the Debt be ſatisfied. Fin. Rep. 392. Trin. 30 Car. 2. Luckin v. Ruſhworth and Pinchon.

6. *Three Leſſees* are under a Dean and Chapter; *one ſurrenders and renews to himſelf*; Per North K. it is a Truſt for all. Vern. 276. pl. 277. Mich. 1684. Palmer v. Young.

7. If a Biſhop makes a Leaſe for 21 Years, and *Leſſee creates a Truſt* thereupon, and after the Biſhop dies, and his Succeſſor for a Fine renews the Leaſe, though not compellable to do it, and though there be no Truſt of the ſecond Leaſe, yet Equity ſhall ſubject it to the former Truſt; Per Serjeant Powis in Canc. 6 Mod. 57. Mich. 2 Ann. B. R. Anon.

8. A. deviſed a *College Leaſe* for 21 Years to his Wife for Life, *paying 10 l. per Ann. to B. his Son during her Life Remainder to B.* is an Implication that the Wife ſhall renew and keep the Term on Foot, and there being but ſeven Years of the 21 to come, ſhe was decreed to renew, and the Maſter to ſettle the Proportion; Per Ld. Keeper. 2 Vern. 666. Mich. 1710. Lock v. Lock.

9. 4 *Geo.* 2. *cap* 28. *Chief Leaſes may be renewed without ſurrendering all the Under Leaſes.*

(B. b. 9) Leaſes. Revived.

1. A *Man is Purchaſor with his Wife to them and the Heirs of the Baron.* The *Baron leaſes for Years and dies.* The *Feme enters.* This ſhall avoid the Leaſe for her Life, but if *ſhe dies during the Term*, there the Reſt of the Term is good to the Leſſee againſt the Heir of the Baron. Br. Leaſes, pl. 58. cites 36 H. 8.

2. If *Leſſor enfeoffs Leſſee upon Condition*, and re-enters for Condition broken, the Term is not *revived*; Arg. 2 Roll Rep. 472. cites 8 Eliz. Bendl. Rep.

3. Tenant in Capite made a *Leaſe for Life rendering Rent*, and for Non-Payment a *Re-entry*. The Rent is behind, and the *Heir under Age enters* for Non-Payment, and afterwards *Office was found* of the dying ſeiſed, and that the Land was holden *in Capite*, and the Heir within Age; In that Caſe the Entry for the Condition broken was revived, and the Eſtate for Life revived; Arg. Godb. 325. cites Pl. C. 488. [Mich. 17 & 18 Eliz.]

4. When the Intereſt of him who makes the Avoidance of a Leaſe is but for Part of the Term, ſo that it appears that a Reſidue remains, there the Leaſe may be revived; But when he that makes the Avoidance avoids all the Intereſt, ſo that it appears that *no Reſidue* can remain, there can be no Reviver; Reſolved. 7 Rep. 8 a. Mich. 28 & 29 Eliz. in the Court of Wards, in the Earl of Bedford's Caſe.

S. C. cited; and S. P. held accordingly Jo. 45. pl. 1. in Caſe of Plowden v. Oldfield, which ſee infra pl. 8.

5. *Tenant in Fee takes Wife*, and *makes Leaſe for Years and dies*; the *Wife is endowed*; ſhe ſhall avoid the Leaſe, but *after her Deceaſe the Leaſe ſhall be in Force* again. Co. Litt. 46. a. ad finem.

6. If a Leaſe be made *by a Parſon for ſo long as he ſhall continue Parſon*, and he is afterwards *deprived* unjuſtly, the Leaſe is gone and determined, and ſhall have no longer Continuance though he afterwards doth *reverſe* this again; but it would be otherwiſe if it were limited to continue *for 21 Years if he ſhould ſo long live*; Per Haughton J. 2 Bulſt. 84. Trin. 11 Jac. in Caſe of Wheeler v. Heydon.

Per Doderidge J. by the Deprivation the Leaſe is now gone; but if he appeals from the Sentence, then hanging this Appeal, he continues ſtill Parſon until Sentence be given. Ibid.

7. *Tenant in Tail* makes a Leaſe and *dies without Iſſue*, his Wife *Privement enſeint*. The *Donor enters*. The Leaſe is avoided. Afterwards a *Son is born*. Now the Leaſe is revived; Arg. Godb. 325. in pl. 417. Paſch. 21. Jac. in the Exchequer Chamber, in Caſe of Sheffield v. Ratcliff.

7 Rep. 8. b. Mich. 28 & 29 Eliz S. P. For the Leaſe never was avoided abſolutely, nor ſimpliciter, but Secundum Quid, and upon the Matter Ex poſt Facto was defeated only for the Time.

8. After a *Grant of the next Avoidance*, the Parſon, Patron or Ordinary, before the Statute of 13 Eliz. made a Leaſe 99 Years. The *Parſon died*. The Preſentee of the Grantee *avoided the Leaſe* died. The Leaſe ſhall not revive againſt an *After-Incumbent* preſented by the Patron in Fee, but is totally avoided; For the Parſon had the intire Fee; And ſuch Eviction ſerves for his Succeſſors as well as himſelf. Cro. C. 582. pl. 7. Paſch. 16 Car. B. R. Plowden v. Oldfield.

Jo. 454. pl. 1. Oldfield v. Plowden, S. C. ad judged, and ſo a Judgment in C. B. was affirmed.

(B. b. 10) Riding Leaſes.

1. IF a Man *leaſes for four Years*, and afterwards the *Leſſor and the Leſſee leaſe to another for* 60 *Years*, this Leaſe is *good after the four Years paſt*, per Littleton quod ſuit, conceſſum; And Brooke ſays, therefore Note, that if he who leaſes for 20 Years, and the Day after leaſes for 40 Years, the ſecond Leaſe ſhall take Effect, for 40 Years after the 20 Years paſt. Br. Leaſes, pl. 35. cites 2 E. 4. 11. and ſays that ſo it was held by Bromley J. and others, in the Time of H. 8.

It is a good Leaſe for 10 Years preſently, but if B. get Attornment then he ſhall have the Reverſion preſently, and theſe

2. A Man *leaſed for* 10 *Years*, and the *next Day after he leaſed* the ſame Land *to another for* 20 *Years*, this is a good Leaſe for the laſt 10 Years of the ſecond Leaſe. Br. Leaſes, pl. 48. cites 26 H. 8.

3. But if a Man *leaſes for Life to J. S.* and the *next Day after leaſes to W. D. for* 20 *Years*, the ſecond Leaſe is void unleſs it be a Grant of the Reverſion with Attornment; For in Law the Franktenement is more worthy and perdurable than a Leaſe for Years. Br. Leaſes, pl. 48. cites Paſch. 37 H. 8. and Hill. 1 E. 6.

two Eſtates ſhall be in him, and ſtand as divided Eſtates; Per Coke Ch. J. Noy 153. in Caſe of Fitch v. Vaughan.—— If the ſecond Leaſe be by Parol, it ſhall not commence on * Surrender &c. of the firſt, but on the Expiration only of the 10 Years. For as for the firſt 10 Years it is void, but good for the Reſidue; Arg. Pl. C. 432. b. 433. a. Paſch. 15 Eliz. in Caſe of Smith v. Stapleton.

* For Leſſor had no Power to contract for the firſt 10 Years at the beginnig; But otherwiſe it is when the Eſtate is determinable upon an Uncertainty, Per Gawdy J. Cro. E. 160. in Caſe of Dove v. Williot, cites Pl. C. ..... Smith v. Stapleton.

4. *But if Leſſee for Life dies within the Term*, the Leaſe for Years is good for the Reſidue of the Years to come. Br. Leaſes, pl. 48. cites Paſch. 37 H. 8.

5. A ſecond Leaſe made *during a firſt Leaſe to commence in Poſſeſſion* is void; Arg. Pl. C. 432. Paſch. 15 Eliz. in Caſe of Smith v. Stapleton.

6. A. leaſed for 20 Years to B. *to commence* 10 *Years after*, and after the ſame Day A. leaſes by Parol to C. for 30 Years *to commence preſently*. C. ſhall have only for 10 Years, and it is void for the laſt 20 Years, nor can be made good by Surrender of B. to C. For it is *void* to all Intents; Arg. Pl. C. 433. Paſch 15 Eliz. in Caſe of Smith v. Stapleton.

* But ſee now the Statutes of Frauds as to Leaſes by Parol.

7. A. ſeiſed in Fee makes a *Leaſe for Life* to B. and after *to C. for* 10 *Years by* * *Parol to commence preſently*; whenever B dies C. may enter; For an Eſtate for Life has no Certainty of Continuance, by which it differs from a Leaſe for Years certain; Arg. Pl. C. 433. Paſch. 15 Eliz. in Caſe of Smith v. Stapleton.

8. A. leaſed to B. for 20 Years, and then to C. *for* 20 *Years, the ſame Day, by Deed-Poll*; if C. will Uſe the Deed-Poll as a Grant of the Reverſion, and gets Attornment, it is good; But if as a preſent Leaſe without Attornment it is void, though B. had ſurrendred or forfeited; For a Deed-Poll doth not paſs what another then enjoys; But if the *ſecond Leaſe was by Indenture* or *Fine*, then on the Determination of the firſt Leaſe by Surrender, Forfeiture, Condition &c. C. might enter; For by Indenture or Fine both are concluded to ſay the contrary, but that A. had the Land in Poſſeſſion to paſs, and that he paſſed it in Poſſeſſion according to the Tenor of the Leaſe; So if he had nothing then in the Land, but had purchaſed it afterwards; Arg. Pl. C. 433. b. 434. a. Paſch. 15 Eliz. in Caſe of Smith v. Stapleton.

9. A.

9. A. makes a leaſe to B. *May the 1ſt, for 21 Years enſuing June the 1ſt defeaſible on Condition by Leſſor*, and the *ſecond of May* makes *Leaſe to C. without Deed for 21 Years from the ſaid June the 1ſt enſuing*. If the Condition is performed, and the firſt Leaſe avoided, or if B. ſurrenders his Term, C. never ſhall have the Land by Force of the ſecond Leaſe, becauſe A, had no Power to contract with C. at the Time of the ſecond Leaſe; For during the ſecond Leaſe B. had the Land and Poſſeſſion, and the Contract could not be good in reſpect of the *Poſſibility* of the Condition, or of the Surrender which deſtroyed the Leaſe; Per Plowden. Pl. C. 422. Trin. 14 Eliz. in Caſe of Bracebridge v. Cooke.

10. A. demiſed the Manor of D. for 32 *Years*, and the Day after let the ſame Manor *for* 40 *Years, to begin from Michaelmas after the Date of the firſt Leaſe*, and the *Tenant attorned*; Per Wray Ch. J. this is a good Grant, though to begin at a Day to come; For it is but a Chattel, and a Leaſe for Years may expect its Commencement. Le. 171. pl. 239. Hill. 31 Eliz. B. R. Palmer v. Thorp.

Gawdy J. held, that a Reverſion for Years could not expect. For then the Grantor ſhould have a leſſer Eſtate in himſelf; But Wray contra, that the Reverſion being for Years may well expect. Cro. E. 152. S. C.

11. Where there is *no Poſſibility of the ſecond Leaſe's taking Effect* it is void, As if A. makes a Leaſe for 10 Years to B. and then a Leaſe for ſix Years to C. and all without Rent and by Parol, the Leaſe for ſix Years is utterly void; Arg. Mo. 344. pl. 466. Paſch. 35 Eliz.

12. A. leaſes Bl. Acre to B. for 20 Years, rendering Rent; afterwards A. leaſes *Wh. Acre, and the Rent and Reverſion of Bl. Acre to C.* by the Words *Demiſe, Grant, and to Farm let for* 99 *Years, Habendum Wh Acre, the Reverſion of Bl. Acre, the Rent and Premiſſes, for* 99 *Years, rendering Rent* &c. B. never attorns, the 20 Years expire, and C. enters into Bl. Acre; and per Cur. it is well; for that ſhall enure as a Leaſe by the Words Demiſe &c. Noy 153. Fitch v. Vaughan.

(B. b. 11) Leaſes. In what Caſes they ſhall go to the Survivor.

1. A. Leaſes Land to B. and C. *during their Lives, and the longeſt Liver of them, to the Uſe of D. during the Life of D.* If the Tenants for Life, viz. B. and C. die, the Uſe and Eſtate of D. who had the Uſe, is determined, [* and it is not material what was the Truſt, or how the Uſe was limited.] D. 186. a. pl. 1. Mich. 2 & 3 Eliz.

* S. C. cited 2 And. 136. with this Addition.

2. *Grant of Lands to A. and B. for Term of their own Lives*; If either of them dies the * Survivor ſhall have the Whole; But Grant of Lands † *to A. for the Life of B. and C.* if B. or C. die all the Eſtate is determined; becauſe it is but a Limitation, and B. and C. had not any Intereſt; Per Dyer Ch. J. 3 Le. 103 pl. 150. Paſch. 26 Eliz. C. B. Anon.

Le 74. Baldwin v. Cock, S. P. —— 3 Bulſt. 131. S. C. cited. —— Brownl. 50. ——

* Becauſe they take it by Way of Intereſt. Goldsb. 71. in pl. 16.

† Roll Rep. 197. per Doderidge J. S. P. accordingly, but Coke ſaid it had been adjudged contra 5 Rep. 19. Brudenell's Caſe.

3. *Leaſe to A. and B. for* 21 *Years if* the ſaid *A. and B. or any Child* or Children between them begotten ſhould live ſo long. B. died within the Term without Iſſue, yet the Term ſurvives to A. for it was intended a Common Advancement to both, and the Disjunctive before (Child) makes

Gouldsb 71. pl. 16. Cock v. Baldwin, S. C. and three Juſtices

held, that it appears by the Diſjunctive Sentence which comes afterward, that the Intent was, that the Leaſe ſhall not be determin'd by the Death of one of them. And the Reaſon which moved the Ld. Anderſon to think ſo was, becauſe the Eſtate was made before the Marriage, and ſo is as a Jointure to the Wife, and therefore not determin'd by the Death of the one. And after they all gave Judgment accordingly.——Mo. 239. pl. 375. S. C. adjudg'd; For (Or) is taken Diſtributively to any one of the three. And Anderſon ſaid that this was the Opinion of all the Juſtices of England.——And. 161. pl 206. S. C. adjudg'd.——Ow. 52. S. C. adjudged that the Leaſe was not determined by the Death of one.——3 Bulſt. S. C. cited by Doderidge J.——Jenk. 279. pl. 1. S. C.——Co. Litt. 225. a. the Diſjunctive refers to the Whole, ſo that the Senſe is, if the Baron, Feme or any Child ſhall ſo long live.

makes all the Limitation in the Disjunctive. Le. 74. pl. 101. Paſch. 29 Eliz. C. B. Baldwin v. Cocks.

13 Rep. 66. S. C adjudged accordingly.—— 2 Brownl. 292. S. P.——There is a Difference between a Leaſe for Life and a Leaſe for Years, as a Leaſe to A. for his Life, and the Life of B. if A. dies, yet the Leaſe continues. But if a Leaſe for Years be made with ſuch a Limitation that if A. and J. S. ſo long ſhould live, this is a Limitation Collateral, and here by the Death of one the Leaſe for Years ſhall be determined. Arg. 3 Bulſt. 131, 132.——And ſo it is if a Leaſe be made to A. if Leſſor and J. S. ſhall live ſo long; this is merely collateral in both. Per Doderidge J. ibid. 132. and per Haughton J. accordingly. Ibid.

4. *Leaſe for Years* to A. and B. *To have &c. for* 60 *Years if they live ſo long*; By the Death of A. or B. the Leaſe ends, but otherwiſe had it been for Life. Brownl. 180. Trin. 6 Jac. Hughes v. Crowther.

5. Leaſe for Years rendring Rent *during his Life and the Life of his Wife*; Adjudg'd that this is during the Life of the longer Liver of them. Mo. 876. pl. 1225. Hills v. Hills.

Bond to pay during the Lives of two Strangers, Payment ceaſes on the Death of one.

6. If a Leaſe be made *during the Life of J. S. and J. N.* or if an Eſtate be limited *to A. if B. and C. ſhall ſo long live*, if one of them dies he ſhall hold the ſame during the Life of the Survivor, this being in a *Limitation*, but otherwiſe it will be in a *Condition* as is reſolv'd in Brudenell's Caſe 5 Rep. 9. Per Coke Ch. J. 3 Bulſt. 131. Mich. 13 Jac. Daniel v. Waddington.

Mod. Rep. 187. 26 Car. 2. C. B. Slater v. Carew.

If one dies before Entry the Intereſt ſurvives, and yet till Entry no Agreement can be had of Leſſee. Arg. Show. 299. Mich. 3 W. & M.

7 If two take a *Leaſe jointly of a Farm*, the Leaſe ſhall ſurvive, but not the *Stock*. Vern. 217. pl. 214. Hill. 1683. Jeffries v. Small.

6. A. upon Articles of Marriage was to ſettle Lands upon his Son for his Life, and after his Death to M. his intended Wife for her Jointure, proviſo that the Son ſhould make a Leaſe of the Premiſſes to the Father for 99 *Years if A. and M. his Wife ſhould ſo long live.* Per tot. Cur. this is only for their joint Lives, and the Wife dying the Leaſe is determined. 2 Vent. 74. Mich. 1 W. & M. in C. B. Bailes v. Wenman.

7. *Truſt of a Term for A. and B.* muſt go as the Term at Law would go, and ſhall ſurvive. 2 Vern. 556. pl. 505. Paſch. 1706. Aſton v. Smallman.

(B. b. 12) Leaſes. Void or good.

1. A. Makes a *Leaſe to B. if C. lives for 21 Years*, and *C. is Dead at the Time*; This is a void Leaſe, for it is a Condition precedent. Jenk. 305. pl. 79. cites D. 93. and Perk. 336.

2. There are three Things *incident to make a Leaſe good*, viz. 1ſt. A *Leſſor*. 2dly, A *Leſſee*; and 3dly, *A Thing to be let*. 3 Le. 32. pl. 60. Mich. 15 Eliz. C. B. Anon.

3. A Leaſe (which is nothing but Contract) cannot be good unleſs there be *Quid pro Quo*. Per 2 Juſt. Savil. 99. pl. 179. Hill. 31 Eliz. in Caſe of Sutton v. Dicons.

(B. b. 13) Leaſes.

Voidable. Made good by ſome After-Act.

1. A *Parſon leaſes for Life and dies*, and the *Succeſſor accepts Fealty*, this is good in Juris utrum during the Life of the Parſon that accepted the Fealty. Br. Leaſes, pl. 52. cites 11 E. 3. Fitzh. 3.

2. Note, Per Martin J. that where A. *leaſed for 10 Years to B.* and *after leaſed the ſame Year to C. for ſix Years. C. leaſed to D. for four Years, rendering Rent*, and brought Action of Debt for the Rent, and *B. ſurrendered*, and A. leaſed to the ſaid D. for other 10 Years; The Action does not lie, for the *Leaſe for ſix Years was extinct and void*, becauſe it was made during the 10 Years in ſuch Sort that *none of the ſix Years can continue till the firſt 10 Years were expired*, and therefore by Conſequence the Leaſe for four Years is void alſo; for where it is *void at the Commencement it cannot be made good after* by Matter Ex poſt Facto, viz. by the Surrender. Br. Leaſes, pl. 10. cites 6 H. 5. 8.

3. Leaſe *by Baron and Feme* is not void, but when the *Baron dies* the *Feme may accept the Rent*, or diſtrain, or make Avowry, and ſo either affirm or diſaffirm the Leaſe; but it ſhall be ſaid the Leaſe of both during the Coverture. Br. Leaſes, pl. 3. cites 3 H. 6. 53. Br. Leaſes, pl. 11. cites 22 H. 6. 24. S. P.

4. A. Ceſtuy que Uſe in Tail Male, on Condition that *if he diſcontinue*, or alien, *(otherwiſe than for 21 Years or three Lives) then* the Feoffees ſhould be ſeiſed *to the Uſe of B.* in Fee; A. made a Leaſe for 21 Years, and *after diſcontinued* againſt the Proviſo; Per two Juſtices, the Leaſe being made before the Condition broke was within the Power given, and good; But per one Juſtice, the ſecond Uſe determines the firſt Uſe and all Eſtates derived out of it. 4 Le. 161. pl. 266. in the Time of Q. Eliz. Harvey's Caſe.

5. If a *Diſſeiſin* be *to the Uſe of A. B. and C.* and firſt A. agrees to it, and then B. and afterwards C. though they took Nothing till Agreement, yet when they have agreed *their Agreement ſhall have Relation to the Time of the firſt Diſſeiſin*; and if in ſuch Caſe the Diſſeiſor had made a Leaſe before Agreement, the Party to whoſe Uſe after agreeing ſhould *avoid the Leaſe made by Diſſeiſor*. 2 Le. 223. pl. 233. Hill. 16 Eliz. C. B. in Mutton's Caſe.

6. Per

6. Per Manwood Ch. B. where a Leaſe is made *to be void for Non-payment* of Rent, if the Rent be behind the Leaſe is ſo clearly determined in Privity that *Waſte* does not lie, nor *Debt*, nor Diſtreſs for Rent after, nor Covenant for Covenant broke after. Mo. 295. pl. 440. Paſch. 32 Eliz. in Scacc. in Caſe of Sir M. Finch v. Throckmorton.

7. *Diſſeiſor* makes Leaſe for Years, and after *purchaſes a Releaſe*, yet he ſhall not avoid the Leaſe; But if Diſſeiſee had entered, and *enfeoffed Diſſeiſor*, by which the Eſtate had been defeated, it would be otherwiſe. Mo. 315. in pl. 455. Trin. 32 Eliz. in Scacc. in Englefield's Caſe.

8. In Caſe of a Leaſe delivered as an *Eſcrow*, if at the Time of the *firſt Delivery* the Leſſor be a *Feme Sole*, and *before the ſecond Delivery* ſhe *takes Baron or dies*, in ſuch Caſe for Neceſſity Ut Res magis Valeat to this Intent by Fiction of Law, this ſhall be a Deed ab Initio. 3 Rep. 35. b. Mich. 33 & 34 Eliz. B. R. in Caſe of Butler v. Baker.

Cro. E. 521. pl. 49. S. C. & S. P. held accordingly, and Judgment for the Plaintiff.

9. A. ſeiſed of a Wood in Fee grants the Wood *now growing for* 60 *Years* &c. or ſells the Wood growing &c. and he that has the Wood *before the Cut of them accepts a Leaſe of Land for* 13 *Years*, the Grantee of the Wood cannot take the Wood otherwiſe than Tenant for Years may; for by the Leaſe the Intereſt of the Wood is adjoined to the Land, and Parcel now of the Franktenement as they were before the Grant of them; Held by the better Opinion of the Judges. 2 And. 52. pl 38. in the Caſe of Ives v. Sammes.

D. 15. b. pl. 66. Marg.

10. If Tenant makes Leaſe for Years, and after is *attaint* of Felony, or dies without Heir, the Lord by *Eſcheat*, though he recovers by Writ of Eſcheat, ſhall not avoid the Term; Per Coke. 8 Rep. 45. a. Hill. 45 Eliz. in Whittingham's Caſe.

11. A *Condition in Law* by Force of a *Statute which gives Recovery*, is more ſtrong than a Condition in Law *without Recovery*; For if Leſſee for Life makes a Leaſe for Years, and after enters into the Land and does *Waſte*, and the Leſſor *recovers* in Action of Waſte againſt the Leſſee for Life, he ſhall avoid the Leaſe for Years before the Waſte committed; But if Leſſee for Life makes Leaſe for Years, and after enters and makes *Feoffment in Fee*, the Leſſor ſhall not avoid the Leaſe for Years; Per Coke. 8 Rep. 45. a. Hill. 45 Eliz. in Whittingham's Caſe.

12. If a Man makes a Leaſe *from Mich. for ſo many Years as J. S. ſhall name*, in this Caſe, if *J. S. (in the Life of the Leſſor) names a certain Term*, it is a good Leaſe by Matter Ex poſt Facto; And ſo it is of all Leaſes that are to commence on Condition precedent. 6 Rep. 35. b. Trin. 2 Jac. B. R.

Cro. C. 302. pl. 6. S. C. in B R. and the Judgment in C. B. reverſed.

13. A. *Tenant in Tail, covenants to ſuffer a Common Recovery to the Uſe of B. in Tail ſpecial*, Remainder over, but does not ſuffer any, but lets B. enter into the Land, and *B. makes a Leaſe for* 21 *Years to C.* Afterwards A. covenants to levy a Fine to the ſame Uſes, and the *Fine is levied* accordingly, and then *B. dies without Iſſue*, the Leaſe is not good againſt the Remainder-man; Adjudged in B. R. by which a Judgment in C. B. was reverſed. Jo. 315. pl. 3 Paſch. 9 Car. B. R. Blundell v. Baugh.

14. *Leſſee for Life leaſes for* 1000 *Years*, and after *purchaſes the Reverſion* and dies, his Heir ſhall avoid this Leaſe, becauſe it was the Leaſe which gave the Intereſt, and a Franktenement in greater Eſtate than any Term; But if *Leſſee for* 20 *Years leaſes for* 1000 *Years* by Deed, this is a Leaſe by *Eſtoppel*, and if Leſſor afterwards *purchaſes* the Fee of the ſaid Land, it binds both him and his Heirs. Jenk. 255. pl. 46.

(B. b. 14) Leaſes.

Conſtruction as to Leaſes of Woods.

See further 3. Bulstr. 290. & Clifford's case 11. Co. 46. b.

1. EXception of all Manner of Timber Trees, and Great Woods, is no Exception of the Herbage; Per 3 Juſtices againſt one. D. 79. a. pl. 48. Hill. 6 & 7 E. 6.

2. When Woods are *reſerved*, but not *by Names of Acres*, it ſeems that the Leſſee ſhall have the Profit of the *Herbage*, but it is good to be adviſed. D. 19. a. pl. 111. Trin. 28 H. 8.

3. Woods paſs to Leſſee if *not excepted*, and if Leſſor grants to another omnes Boſcos & Arbores ſuas, nothing paſſes, becauſe they paſſed to Leſſee; Arg. 4 Le. 139. pl. 273. in Englefield's Caſe.

4. A Leaſe was made of a Manor, with all Gardens, Orchards, Yards &c. and with *all the Profits of a Wood, except to Leſſor* 40 *Trees*, to take at his Pleaſure; Per Dyer, The Wood is not compriſed within the Leaſe, but the Leſſee ſhall only have the Profits, as Pawnage, Herbage, &c. and he ſaid it was a Caſe adjudged, that a Leaſe of a Wood was *ad faciendum maximum proficuum* meliori modo quo poterit, that the Leſſee thereby could not cut Trees, nor do Waſte. 4 Le. 8. pl. 37. Trin. 21 Eliz. in C. B. Anon.

A. demiſes, grants, and to Farm lets &c. together with all Manner of Timber, Wood, Underwood &c. except, and always reſerved, all great Oaks growing in Bl Acre, and about the Farm Houſe, to hold for 21 Years &c. Per 3 Juſtices againſt Dyer, Leſſee cannot cut the Timber Trees. D. 374. b. pl. 18. Hill. 23 Eliz. Anon.

(B. b. 15) Leaſes.

Of Goods and Land &c. Conſtruction thereof.

1. LEASE of a Houſe with divers *Implements* by Indenture, rendring Rent; Leſſor inteoffs a Stranger; Feoffee ſhall not have the Implements, but Leſſee ſhall enjoy them during his Term, and then *Leſſor* or his *Executors ſhall re-have them*. D. 212. b. pl. 38. Paſch. 4 Eliz.

2. Leaſe of Land and *a Stock of Sheep* for 20 Years, rendring Rent, and the Leſſee covenanted at the End of the Leaſe, to render back ſo many Sheep in Number as he took in Leaſe, viz. 1000 Sheep of three or four Years old. The Leſſor granted this Stock of Sheep over to another; The Leſſor or the Grantee ſhall have only ſuch as remain alive of the firſt Stock. Ow. 139. 28 Eliz. Wood v. Aſh.

Godb. 112. pl. 135. S C. held accordingly. —— Le. 42. pl. 54. Wood v. Foſter, S C. accordingly, and it was ſaid by Windham J. that if I let certain Sheep to one for two Years, now upon that Leaſe ſomewhat remains in me, but that cannot be ſaid a Property, but rather a Poſſibility of a Property, which cannot be granted over. —— Cro. E 59. S C. but S. P. does not appear. —— Palm. 249. Arg. cites S. C. that the new Stock ſhall not paſs to the Grantee, but only the old Stock.

3. If the Leaſe were of the *Stock, with Lambs, Calves and Pigs*, there the Increaſe belongs to the Leſſor. Ow. 139. Ibid.

4. They took a Difference where a Leaſe is made of *Dead Goods*, and where of *Living*. As to the Dead Goods, if any thing is added to them for Reparations or otherwiſe, the Leſſor ſhall have this Addition at the End of the Term, becauſe it belongs to the Principal; But in Caſe of a Stock of Cattle which has an Increaſe, as Calves, Lambs, &c. there theſe Things are ſevered from the Principal, and Leſſor ſhall not have them, for then he ſhall have the Rent, and the Leſſee no Profit. Ow. 139. Ibid.

(B. b. 16) Leſſor and Leſſee. Inter ſe.

1. A *Condition* ſhall be taken moſt favourably for the Leſſee. Cro E. 764. pl. 2. Trin. 42 Eliz. B. R. Grygg v. Moyſes

2 There is a great *Difference between an Action of Covenant and of Waſte*, and that Thing done may be a Breach of Covenant which ſhall not be Waſte; Per Doderidge J. 2 Bulſt. 113. Trin. 11 Jac. in Caſe of St. John v. Piott.

3. It is generally true, that Leſſee has no Power to *change the Nature of the Thing* demiſed; he cannot turn Meadow into Arable, nor ſtub a Wood to make it Paſture, nor dry up an ancient Pool or Piſchary, nor ſuffer Ground to be ſurrounded, nor Decay the Pales of a Park, nor deſtroy or drive away the Stock or Brood of any Thing, becauſe it diſinherits and takes away the Perpetuity of Succeſſion, As Fiſh, Deer, young Spring of Woods &c. He may better a Thing in the ſame Kind, as by digging a Meadow to make a Drain or Sewer to carry away the Water. Hob. 234. pl. 296. Hill. 15 Jac. in Caſe of Darcy v. Askwith.

4 A Leſſee may *build a Houſe where none was before*, but that muſt be every way at his own Charge; For he muſt neither take Timber, or other Things waſtable, neither to build or repair it, though it were never ſo needful; and yet if he keep it not in Repair an Action of Waſte lies, though the Writ be in Domibus dimiſſis; But if Leſſor build a Houſe after the Leaſe, the Leſſee is not bound to keep it in Repair. Hob. 234. pl. 296. Hill. 15 Jac. in Caſe of Darcy v. Askwith.

Cro. J. 478. pl 12. Hunt v. Dowman, S. C. adjudged, and Caſe lies if Leſſee diſturbs him in his Entrance.

5. Leſſor has Authority to *enter and ſee if Waſte* be committed, tho' it was not committed; Adjudged. 2 Roll Rep. 21. Paſch. 16 Jac. B. R. Hunt v. Dadvers.

6. If *Leſſee will not ſuffer Leſſor to enter upon the Land to ſee* &c. *Caſe lies* againſt him; Per Chamberlain J. 2 Roll Rep. 312. Paſch. 21 Jac. B. R. Anon.

7. Leſſee of a Houſe *leaves his Goods at the End of the Term in the Houſe*, Leſſor cannot fling them out, and yet if they fill the Houſe the Leſſor has Prejudice by it, and may have an Action on the Caſe for it, and if they periſh Leſſor ſhall not anſwer for them; Per Le Ch. J. 2 Roll Rep. 329. Trin. 21 Jac. B. R.

8. Leſſor and Leſſee agree for *Surrender of the Leaſe*, and Leſſee *delivers up the Key*, which Leſſor accepts, but afterwards Leſſor refuſes to accept the Surrender of the Leaſe; Decreed the Leſſee to be diſcharged of the Rent. 2 Vern. 112. pl. 109. Mich. 1689. Knatchbolt v. Porter.

(B. b. 17) Leſſor and Leſſee inter ſe. As to Repairs and Timber for it.

See Waſte M.

1. THE *Authority of the Termor* as to making Reparations is no other but to repair little Reparations, As to make Splents, Mudwalls, Hedges and Dykes, but not to make great and principal Reparations, As principal Timber, and Stone Walls, and Tyle, but Covering with Thatching he may; Per. two J. D. 26. a. pl. 35. Trin. 29 H. 8.

2. *Great Timber* ſhall be at the Coſts of Leſſor if *none be upon the Land*, nor any Default in Leſſee in ſufferring of the Great Timber of the Houſe to be corrupted and putrified for want of Covering; Per Montague and Hind J. Mo. 7 pl. 23. Paſch. 3 E. 6. Anon.

D. 314. a. pl. 94. Trin. 14 Eliz. Anon. S. P. leaves it a Quære. —— In ſuch Caſe the great Timber ſhall be at the Coſts of the Leſſor; Per Hutton J. Hetl. 78. Hill. 3 Car. in Coniers's Caſe.

3. If Leſſor *covenants that Leſſee may take* Trees for repairs *in other Lands not leaſed*, yet he may cut Trees growing on the Land leaſed, for the Covenant is not excluſive of the Benefit which otherwiſe he had by the Law. Mo. 23. pl. 80. Paſch. 3 Eliz. Anon.

Dal. 28. pl. 3 S. C. in totidem Verbis. —— D. 198 pl. 53. b. S. C. accordingly. —— Mo. 78. pl. 23. Paſch. 3 E 6. S. P. accordingly.

4. Leſſee covenanted not to diſturb the Leſſor in felling and carrying away Trees &c. *Leſſor cuts Wood* and puts it into his Cart, and *leaves it on the Land for a Month*, and then will carry it away; the Leſſee may diſturb him, for he may diſtrain it *Damage feaſant* for the Wrong to him; Per Doderidge. Palm. 504. Hill. 3 Car. B. R.

5 Leſſor ought to find or allow Leſſee ſufficient *Timber for the making Reparations*, if no Timber be on the Land leaſed, nor no Default in the Leſſee in ſuffering the great Timber to go to decay or putrify; Per Hutton J. Hetl. 78. Mich. 3 Car. C. B.

6. Covenant for Leſſee to repair, and that he may take fit and *convenient Timber &c. by the Appointment of the Bailiff* &c. and not otherwiſe; The Bailiff appointed Leſſee to cut fit and convenient Timber for the neceſſary Repairs &c. but mark'd out none himſelf for Leſſee; Leſſee cannot take by ſuch Appointments, eſpecially ſince the *Trees* were *excepted in the Leaſe*; but if there had been no Exception, and if the Bailiff would not appoint what was convenient, then the Leſſee might reſort to the general Liberty which is given him by the Law, viz. to take what is neceſſary. 2 Lutw. 1471. Hill. 10 & 11 W. 3. Talbot v. Woodhouſe.

7. A. *articled* with B. *to leaſe Lands* in Norfolk to B. *at* 30 *l. per Ann. Rent.* The Cuſtom in Norfolk throughout is, for the Landlord to repair during the Term. Per Cur. the Tenant being Plaintiff to have a Leaſe made, and it being *proved that* 30 *l. per Ann. is not the full Value*, a Leaſe was decreed, but the Tenant to covenant to Repair, and the Rent of 30 l. per Ann. to be ſubject to no Deductions, ſave only Parliamentary Taxes. 2 Vern. 231. pl. 210. Trin. 1691. Burrell v. Harriſon.

Chan. Prec. 25. pl 27. Burwell v. Harriſon S. C. accordingly; but the Court thought that the Caſe might have had a Different Conſtruction if the Defendant had been Plaintiff to have inforced the Leſſee to take a Leaſe.

(B. b. 18) Leſſor and Leſſee, and Aſſignee. Inter ſe.

1. A. *Leſſee for ſix Years* of a Tavern in London *leaſed to B. for three Years*, and it was covenanted between them, that during the three Years Quolibet Menſe the *Leſſee ſhould account to Leſſor for the Wine he ſold*, and ſhould pay for every Tun ſold ſo much; Afterwards *Leſſor granted the other three Years*, and Leſſee would not account, and in Covenant by Leſſor Leſſee pleaded he had accounted to the Aſſignee of three Years, and on Years, and on Demurrer joined the better Opinion of the Court was, that it was no Plea, becauſe it was *no Covenant that went on the Land* or the Reverſion, but was collateral Thing, and paſſed not by the Aſſignment of the three Years. Godb. 120. pl. 140 Hill. 29 Eliz. B. R. Anon.

Cro. E. 617. pl. 2. Mich. 40 & 41 Eliz. B. R. S. C & S. P.

2. Covenant lies againſt Aſſignee for not leaving the Premiſſes *repaired Ad finem Termini*, though the Term be ended before a Breach can be; Arg. Show 195. cites Cro. E. 300. [599. pl. 6. Hill. 40 Eliz. B. R.] Matuns [Matures] v. Weſtwood.

S.P. the Leſſee expreſsly covenanting for himſelf, his Executors and Aſſigns not to erect any Building to the Prejudice of the Leſſor's Lights. Cro. C. 188 pl. 8. Paſch. 6 Car. B. R. Batchelor v. Gage.——Jo. 223. pl. 3. S. C. adjudged.

3. *Covenant* lies againſt the firſt Leſſee upon Breach made by Aſſignee. Brownl. 20. Hill. 8 Jac. Fiſher v. Ameers.

Brownl 56. S. P. * For the Aſſignment does not take from the Leſſor his Advantage of the Expreſs Covenant. Cro. J. 309. pl. 8. Mich. 10 Jac. B. R. Barnard v. Godſcall.

4. If Leſſee *covenants that he, his* Executors Adminiſtrators, and Aſſigns, ſhall pay the Rent to the Leſſor; if he Aſſigns over his Term, and the Aſſignee pays the Rent to the Leſſor, yet the * Covenant lies againſt the firſt Leſſee, otherwiſe it is where *Rent is reſerved, and no Covenant to pay it*, if the Leſſor accepts the Rent of the Aſſignee, the Action will not lie againſt the Executor of the Leſſee. Brownl. 20. Hill. 8 Jac. Fiſher v. Ameers.

On ſuch Aſſignment and Reſervation by Indenture it was Reſolved that it was a Rent, and that Debt would lie for Leſſee againſt his Aſſignee, and alſo againſt the Aſſignee of his Aſſignee. Carth. 161, 162. Mich. 2 W. & M. in B. R. Newcomb v. Harvey.

5. *Leſſee aſſigns his whole Term reſerving a Rent*; this is not a Rent attending on the Reverſion, but is only due by *Contract*, and will be diſcharged by a Releaſe of all Demands by the Leſſee to the Aſſignee. Cro. J. 487. pl. 6. Trin. 16 Jac. B. R. Witton v. Bye.

6. Leſſee gave Bond to deliver poſſeſſion to Leſſor or his Aſſigns at the end of the Term; the Leſſor aſſigns his Intereſt and Aſſignee *requires Leſſee to perform the Condition*, who *anſwers that he knew not if he were Aſſignee* and ſo *refuſes*. Adjudged a Breach of the Condition; for he had taken upon him ſo to do, and it is not like a Condition annexed to an Eſtate, as 5 Rep. Mallory's Caſe. Poph. 136. Paſch. 16 Jac. B. R. Anon.

7. For *collateral Covenants* Action lies againſt the Leſſee only. Jo. 223. pl. 3. Paſch. 6 Car. B. R. in Caſe of Batchelor v. Gage.

8. Covenant that Leſſee and his Aſſigns ſhall *enjoy during the Term*, Leſſee aſſigns, a Stranger enters upon the Aſſignee, *Leſſee gives Aſſignee 40 l. in Satisfaction for his being ejected*, yet Covenant lies for the Aſſignee

Aſſignee againſt the Leſſor or his Executor, unleſs the 40 l. had been given in Satisfaction of the Covenant of Leſſor as was well as Leſſee. Sty. 300. Mich. 1651. Whitway v. Pinſent.

9. A. leaſes to B. a *Wine-Licence* for Years, rendering 41 l. per Ann. Rent; B. aſſigns to C. and C. for a valuable Conſideration aſſigns to D. who had *no Notice of the Rent*; A. ſhall not charge D. with the Rent, becauſe it is *only a perſonal Contract* which does not run with the Licence, As in Caſe of a Leaſe of a *Fair*, *rendering Rent*, an Action of Debt does not lie againſt the Aſſignee, and Æquitas ſequitur Legem, eſpecially where the Aſſignee is a *Purchaſor for a valuable Conſideration* without Notice of the Rent reſerved. Hardr. 88. pl. 6. Mich. 1656. in Scacc. James v. Blunk.

10. Aſſignee *of Rent (without the Reverſion)* reſerved on a Leaſe for Years ſhall have *Debt* againſt Leſſee for it. Lev. 22. Paſch. 13 Car. 2. Robins v. Cox. Raym. 11. S. C. —— 1 Keb. 1. S. C. —— Cro. E. 637. 651. S. P. in Caſe of Ards v. Watkins.

11. An *Aſſignee of a Reverſion brought Debt for Rent*; The Defendant *pleads that before any Rent became due, he aſſigned the Term to another*; Upon Demurrer it was adjudged by Keeling and Windham, contra Twiſden, for the Plaintiff, becauſe rhe Defendant did not allege that he gave Notice to the Plaintiff of this Aſſignment. Raym. 162. Mich. 19 Car. 2. B. R. Knight v. Buckley. Sid. 338 pl. 2. Kighly v. Bulkly S. C. held accordingly. — Lev. 215 Keightly v. Buckly, S. C, held accordingly, but ſays that Judgment was given for the Plaintiff by all the three. —— 2 Keb. 260. pl. 9. S. C. adjudged for the Plaintiff —— S. C. cited and denied per Curiam. 1 Salk. 81. pl. 2. Paſch. 4 W. 3. B. R. in Caſe of Pitcher v. Tovey, where a like Judgment was given in C B. but that Judgment reverſed in B. R. and Judgment given according to the Opinion of Twiſden. —— Show. 340. in S. C of Pitcher v. Tovey, and adjudged in B. R. that no Notice was neceſſary. —— 4 Mod. 76. in S. C the Court ſaid that the Cauſe of Kighly v. Bulkly upon the Point of Notice &c. was not adjudged upon much Debate, and therefore a Writ of Error was after brought upon it in the Exchequer-Chamber, and my Ld Hale, who was then Chief Baron, and Ld. Ch. Juſtice Bridgman were of the ſame Opinion with Juſtice Twiſden, that Notice was not neceſſary.

12. Twiſden and Rainsford J. ſaid, it might be queſtioned whether after Acceptance of the *Aſſignee* the Leſſor might not reſort to his Leſſee for his *Rent?* It is delivered in 3 Rep. 22. **Walker's Caſe** thus, Fuit Dit, not as a Reſolution, but adjourned. Vent. 99. Mich. 22 Car. 2. B. R. Dean &c. of Windſor v. Gower. And the Court agreed that the Leſſor might reſort back, but on Recovery by Action againſt the Aſſignee Moreton J. conceived the Leſſee diſcharged; to which the Reſt inclin'd. 2 Keb. 689. S. C.

13. *Leſſor refuſes to accept Aſſignee* for his Tenant, and gives his Receipts in Leſſee's Name, and after brings Debt againſt Aſſignee, and held good; for he may refuſe when he will and *accept when he will.* 2 Saund. 181. Mich. 22 Car. 2. Devereux v. Barlow.

14. *Leſſor* after Aſſignment of his Reverſion, and before any Rent due, *releaſes to Leſſee all Covenants*; yet in Action of Covenant by Aſſignee he ſhall recover the Rent; for the Court will intend the Action brought upon the *Reddendum*, which is a Covenant in Law, and runs with the Reverſion at Common Law before the Statute of 32 H. 8. and paſſes by the Grant of the Reverſion, ſo that the Leſſor cannot releaſe this after the Aſſignment. 2 Lev. 206. Mich. 29 Car. 2. Harper v. Burgh. 2 Jo 102. Harper v Bird, S. C. held accordingly,

15. Aſſignee of a Leſſee *aſſigns and keeps Poſſeſſion*; In Debt for Rent by Leſſor the Aſſignee of Leſſee pleads this Aſſignment; The Plaintiff replied *Fraud* &c. and per three Juſtices contra Scroggs Ch.

J. Judgment for the Plaintiff, viz. that Fraud in ſuch a Caſe may be *averred*. Vent. 329. 331. Trin. 30 Car. 2. B. R. Knight v. Freeman.

2 Lev. 231. S. C. adjudged for the Plaintiff.

16. Leſſor brings *Debt againſt Aſſignee of the Moiety of the Land for all the Term for a Moiety of the Rent* reſerved upon the Leaſe, and reſolved per tot. Cur. that the Action well lies. 2 Jo. 104. Paſch. 30 Car. 2. B. R. Gammon v. Vernon.

17. The *Aſſignee* of a Leaſe rendering Rent, *having enjoyed* the Land *ſix Years, aſſigns over*. The Bill was to call him to an *Account for the Rent* for ſuch Time as he enjoyed the Land; the Defendant pleaded a Judgment upon a Demurrer at Law; and the Plea was over-ruled; for though in Strictneſs of Law there is no Privity of Contract to charge the Aſſignee, yet in Equity he is moſt certainly chargeable for ſuch Time as he received the Profits. The Council alleged there were 20 Precedents in the Caſe; and the Ld. Keeper ſaid, if there had not been one he ſhould not have doubted to have made a Precedent in this Caſe. Vern. 165. pl. 155. Paſch. 1685. Treackle v. Coke.

1 Salk. 196. pl 1. Cole's Caſe, S. C. adjudged for the Plaintiff. — Carth. 232. Buſh v. Coles, S. C. adjudged for the Plaintiff. —— 12 Mod. 24. S. C. and per Cur. Covenant lies againſt Leſſee and Aſſignee too. —— 12 Mod. 24. S. C. held accordingly.

18. *Covenant* on a Leaſe, *excepting an Entry with Liberty to waſh in the Kitchen, and a Paſſage for that Purpoſe*; Covenant lies againſt the Aſſignee for hindering the Leſſee of his Paſſage, by erecting of a *Partition*. Show. 388. Paſch. 4 W. & M. Buſh v. Calis.

19. *Covenant* to *build a Houſe* upon Land demiſed, before ſuch a Day, *and to keep it in Repair*, was for Leſſee and his Aſſigns; and after the Day Covenant was brought againſt Aſſignee for not repairing; Defendant pleads the Houſe was not built before the Day; and upon General Demurrer, Judic pro Quer. It was agreed that this would not have bound Aſſignee, being for a new Thing without *expreſly naming him*. 12 Mod. 384. Paſch. 12 W. 3. Anon.

20. Original Leſſee muſt be *a Party to a Bill by Leſſor againſt Aſſignee* for paying Rent and Performance of Covenants; but where an Aſſignee has ſplit his Intereſt into a Multitude of Shares, the *Sharers* need not be made Parties. 2 Vern. 421. pl. 384. Paſch. 1701. The City of London v. Richmond.

1 Salk. 309. pl. 13. S. C. and Judgment Niſi for the Plaintiff, no Counſel attending on the other Side. —— Ld Raym. Rep. 553. S. C. and ſays this was afterwards argued at the Ch. Juſtice's Chamber, and after mature Deliberation the Plaintiff had Judgment. —— 1 Salk. 316 pl. 25. Trin. 9 Ann. B. R. Buckley v. Pirk S. P.

21. A. leaſes to B. for Years, B. *covenants to repair*, B. aſſigns to C. C. dies. D. adminiſters to C. and enters, and the Premiſſes are out of Repair; A. brings Covenant againſt D. *as Aſſignee of Leſſee*, and *not as Adminiſtrator of Aſſignee*; and adjudged that it was well brought. Carth. 519. Paſch. 12 W. 3. B. R. Tilney v. Norris.

Chan. Prec. 156. S. C. accordingly.

22. Aſſignee of a *perſonal Contract* for Liberty to bring Water to London muſt pay the Rent become due ſince his Aſſignment, and what ſhall grow due during his Poſſeſſion, but Equity will not decree him to pay the *Rent during the Continuance of the Leaſe*, for if he can *get rid of it* he may, and then he is no longer chargeable. 2 Vern. 421. pl. 384. Paſch. 1701. The City of London v. Richmond.

(B. b. 19) Aſſignee of Leſſor, and Aſſignee of Leſſee. Inter ſe.

1. LESSOR aſſign'd his Reverſion, and *before any Rent arrear* Leſſee aſſigned over his Term; Leſſee ſhall not be charged with the Rent after the Aſſignment; For no *Privity* is between the Bargainee and Leſſee but by Reaſon of the Privity of Eſtate, which being gone the Leſſee is not chargeable; but between Leſſor and Leſſee he ſhall not diſcharge himſelf by aſſigning over the Term. For the Privity is by Reaſon of the Contract and Reſervation rather than by the Occupation of the Land, which by his own Act he ſhall not diſcharge. But in this Caſe the Privity *is deſtroyed*. Cro. E. 328. pl. 1. Trin. 36 Eliz. B. R. Humble v. Glover.

Poph. 55. pl. 5. Humble v. Oliver. S. C. & S. P. agreed accordingly per totam Curiam.—— Brownl. 56. S. P. and ſeems to be S. C.—— Gouldsb. 182. pl. 119. S C. held accordingly.——Cro. E. 556. in pl. 11. S. C. cited by Gawdy as adjudged. ——S. C. cited Mo. 351. in pl. 472. as adjudged. ——S. C. cited Poph. 120. as adjudged.

2. Debt for Rent againſt an Executor; The Caſe was, the *Prebendary of T. let Land* for Years rendring Rent, which was confirmed by the Dean and Chapter; The *Executor aſſigns over his Term*, the *Prebend reſigns*, and a *new Prebend made*, who *brings Debt for Rent due after the aſſignment*; It was adjudged that the Action did not lie againſt him for the Rent due after the Aſſignment. Cro. E. 555. pl. 12. Paſch. 39 Eliz. B. R. Overton v. Syddal.

Poph. 120. S. C.—— Mo. 351, 352. pl. 472. cites S. C. that the Court was divided. ——Gouldsb. 120. pl. 6. S C. held by three Juſtices, contra Popham, that the Action would not lie.——Lev. 127. S. C. cited per Cur. that Privity of Contract does not go to the Succeſſor any more than to the Heir.

3. Aſſignee of a Reverſion granted over his Reverſion, and after brought *Covenant* againſt Aſſignee of the Term *for Rent arrear before the Grant of the Reverſion*; and on Demurrer tota Curia held, that if *at Common Law* the Aſſignee of a Reverſion had granted it over, yet he might after have an Action of *Debt for Rent*, though he could *not diſtrain* or have *Waſte*, becauſe his Power over the Land was determined. It is true, where a Man ſeiſed of a Rent in Fee grants it over, there he has no Remedy for the Arrears, becauſe the Diſtreſs, which was his only one, is gone by the Aſſignment, but where Rent is reſerved upon a Leaſe for Years it is otherwiſe, becauſe *Debt lies on the Contract*, and here Aſſignee ſhall have it as a Fruit fallen from the Reverſion. Jud' Pro Quer'. 12 Mod. 45. Mich. 5 W. & M. Midgleys v. Lovelace.

Carth. 189, 290. S. C. reſolved that the Action was maintainable.

4. The *Deviſee of a Reverſion* brought an Action of Covenant by *Arrearages* of Rent *incurred after the Death of a Teſtator* againſt the Defendant who was Aſſignee of a Term, the Defendant *pleads*, that *after the Arrearages incurred, and before* the *Action brought*, that the *Plaintiff had aſſigned the Reverſion* &c. to which the Plaintiff demurred, and it was adjudged for him, for the Arrearages were a Right veſted and attached in him before the Aſſignment; the which he ſhall not loſe by the Aſſignment. Skin. 367. pl. 13. Mich. 5 W. & M. in B. R. Anon.

(B. b. 20) Leſſor, Leſſee, and Under-Leſſee. Inter ſe.

Co. Litt. 233 b. ad finem S P. —The Reaſon is becauſe of Neceſſity the Action of Waſte muſt be brought againſt the Leſſee for Life, which in that Caſe muſt bind the Leſſee for Years, or elſe by the Act of the Leſſee for Life the Leſſor ſhould be barred to recover Locum Vaſtatum, which the Statute gives. Co. Litt. 234. a.

1. IF Leſſee for Life leaſes for Years, and after *Leſſee enters into the Land and does Waſte, and Leſſor recovers* in Action of Waſte againſt the Leſſee for Life, he ſhall *avoid the Leaſe* for Years made before the Waſte committed; But if Leſſee for Life makes Leaſe for Years, and after enters and *makes Feoffment in Fee*, the Leſſor ſhall not *avoid* the Leaſe for Years; ſo that a *Condition in Law* by Force of a Statute which gives a Recovery, is more ſtrong than a Condition in Law without a Recovery. 8 Rep. 45. a. Hill. 45 Eliz. in a Nota at the End of Whittingham's Caſe.

2. *Leſſee for Life makes a Leaſe for Years excepting the Wood, Underwood, and Trees* growing upon the Land; Reſolved it is a good Exception, though he has not any Intereſt in them, but as Leſſee, becauſe he is chargeable in Waſte, and to prevent that he may make the Exception; But if the Leſſee for Years aſſigns over his Term with ſuch an Exception, it is a void Exception. Cro. J. 296. pl. 2. Hill. 9 Jac. B. R. Bacon v. Gyrling.

3. Leſſee *covenants* that Under-Leſſee ſhall *enjoy without Impeachment* of him, or any other *occaſioned by his Means &c.* afterwards the Leſſor for *non Payment of Rent* by the Leſſee *entred upon the Whole*, and ſo avoided the Term of the Under-Leſſee. Adjudged a Breach of Covenant. Bulſt. 182. Paſch. 10 Jac. B. R. Stevenſon v. Powell.

Jo. 224. S. C. held accordingly.

4. A. Leſſee for 20 Years leaſed to B. for ſix Months, who *continued in Poſſeſſion after* the ſix Months expir'd, *and pulled down Windows &c.* A. may bring either *Treſpaſs or Caſe*; But properly in this Caſe it ſhould be Action on the Caſe, *to recover as much as he may be damnified*, becauſe he is ſubject to an Action of Waſte. Cro. C. 187. pl. 7. Paſch. 6 Car. B. R. Weſt v. Treude, alias Treſuſis.

5. If *Tenant for Life grants a Rent-Charge*, and after *ſurrenders his* Eſtate to the Leſſor, albeit the Eſtate charged be drowned, and the Leſſor is not in by him, yet he ſhall hold it charged. Co. Litt. 185.

6. A. leaſes to B. *Leſſee leaſes to C.—C. leaſes to D.*—D. is Under-Tenant to B. Lev. 144. Mich. 16 Car. 2. Burman v. Aſton.

Aſſignee of all the Term except a Week, is not liable at Law to the Covenants in the Leaſe, nor ſhall he be obliged in Equity. Arg. Ch. Prec. 157.

7. A. leaſes for Years to B.—B. *covenants to repair.* B. makes an Under-leaſe to C.—C. is in Poſſeſſion. C. is not liable to this Covenant in Law, nor bound by it in Equity, unleſs B. be *Inſolvent*; But in this Caſe there being Aſſets, A. had a proper Remedy againſt the Executors of B. at Law, who were not made *Parties*, nor brought before the Court; Bill diſmiſs'd. Vern. 87. Mich. 1682. Goddard v. Keate.

8. A. leaſes to B.—B. covenants to pay the Rent, and to repair. B. lets Leaſes to 100 Under-Leſſees. The Rent is behind, and the Premiſſes out of Repair; The *original Leaſe is avoided for Non-payment* of

of Rent. On a Bill by the Under-Leſſees to be reliev'd againſt the Forfeiture; Per Cur. this Court cannot decree *Apportionment* of the *head Landlord's Rent*, nor relieve the Plaintiffs, but on the Payment of all Arrears, and repairing the Premiſſes; But having ſo done they may compel the Reſt to *contribute.* 2 Vern. 103. pl. 99. Trin. 1689. Webber v. Smith.

9. Leſſee of a *Church Leaſe* grants an Under-leaſe; he brings a Bill againſt Under-Leſſee to *ſurrender his Leaſe, to enable him to renew*, offering to make a new Leaſe for the Term to come, and under the ſame Rent &c. Per Cur. There being *no Covenant* in the Under-leaſe to compel a Surrender for Renewal, the Court cannot compel him, and diſmiſs'd the Bill. 2 Vern. 383. pl. 350. Mich. 1700. Colcheſter v. Arnet. Chan. Prec. 124. S. C.

10. *Stat.* 4 *Geo.* 2. *cap.* 28. *S.* 6. *In Caſe any Leaſe ſhall be ſurrendered in order to be renewed, and a new Leaſe executed by the chief Landlord, the new Leaſe ſhall, without a Surrender of the Under-leaſes, be as valid, as if all the Under-leaſes had been ſurrendered; and every Perſon in whom any Eſtate for Life, or Years, ſhall be veſted by Virtue of ſuch new Leaſe, ſhall be entitled to the Rents and Duties, and have like Remedy for Recovery thereof, and the Under-Leſſees ſhall hold and enjoy the Tenements, as if the original Leaſes had been kept on Foot; and the chief Landlord ſhall have the ſame Remedy, by Diſtreſs or Entry, for the Rents and Duties reſerved by ſuch new Leaſe, ſo far as the ſame exceed not the Rents and Duties reſerved in the Leaſe out of which ſuch Under-leaſe was derived, as they would have had in Caſe ſuch former Leaſe had been continued, or the Under-leaſes had been renewed under ſuch new Leaſe.*

(B. b. 21) Leaſe for Years by Parol.

See the Stat. of Frauds &c. at tit. Contract (H) and the Notes there.

1. A Promiſe and Agreement to *aſſign a Term* is within the Act as well as Intereſts created De Novo out of an Eſtate. Vent. 362. Hill. 33 & 34 Car. 2. B. R. Anon.

2. It was ruled by Holt Ch. J. at Lent Aſſizes at Kingſton 1699. that ſuch *Leaſe for three Years* of Land, as will be good without Deed *within the* 29 *Car.* 2. *cap.* 3. *muſt be for three Years to be computed from the Time of the Agreement*, and *not* for three Years to be computed *from any Day after.* Ld. Raym. Rep. 736. Rawlins v. Turner. A Leaſe for three Years to commence in futuro, by Parol, is not warranted by the Statutes of Frauds and Perjuries; Per Holt Ch. J. 12 Mod. 619. Hill. 13 W. 3. Anon.

3. *Leaſe Habend' de Anno in Annum & ſic ultra quandiu ambabus Partibus placuerit*, to commence *from Lady-Day* 1703, rendring an Annual Rent, payable Quarterly; the *Leſſee entered and died* the 17th of *December* 1706, and the Rent for a Year and a half, ending at Chriſtmas before, was arrear, for which the Leſſor entered and diſtrained, to this the Plaintiff demurred. Per Cur. the *third Year is not in the Nature of a diſtinct Intereſt*; Therefore the Leſſor may diſtrain the third Year for the Rent of the ſecond, and ſuch executory Contract is not void by the Statute of Frauds, becauſe there is no Term for above two Years ſubſiſting at the ſame time, and there can be *no Fraud to a Purchaſor*;

For the utmoſt Intereſt that can be to bind him can be only one Year. Holt's Rep. 417, 418. pl. 9. Hill. 7 Ann. Legg v. Strudwick.

(C. b) Forfeiture.

Of what Eſtate Forfeiture may be.

1. Leſſee for Life, **Remainder in Tail,** Remainder in Fee to the Right Heirs of Leſſee, **and he** makes a Feoffment, **this is a Forfeiture of his Eſtate for Life.** 42 E. 3. 18. * 50 E. 3. 4.

* And Remainder in Tail may enter for Alienation to his Diſinheritance. Br. Waſte, pl. 56. S. C.——S. P. by Popham Ch. J. Poph. 84 cites 41 E. 3. ——But if Copyholder for Life ſurrenders to the Uſe of another in Fee it is no Forfeiture; For it paſſes by Surrender to the Lord, and not by Livery. 4 Rep. 23. a. pl. 4. Paſch. 35 Eliz. B. R. Bullock v. Dibley.——So if Copyholdet ſuffers a Recovery as Tenant in Fee. Mod. 199. pl. 31. Paſch. 27 Car. 2. C. B. Bird v. Kirk.——See tit. Copyhold.

2. If Tenant in Tail after Poſſibility alien in Fee, or for another's Life, **this is a Forfeiture, becauſe he has in Effect but for Life.** * 39 E. 3. 16. 3 H. 6. 52. ‡ 10 H. 6. 1. b. † 45 E. 3. 25. 11 H. 4. 15. **Littleton** 7. b. § 29 Aſſ. 64. **admitted** 32 Aſſ. 9. **admitted by Iſſue.** 43 Aſſ. 24. **adjudged by Admittance.**

* Br. Entre Cong. pl. 40 cites S. C.—Br. Forfeiture, pl. pl. 21. cites S. C.——

2 Le. 60. in pl. 89 cites S. C. but not S P.——‡ Fitzh. Ayde, 67. cites S. C. —— Br. Forfeture de terres, pl. 88. cites S. C. —Br. Waſte, pl. 43 cites S. C.——Br. Entre Congeable, pl. 12. cites S. C. & S. P. but contrary of the Iſſue of Tenant in Tail.

† Fitzh. Aſſize, 292. cites S. C.

3. Land is *given to two, and to the Heirs of one*, and *Ceſtuy que Vie aliens in Fee*, the other may enter for a Forfeiture, and that though they are Jointenants, nevertheleſs it appears elſewhere that he ſhall not have an Action of Waſte againſt him who has not but for Life; for their Intereſts commenced together. Br. Entre Cong. pl. 113. cites 16. Aſſ. 11.

4. If Ceſtuy que Uſe in Tail makes a Feoffment in Fee, this ſhall bind him during his Life and his Feoffees by the Stat. of Uſes 1 R. 3. and after his Death the Heir or Feoffee may enter, and ſo it is only a Grant of his Eſtate; and ſo if *Ceſtuy que Uſe for Life makes a Feoffment* it is good for his Life, and is no Forfeiture, for a *Uſe* cannot be forfeited, but a Thing in Poſſeſſion or *Seiſin* only, and not a Uſe. Br. Feoffment &c. pl. 22. cites 4 H. 7. 18.

But if Tenant for Life or Years of Lands, the Reverſion or Remainder being

5. A *particular Eſtate* of any thing that *lies in Grant* cannot be forfeited by any Grant in Fee by Deed, As if Tenant for Life or Years of an Advowſon, Rent, Common, or of a Reverſion, or Remainder of Land by Deed, grant the ſame in Fee, this is no Forfeiture of their Eſtates; For that nothing paſſes thereby but that which lawfully may paſs. Co. Litt. 251. b.

in the King, makes a Feoffment in Fee, this is a Forfeiture, and yet no Reverſion or Remainder is deveſted out of the King; And the Reaſon is, becauſe of the Solemnity of the Feoffment by Livery tending to the King's Diſherſion. Co. Litt. 251. b.

6. If a *Tenant for Life makes a Leaſe for Life, or a Gift in Tail, or a Feoffment in Fee upon Condition and enters for the Condition broke*, yet the Forfeiture

Forfeiture remains; *So* it is *of Tenant in Tail apres Poſſibility*, Tenant *by the Curteſy*, Tenant *in Dower*, *or* of him *that has an Eſtate to him and his Heirs*, *during the Life of J. S.* &c. And *ſo of Tenant for Years*, Tenant *by Statute Merchant*, Statute *Staple*, *or Elegit*. Co. Litt 252. a.

7. *By Matter in Fact*, *a particular Tenant* may commit a Forfeiture, as well as by Matter of Record; By Matter in Fact he *cannot commit a Forfeiture*, *if the Reverſion be not thereby pulled out of him in the Reverſion*, As if *Leſſee for* 10 *Years makes a Leaſe for* 1000 *Years*, the ſame is no Forfeiture, for by that the Reverſion is not touched, but if he in by Matter of Record do any thing which ſounds to the Diſinheriting of him in the Reverſion, although in Truth it does not touch the Inheritance, yet it is a Forfeiture; Arg. 2 Le. 60. pl. 89. Paſch. 31 Eliz. In the Exchequer, in Sir William Pelham's Caſe cites 39. E. 3 16.

And ſee ibid to pag 67. abundance of Caſes cited out of the old Books to Forfeitures.

8. A. *Tenant for Life*, the Remainder to B. in Fee. A. *makes a Leaſe for Years to J. S. who entred. Afterwards A. granted the Reverſion to W. R. Habendum tenementa prædicta from Mich. next for Life of A.* and *J. S. attorns. W. R. enters* and makes a Leaſe at will to J. N. *A. levied a Fine* come ceo &c. *B. entred.* Reſolved, that if the Fine had been levied to W. R. who was a Diſſeiſor, B. might enter for the Forfeiture, and that ſo he might upon J. N. the Tenant at Will, for that the Fine levied to him was a Forfeiture. Mo. 423. pl. 591. Paſch. 37 Eliz. C. B. Buckler v. Harvey.

9. Tenant for *Life*, *Remainder for Life*; a Fine from the firſt to the ſecond is a Forfeiture of both their Eſtates. 2 Lev. 202. Trin. 29 Car. 2. B. R. Smith v. Abell.

2 Jo. 65. S. C. the Court thought the Accceptance of the Fine is a Forfeiture of Remainder, but adds a Quære, if any Judgment was given.——Freem. Rep. 434. pl. 587. S. C. Curia adviſare vult.——3 Keb. 687. pl. 14. S. C. adjornatur.——Ibid. 733. pl. 23. S. C. & S. P. admitted.

10. The *King's Tenant at Will* may forfeit, for it may be the King's Will not to determine the Eſtate till a Forfeiture; he will firſt *inform himſelf by Inquiſition*, on Record, whether the Party hath well behaved himſelf or no, before he will determine his Intereſt which was Sir J. Savages; When there is a *Conviction on Record* it is a Forfeiture, though it he be an Officer for Life there muſt be Scire Facias; Per Holt Ch. J. 12 Mod 79. Trin. 7 W. 3. in Caſe of The King v. Kemp.

Carth. 350. S. C & S. P. by Holt Ch. J. that the King does not arbitrarily take Notice of Forfeitures of Eſtate by Misbehaviour, but by way of Inquiſition on which the Misbehaviour is found and returned.

(D. b) Eſtate for Life or Years.

See tit. Baron and Feme and tit. Cui in Vita.

Forfeiture. What Perſon may commit Forfeiture.

[*Baron and Feme.*]

1. IF Baron and Feme Tenants for Life make Feoffment, this is a Forfeiture during the Coverture. 45 E. 3. 21. b. 18 E. 3. 39.

2. So it ſhall be a Forfeiture during the Coverture where the Baron is ſeiſed in Right of his Wife, and the Baron and Feme make a Feoffment.

3. So

3. So if **Baron and Feme Tenants for Life are, and the** Baron alone makes Feoffment, **this is a Forfeiture during the Coverture.** 29 Aſſ. 43. 43 Aſſ. 17 **adjudged, 45 adjudged.**

4. But **in thoſe Caſes it ſhall** not **be any Forfeiture** againſt the Feme after the Death of the Baron. 45 E. 3. 21. **b.** 29 Aſſ. 43. **adjudged,** 43 Aſſ. 17. 8 **Rep.** 44. **b.** *Whittingham's Caſe.*

5. But if Baron **poſſeſſed of a Term in the Right of the Wife** forfeits the *Term, this ſhall bind the Wife, **becauſe he might diſpoſe of the Term at his Pleaſure.** *7 H. 6. 2. b. † 9 H. 6. 52.

* Fol. 852.

* Br. Forfeiture, pl. 69. cites S. C. & S. P. for it is only a Chattel. † Br. Forfeiture, pl. 76. cites S C. but that is where the Baron is ſeiſed of Land in Right of the Wife, and diſclaims in Avowry, or claims Fee in Quid Juris clamat and dies, the Land ſhall be loſt by the Diſclaimer of the Baron. —— Br. Charge, pl. 1. cites S. C. & S. P. as to a Term.

6. **If Baron and Feme, Leſſees** for Life in Right of the Feme, accept a Fine come ceo **&c. of a Stranger, this ſhall not be any Forfeiture againſt the Feme after the Death of the Baron, becauſe ſhe was** not examined **upon this Fine.** D. 3 & 4 M. 148. 89. [pl. 79.]

7. If a Man has *a Reverſion in Right of his Wife*, and *aliens it by Fine*, and the *Tenant attorns*, and the *Baron dies*, the Feme may enter for the Forfeiture by reaſon of the Attornment, where the Feme was not Party to the Fine. Br. Forfeiture de terres, pl. 117. cites 4 E. 3. 36. and Fitzh. Aſſiſe 166.

8. If *Baron alone grants the Reverſion of his Feme*, and the *Tenant attorns, and the Baron dies*, the Feme may enter; Quære inde; For ſuch Grant is no Diſcontinuance, and therefore it ſeems that it is no Forfeiture. Br. Forfeiture de terres, pl. 100. cites 27 E. 3. 27.

9. If Feme, Tenant for Life, takes *Baron*, who *aliens in Fee*, and he in the Reverſion enters, and the Baron dies, the Feme ſhall recover the Land. Br. Baron and Feme, pl. 86. cites 29 Aſſ. 43.

S. P. And this by Petition, if it be in the Hands of the King, and by Cui in Vita if it be in the Hand of him in Reverſion. Br. Forfeiture de terres, pl. 35. cites S. C.

10 Lands were given *to R. and J. his Feme, and to the Heirs of R.* and R. and J. *have Iſſue C.* and *C. takes to Baron D.* and after J. gives gives the Land to C. and D. her Baron *in Tail*, the *Remainder to the Heirs of D.* and held a Forfeiture of the Eſtate of J. by the beſt Opinion, and that the Feme ſhall be adjudged in her beſt Eſtate in Fee, and yet ſhe died, and the Baron ſurvived her, therefore it ſeems no Forfeiture by reaſon that the Baron is joint with her; and ſhe cannot make Claim againſt her Baron in the Life of the Baron. Br. Forfeiture de terres, pl. 22. cites 39 E. 3. 29.

11. If Land be given *to A. and B. and C. his Wife, and to the Heirs of the Body of B. and C.* and after the *Donor releaſes to A. and B. and C. in Fee*; in ſuch Caſe, *if B. dies leaving Iſſue, and A. aliens in Fee*, there C may enter. Br. Entre Cong. pl. 87. cites 45 Aſſ. 7.

12. If the *Baron be ſeiſed in Jure Uxoris*, and *diſclaims in Avowry, or claims Fee* in Quid Juris clamat and dies, yet the Land ſhall be loſt by Diſclaimer of the Baron; Per Marten, ad quod non fuit reſponſum. Br. Forfeiture de terre, pl. 76. cites 9 H. 6. 52.

13. If *Feme Tenant for Life takes Baron*, and *are impleaded*, and *pray Aid of a Stranger*, and the *Baron dies*, he in the Reverſion cannot enter; For this is the Act of the Baron. Br. Baron and Feme, pl. 86. cites 15 E. 4 29.

14. *Termor* for 1000 Years makes Feoffment, and Letter of Attorney to make *Livery*; Attorney makes Livery, the *Leſſor being preſent* on the Land

Land, and not contradicting it, this is a Forfeiture. D. 362. b. 20. and in Marg. cites Paſch. 35 Eliz. B. R.

15. Baron and Feme, Tenants for Life, make a Leaſe for Years, being *ſo out of Poſſeſſion levy a Fine* come ceo &c. it is Forfeiture. Mo. 424. pl. 591. Paſch. 37 Eliz. C. B. Buckler v. Harvy.

16. Tenant *by Statute* may forfeit by making a Feoffment; Per Ventris J. 2 Vent. 328. cites Mo. 603. [pl. 833 Trin. 42 Eliz. in Canc. Burgh's Caſe].

(E. b) Leaſe for Life or Years. Forfeiture.

By Matter of Record.

1. IF a Man leaſes at Will, and after grants a Rent-charge in Fee to another, **this is not any Determination of the Will; Admitted.** 11 H. 6. 28. 33. **But Quære, for what Remedy ſhall the Grantee have for the Rent, for he ſhall not diſtrain the Beaſts of the Leſſee if the Leaſe continues, becauſe he comes paramount to the Charge.**

2. If *Tenant for Life be impleaded by Writ of Right*, and *joins the Miſe*, he in Reverſion may enter; Per Hales; Quod non negatur. Br. Forfeiture de terres, pl. 77. cites 9 H. 5. 14.

3. *Leſſee for Years* in Action of Debt againſt him for Rent reſerved, *claimed Fee by Bargain and Sale* of his Leſſor; The Plaintiff traverſed the Bargain and Sale, yet it is a Forfeiture by the very Claim which cannot be ſaved by Matter ſubſequent. 3 Le. 169. pl. 220. Mich. 29 Eliz. C. B. Dixſey v. Spenſer. Mo. 211. pl. 352. Dixey's Caſe, S. C. adjudged a Forfeiture. —— Godb. 105. pl. 124. Anon. ſeems to be S. C. and by Walmſley and Fenner, where he claims in Fee Generally, and it is found againſt him, there perhaps he ſhall forfeit his Eſtate; but where he *ſhews a ſpecial Conveyance which reſts doubtful in Law*, it is no Reaſon that his Eſtate thereby ſhould be forfeited, though it be found againſt him. But Rodes cited 6 R. 2. Quid Juris clamat 20, where the Tenant claimed by ſpecial Conveyance, and yet it was a Forfeiture; But in the Principal Caſe he and Windham agreed clearly that it was no Forfeiture. —— In Debt againſt Leſſee for Years for Rent the Defendant claimed Fee in the Land whereas he had no Fee; Reſolved to be a Forfeiture. 4 Le. 3. pl. 12. Paſch. 30 Eliz. Barkhouſe's Caſe.

(F. b) Eſtate for Life or Years.

Forfeiture.

What ſhall be Forfeiture by Matter of Record.

1. IF Leſſee for Life in a Quid Juris clamat attorns **to the Grant by Fine of one who had nothing in the Reverſion, this is a Forfeiture, for he by this acknowledges the Reverſion in a Stranger.** * 27 E. 3. 77. But not *where it is by Judgment of the Court*; Per Anderſon. Ow. 147. Holt v. Liſter. —— Cro. E. 757. S. C. agreed per tot. Cur. —— 2 And. 30. in pl. 19. S. P. * Fitzh. Quid Juris clamat, pl. 34. cites S. C. —— S. C. cited by Manwood 2 Le. 66.

Fitzh. Quid Juris clamat, pl. 34 cites S.C.

2. **If Leſſee for Life be,** the Reverſion over jointly to Baron and Feme, **and the** Baron alone aliens **the Reverſion** by Fine, **and the Conuſee brings** Quid Juris clamat, and the Leſſee attorns to the Grant, **this is a** Forfeiture to the Feme, **and ſhe ſhall have Advantage of it after the Death of her Baron, becauſe the Leſſee by the Attornment has acknowledged the Reverſion in a Stranger.** 27 E. 3. 77.

Jo. 389, 391. S. C. & S. P. agreed and cited 15 E. 4. 9 [a.] 14 E. 3. Avowry 217, or 117. 31 E 3. Grant 6. [60] and Co. Litt. 251. [b].

3. **If Tenant for Life** of an Advowſon in Groſs levies a Fine come ceo &c. **of it, this is a Forfeiture though it does not deveſt the Reverſion. Trin. 13 Car. B. R. between** *Spring and Sir Julius Cæſar*, **Maſter of the Rolls, adjudged per Cur. without Doubt, and would not ſuffer it to be argued in a Writ of Error upon a Judgment in Bank in a Quare Impedit.**

4. *Leſſee for Life* of a *Rent* grants it in Fee by a *Fine*; Walmſley J. cited a Judgment that it was no Forfeiture, and Glanvil vouched 31 E. 3. Grant. 60. to the contrary, and 15 E 4. 9. by Littleton. If Leſſee for Life of a Rent grants it by Fine in Fee, it is a Forfeiture by Reaſon of the Eſtoppel, otherwiſe if it were by *Deed*. Ow. 147. cites 1 H. 7. 12.

Le. 264. pl. 354. S. C. it was held to be a *Forfeiture committed by the Bargainee* and not by the Bargainor, who at the Time of the Fine had nothing to forfeit.

5. *Tenant for Life of another bargain'd and ſold* his Lands *to A. and his Heirs by Deed indented and inrolled*, and afterwards *levied a Fine to the Bargainee Sur Conuſance come ceo* &c. Per tot. Cur. This is a Forfeiture of his Eſtate; For when the Bargainee, being now Tenant for Life of another, accepts ſuch Fine of a Stranger, he admits the Fee in him by Matter of Record; but *otherwiſe* it is *of a Fine Sur Releaſe*. 4 Le. 217. pl. 350. Trin. 19 Eliz. B. R. Anon.

6. If a *Stranger brings Waſte* againſt Tenant for Life, and he *pleads Nul Waſte fait*; Or if Tenant for Life *prays in Aid of a Stranger*, theſe are Forfeitures; Per Anderſon. Cro. E. 451. pl. 18. Mich. 37 & 38 Eliz. C. B. in Caſe of Buckler v. Harvey.

Mo. 423. S. C. —— Cro. E. 450. 585. S. C.

7. Tenant for Life makes Leaſe for Years, and after grants Land to another, habend' after the Leaſe for Years determined, during the Life of Leſſor; *One enters on the Land, ouſts Leſſee for Years, and diſſeiſes the Tenant of the Freehold*; after which Leſſor for Life levies *a Fine with Proclamation* of this Land to the Diſſeiſor, Reverſioner in Fee may enter for a Forfeiture. 2 And. 29. pl. 19. Mich. 28 & 29 Eliz. Buckley v. Hardy.

J. S. ſuffered a Common Recovery in which A. is vouched, and the Recovery executed, and all this was before the Statute 14 Eliz. and adjudged a Forfeiture 2 Le. 60 to 66. Sir Wm. Pelham's Caſe. —— This Bargain and Sale was by Deed indented and inrolled, and Clerk J. held, that when Tenant for Life bargains and ſells his Land by Deed inrolled, although no Fee paſſeth, yet it is a Forfeiture, and that by Reaſon of the Inrollment, which is Matter of Record. But by Manwood Ch. B. as to what my Brother Clerk hath ſaid, that the Bargain and Sale in this Caſe is not any Forfeiture, but when the Bargain and Sale is inrolled then it is a Forfeiture, I am not of ſuch Opinion; for although that the Inrollment be of Record, yet the Deed is not of Record; for againſt a Deed inrolled a Man may plead Infancy, although none can plead Non eſt Factum. Alſo he held that although by the Bargain and Sale, and the Inrollment of it, the Bargainee had not a Fee, for by ſuch Act the Reverſion is not removed, yet by the Recovery and the Execution of it, the Bargainee hath gained a Fee out of the Leſſor; for the Recovery is to the Uſe of the Bargainee againſt whom it was had. 2 Le. 64, 65. in Sir Wm. Pelham's Caſe. —— 4 Le. 123. pl. 251. S. C. in totidem Verbis.

8. *A. Leſſee for Life bargains and ſells* the Land *to J. S. and his Heirs*, and after he *ſuffers a Common Recovery to the Uſe of the Bargainor*, and the Queſtion was, if the Recovery was a Forfeiture? And upon Argument of Manwood Gent and Clark, it was adjudged a Forfeiture. Mo. 271. pl. 423. Mich. 30 & 31 Eliz. Page v. Griffith.

10. *Tenant for Life, Remainder for Life,* he in *Remainder for Life reciting that he had the Eſtate in Fee, levied a Fine* Sur Cognizance de Droit come ceo, As if he had a Fee Simple; the Conuſee brought a *Quid Juris Clamat* againſt the Tenant for Life, who not appearing, he was adjudged to attorn to the Conuſee; All the Court agreed, that by this Attornment the Tenant for Life had not forfeited his Eſtate, becauſe it was by *Compulſion of the Court*; and Walmſley and Kinſmill held, that the Remainder for Life had not forfeited his Eſtate by levying the Fine, becauſe it was no Diſcontinuance, for nothing paſſed but what he might lawfully paſs; but the Ch. J. and Glanvill were of a contrary Opinion as to this Point, for that the Forfeiture is not only where there is a Diſcontinuance, but where the Party doth *any Act in a Court of Record whereby his Will may appear to diſinherit him in Reverſion.* Cro. E. 757. pl. 25. Paſch. 42 Eliz. C. B. Holt v. Lyſter.

9. In the Caſe above it was much diſputed between Walmſley and Glanvill, if *Leſſee for Life of a Rent grants* this *in Fee by Fine*, if this be a Forfeiture; and Walmſley vouched a Judgment that it was no Forfeiture; and Glanvill vouch'd 31 Ed. 3. Grant. 60. to the contrary; and 15 E. 4. 9. by Littleton, if Leſſee for Life of a Rent grants this by Fine in Fee, it is a Forfeiture, by Reaſon of the Eſtoppel; otherwiſe if it were by Deed. Ow. 147. Paſch. 40 Eliz. C. B. in Caſe of Holt v. Liſter cites 1 H. 7. 12.

Co. Litt. 251. b. holds that the levying a Fine of a Rent or Common, or any other Thing that lies in Grant, is a Forfeiture; and in Marg. cites Same Caſes as are here cited by Glanvil; and ſo notes a Diverſity between a Grant by Fine which is of Record, and a Grant by Deed in Pais.

11. There is a *Difference between a Deputy* and an *Aſſignee*; For an Aſſignee can *forfeit* but his own Eſtate, but a Deputy ſhall forfeit the Eſtate of his Maſter; and therefore if a Steward *grants his Office for Life* where he has the Office in Fee, the Grantee ſhall forfeit no more than his Eſtate for Life; Arg. 4 Le. 244. pl. 397. Paſch. 8 Jac. C. B. in Caſe of E. of Rutland v. Spencer.

12 *Common Recovery* by Tenant for Life *though reverſed* is a Forfeiture; Per tot. Cur. Sid. 90. pl. 10. Mich. 14 Car. 2. Leſtrange v. Temple.

13. Forfeiture *of a Particular Eſtate is either by Matter in Pais or of Record*; a *Forfeiture in Pais is of Things that lie in Livery when a greater Eſtate paſſes than the Tenant can lawfully make*, whereby the Reverſion or Remainder is deveſted. If Tenant for Life and Remainder-man for Life join in a Feoffment, both their Eſtates are forfeited. If Remainder-man for Life diſſeiſes Tenant for Life, and makes a Feoffment, this forfeits the Right of his Remainder. If King's Tenant for Life or Years makes a Feoffment, the Solemnity of the Livery, tending to the King's Diſheriſon, is a Forfeiture, though the King's Eſtate cannot be deveſted; but no Grant by Deed can forfeit Things lying in Grant. Hawk. Co. Litt. 335.

14. Forfeiture *by Record is by Alienation, as Fine and Recovery*, whether it deveſts the Reverſion or Remainder, as in Caſe of Things lying in Livery, or deveſts them not, as in Caſe of Things lying in Grant; But a *Deed inrolled* cauſes no Forfeiture, becauſe the Deed itſelf which makes the Conveyance is merely Matter in Pais, though it be afterwards recorded. Hawk. Co. Litt. 336.

15. 2dly, *By Claim either expreſs*, As when *Tenant for Life claims Fee in Court of Record*, or *Leſſee for Years brings Aſſiſe; or implied, As when Tenant for Life joins the Miſe on the mere Right*, or Leſſee for Years loſes in a Præcipe, and brings Error for Error in a Proceſs; For a Writ of Error to reverſe a Recovery of a Freehold lies for the Tenant of the Freehold only, and therefore it is a Forfeiture for Leſſee for Years to bring

bring it; So that where Leſſee for Years is ſummoned and loſes by Default, he has no Remedy; but if he were ſummoned and did appear, he might have pleaded in Abatement, that no Tenant of a Freehold was named in the Writ; if he were not ſummoned, I ſuppoſe that he might have an Action grounded on the Deceipt. Hawk. Co. Litt. 36.

16. 3dly, *By affirming the Reverſion or Remainder to be in a Stranger*, As praying in Aid of, or attorning to the Grant of, a Stranger, (but the Tenant ſhall not forfeit his Eſtate by attorning in Pais) or by confeſſing the Action in a Caſu Proviſo brought by a Stranger, or by pleading covenouſly to the Diſheriſon of him in Reverſion or Remainder, or by pleading Nul Waſt fait, in an Action of Waſte done by a Stranger, or by accepting a Fine of a Stranger ſur Conuſance de Droit come ceo que il ad de ſon done. Hawk. Co. Litt. 336.

17. *Every particular Tenant may forfeit*, whether for Life or Years, or by Execution, As Tenant by Statute-Merchant &c. and Tenant in Tail apres &c. and Leſſee to him and his Heirs for Life of J. S. If Tenant for Life make a Leaſe for B's Life, or on Condition, and B. dies, or the Condition be broken, yet the Forfeiture remains. Hawk. Co. Litt. 337.

S. C. cited 2 Vern. 56. Arg.

18. A wilful Forfeiture by *ſuffering a Recovery*, in Point of Law by Tenant for Life, was *relieved in Equity* on the Foot of an *Agreement precedent* to the Recovery by the Anceſtor, ſince dead, to make the Tenant for Life Tenant in Tail. Chan. Caſes 49. Paſch. 16 Car. 2. Goodrick v. Brown.

2 Lev. 202. Trin. 29 Car. 2. S. C. the Court without Argument held it a Forfeiture of both their Eſtates; of the one by the Gift, and of the other by Acceptance of ſuch Eſtate. —— Freem. Rep. 434. pl. 587. S. C. adjornatur.

19. *A. Tenant for Life*, Remainder *to* B. *for Life*, Remainder *to* C. *in Fee. B. accepts a Fine* ſur Conuſance de Droit come ceo &c. *from A. and a Stranger*, this was thought by the Court to be a Forfeiture of both their Eſtates. 2 Jo. 65. Hill. 28 Car. 2. B. R. Smith v. Abell.

(F. b. 2) Forfeiture by one, where it ſhall be a Forfeiture by another.

1. A. Gave Lands in Tail to B. upon *Condition*, that *if B. or any of his Heirs alien*, or diſcontinue &c. the Land, or any Part of it, that then A. do re-enter. B. hath *Iſſue two Daughters* and dies. *One* of the two Daughters *levies a Fine* ſur Conuſance de Droit come ceo *to her Siſter*. It was inſiſted, that Conditions which go in defeating of Eſtates ſhall be taken ſhortly, and here both the Siſters are one Heir, and therefore the Diſcontinuance by the one, is not the Act of the other. But per Clench J. the Words are, *(or any of his Heirs)* therefore it is a Forfeiture, quod fuit conceſſum per tot. Cur. and Judgment was given accordingly. Le. 292. pl. 400. Mich. 26 & 27 Eliz. B. R. Anon.

(G. b) Leaſes for Life or Years.

What ſhall be ſaid a Forfeiture of a Leaſe.

By Matter of Record.

1. **If Tenant for Life** affirms the Land in a Stranger in a Court of Record, **it is a Forfeiture.** 13 H. 4. 13. b. Co. Litt. 252. a. S. P.

2. **If Leſſee for Life** accepts a Fine ſur Conuſance de Droit come ceo, which he has &c. **this is a Forfeiture; For he has acknowledged by Eſtoppel that he has the Fee from him.** 1 H. 7. 12. b. 2 Rep. 56. *Buckler's Caſe.* 9 Rep. 106. b. *Marg. Podger's Caſe.* See D. 3 & 4 Ma. 148. 89. S. P. by Hale Ch. J. Mod. 117. pl. 17. Mich. 26 Car. 2. —— S. P. becauſe he admits the Reverſion to be in a Stranger. Vent. 257. 258. per Cur. Paſch. 26 Car. 2. B. R. —— Co. Litt. 252. a. S. P.

3. But **otherwiſe it is if he accepts a Fine** ſur Conuſans de Droit tantum * with Releaſe, **for this enures for Benefit of the Reverſion, and is no Eſtoppel.** 1 H. 7. 12. b. * Fol. 853. Tenant for Life may be Cogniſee in a Fine, by which the Cogniſor does confeſs all his Right which he has in the Lands to be the Right of the Tenant for Life, and releaſe and quit Claim to him and his Heirs, and not commit any Forfeiture, for thereby his former Eſtate is not changed, and it may enure to him in Reverſion or Remainder. Weſt's Symb. S. 15. cites 1 H. 7. fol. 5. —— Nor is it any Eſtoppel, becauſe it is not Conuſance de Droit come ceo que il ad &c. and it may enure to Tenant for Life, and after to him in Reverſion. Br. Fines, pl. 84. cites 1 H. 7. 12. and 22.

† A Fine ſur Releaſe is no Forfeiture; Per Curiam. 4 Le. 217. pl. 350. Trin. 19 Eliz. B. R. Anon.

4. **If Tenant for Life** has Aid granted of him in Reverſion, and J. S. comes without Proceſs, and ſays that he is the ſame Perſon of whom Aid is prayed, **and is ready to join, to whom the** Leſſee ſays, that he is not the ſame Perſon, **upon which he is adjudged to anſwer alone, this is a Forfeiture if he be the ſame Perſon who has the Reverſion, becauſe he by this Plea ſuppoſes this Reverſion in another.** 21 E. 3. 14. Aid-Prayer of a Stranger is a Forfeiture, becauſe thereby he acknowledges the Reverſion to be in a Stranger; pl. 25. S. P. Arg. Le. 62. cites 39 E. 3. 16. —— 2 Rep. 55. b. ad finem, S. P. —— Cro. E. 578. by Anderſon and Glanvill. —— Co Litt. 252. a in Principio, S. P. —— Cro. E 451. S. P. in pl. 18. —— Br. Forfeiture &c. pl. 87. cites 24 H. 8. that he in Reverſion may enter.

5. **In Quid Juris clamat, if Leſſee for Life or Years** claims Fee, **this is a Forfeiture.** * 11 H. 4. 57. b. 2 Rep. 68. b. *Tooker's Caſe.* 38 E. 3. 29. * Br Quid Juris clamat, pl. 10. cites S. C. —— So it is if Leſſee for Years claims Eſtate for Life. D. 209. pl. 21. Marg. —— By Leſſee's for Life claiming Fee, he has loſt the Land by Eſtoppel, and yet no Judgment ſhall be given that the Plaintiff recover the Land; for no Land was in Demand, nor ſhould he have Judgment of Attornment, and yet the Plaintiff may enter; Per Priſot, quod non negatur. Br. Eſtoppel, pl. 111. cites 34 H. 6. 28, 29. 34. —— 2 And. 30. S. P.

6. So **it ſhall be, though he** has Colour to claim by void Condition to have Fee. * 6 R. 2. *Pleſington* **Quid Juris clamat 20. adjudged.** 19 H. 6. 62. So it is a Forfeiture if by a void Condition he claims an Eſtate for Life. D. 209. 21. cites Pleſington's Caſe. * Fitzh. Quid Juris clamat 20. cites S. C. —— S. C.

S. C. cited Gouldsb. 41. —— S. C. cited Godb. 105. in pl. 124. per Rhodes J. ——— S. C. cited 2 And. 30.

Br. Quid Juris clamat, pl. 7. cites S. C.

7. In Quid Juris clamat brought againſt one as Tenant for Life of 10 l Rent, if Defendant ſays it is but 40 s Rent, if this be found againſt him, yet it is not any Forfeiture. 46 E. 3. 27.

8. In Quid Juris clamat, if the Defendant pleads a ſpecial Matter of Attainder and Forfeiture of him from whom the Plaintiff claims, and a Grant over by the King, and Plaintiff ſhews a ſpecial Reverſal of the Attainder, upon which the Parties demur, and this is adjudged againſt the Defendant, yet this is not any Forfeiture. 29 E. 3. 25.

9. In Quid Juris clamat, if the Defendant be erroneouſly adjudged to attorn to a Stranger who has nothing in the Reverſion, and he does it accordingly, this is not a Forfeiture, becauſe it is the Act of the Court. 29 E. 3. 25. b.

10. If Tenant for Life attorns to a Grant by Fine of a Reverſion in Mortmain. 17 E. 3. 7.

Co Litt. 252 a S. P. —Cro. E. 451. in pl. 18. S. P. —Ibid. 758. in pl. 25. per Anderſon and Glanvill. S. P.

11. If a Stranger who nothing has in the Reverſion brings an Action of Waſte againſt the Leſſee if he pleads in Bar no Waſte done, this is a Forfeiture, becauſe by this he affirms the Reverſion in him. 18 E. 3. 54.

If Præcipe quod reddat be brought againſt Tenant for Years, and he accepts the Tenancy and pleads, he forfeits his Eſtate. 2 And. 30. in pl. 19. cites 29 E. 3. Aſſ. 43. and 21 E. 3. 1. ——— S. P. in a Nota of the Reporter 3 Rep. 4. b. and cites 5 Aſſ. 3. 14 E. 3. Reſceit 135. 22 Aſſ. 31. and 9 H. 5. 14.

12. If a Man brings Præcipe in Capite againſt Leſſee for Life, and him in Remainder in Tail as Jointenants by the Aſſent and Covin of the Leſſee with the Demandant, and they procure another to anſwer for him in Remainder as Jointenant, and after the Wife joined they make Default, by which Judgment final is given againſt them; If he in Remainder reverſes the Judgment by Writ of Diſceit he ſhall have the Land; For the Leſſee has forfeited his Eſtate. 17 E. 3. 60. b.

For it is a Forfeiture of Leſſee's Eſtate to admit the Reverſion in a Stranger by matter of Record. Br. Entre Cong. pl. 49. cites S. C. ——— Br. Forfeiture de terres, pl. 29. cites S C. —— Fitzh. Entre Congeable, pl. 42. cites S. C. —— Le. 60. pl. 89. cites S. C. adjudg'd. For his admitting the Reverſion in a Stranger is an Alienation to the Diſinheritance of the Leſſor. —— S. C. cited 1 Rep. 15. b.

13. If a Stranger brings a Writ of Entry againſt Leſſee for Life, ſuppoſing that he holds of his Leaſe, and the Leſſee confeſſes the Action by which the Stranger recovers, this is a Forfeiture to the Leſſor. 5 Aſſ. 3. adjudged.

14. In a real Action againſt Leſſee for Life, if he loſes by Miſpleader this is not any Forfeiture. 18 E. 3. 28. b.

15. But if Plaintiff recover by render of the Leſſee it is a Forfeiture. 18 E. 3. 38. b.

16. So if he recovers by Nient dedire of the Leſſee. 18 E. 3. 28. b.

1 Rep. 15. b. in Sir Wm. Pelham's Caſe, S. C. cited 2 Le. 61.

17. So if he recovers by Default of the Leſſee. 18 E. 3. 28. b.

18. So if he recovers by Miſpleader of the Leſſee if he pleads it faintly. Contra 18 E. 3. 28. b.

19. As if he pleads to the Inqueſt faintly in a Scire Facias, and loſes where he might have barred the Demandant by a Plea of Nient Comprize, this is a Forfeiture. 22 E. 3. 2. b. Curia.

In

20. In Quid juris clamat the *Tenant ſaid, That the Conuſor had nothing at the Time of the Conuſance, unleſs in Right of A. his Wife not named*, and a good Plea; For if the Tenant attorns to this Grant, and the Baron dies, the Feme may enter for the Forfeiture; For he ought not to attorn upon other Grant, and now the Feme is the Inheritor of the Reverſion. Br. Quid juris clamat. pl. 24. cites 27 E. 3. and in the Addition of Quid Juris clamat in F. N. B.

I do not obſerve this Point any where of that Year Book, or in F. N. B.

21. In Quid juris clamat *againſt Baron and Feme who demanded the View of the Land and were ouſted*, by which they ſaid, *That at the Time of the Fine levied they were ſeiſed in Fee*, and this is no Plea *without anſwering if they held for Life or not*; For this is only Argument; by which he *ſaid, Abſque hoc that they held for Term of Life the Day of the Note levied*, and a good Plea, per tot. Cur. quod nota, *without ſhewing how they are ſeiſed in Fee*, and per Littleton, if it be found that they had only for Term of Life they ſhall loſe the Land, becauſe they claim'd Fee. Br. Quid juris clamat, pl. 15. cites 15 E. 4. 28.

22. *A.* was *Tenant for Life*, the *Remainder to B. for Life*, the *Remainder to C. in Fee. B. being in Poſſeſſion levied a Fine Sur Conuſance de Droit come ceo &c. to a Stranger. A. died.* The whole Court agreed, that the Remainder in Fee is not touched by that Fine, but B. having done as much he could for diſpoſing of the Fee-Simple by the Fine, the ſame amounts to a Forfeiture. Le. 40. pl. 51. Mich. 28 & 29 Eliz. C. B. Braybrook's Caſe.

23. If *Leſſee for Years loſes in a Præcipe*, and will *bring a Writ of Error* for Error in Proceſs, this is a Forfeiture. Co. Litt. 251. b.

24. If a *Recovery* be had *by Agreement and Covin between the Demandant and Tenant for Life*, it is a Forfeiture of the Eſtate for Life, and he in the Reverſion or Remainder may enter for the Forfeiture. Co. Litt. 362. a.

1 Rep. 15. a. b. 16. b. S. P.

25. *So* it is if the *Tenant for Life ſuffers a Common Recovery* at this Day, it is a Forfeiture of his Eſtate, for a Common Recovery is a Common Conveyance or Aſſurance whereof the Law takes Knowledge. Co. Litt. 362. a.

(H. b) Leaſes for Life or Years.

Fol. 854.

What Act or Thing be a Forfeiture.

1. IF Leſſee for Life aliens in Fee **it is a Forfeiture.** * 40 E. 3. 5. 2 H. 4. 20. b.

* Fitzh. Iſſue, pl. 142. cites S. C.—Co. Litt. 251. a. b. ſays this muſt be underſtood of a Feoffment, Fine, or Recovery, by Conſent.

2. So **if he aliens** for the Life of another **it is a Forfeiture.** 40 E. 3. 5.

Fitzh. Iſſue, 142. cites S. C. ——— Co. Litt. 252. a. S. P.

3. **If Leſſee for Life** of a Rent grants it in Fee **it is no Forfeiture, for only his Eſtate paſſes.** 48 E. 3. 23. b.

A. Tenant for Life aliened to B. Habend' to B. & Hæredibus ſuis for the Life of A. this is no Forfeiture; For it is all but one Limitation. Br. Forfeiture &c. pl. 87. cites 24 H. 8.—S. P but contrary if it be by Fine; Per Littleton. Br. Forfeiture de terres &c pl. 18. cites 15 E. 4. 9.——Co. Litt. 251. b. S. P. and ſo there is a Diverſity between a Grant by Fine, which is Matter of Record, and a Grant by Deed, which is a Matter en Pais, and alſo between a Matter of Record, as a Fine &c. and a Deed recorded as a Deed inrolled; For that works no Forfeiture, becauſe the Deed is the original.

4. So

4 So if Reverſioner for Life of Land grants it in Fee it is no Forfeiture; Littleton 137. 48. E. 3. 23. b.

S. P. agreed per Curiam, But if he levies a Fine of it it is a Forfeiture. Jo. 391.

5 If Leſſee for Life of Advowſon aliens in Fee it is no Forfeiture, becauſe this Thing lies only in Grant, and the Eſtate determines by Death of the Leſſee. 17 E. 3. 19. b. admitted. Contra. 43 E. 3. 25. b. 18 E. 3. 16.

6. If Leſſee for Life of a Manor to which an Advowſon is appendant aliens an Acre with the Advowſon in Fee, this is a Forfeiture of the Advowſon; for the Leſſor may preſent to it after Entry into the Acre if not before. 18 E. 3. 44. admitted by Iſſue.

7 So if he had alienes all the Manor with the Advowſon the Leſſor might enter for a Forfeiture, and ſhould have the Advowſon. 19 H. 6. 33. b.

8. If Leſſor diſſeiſes his Leſſee for Life, and leaſes to another for Life, who leaſes to the firſt Leſſee for Life, this is not any Forfeiture, for nothing paſſes by his Leaſe; For the firſt Leſſee is remitted, and ſo the Livery void, and ſo the ſecond Leſſee has a Reverſion for Life. 18 E. 3. 48. admitted.

2. Le. 61. Arg. cites S. C. that he in Remainder may enter, but that after Execution he is put to his Action.——Br. Entre Cong. pl. 26. S. P. per Hall. cites 9 H. 5. 15.

9. If *Tenant for Life pleads in the Right without praying Aid of him in Reverſion* or Remainder, he in Reverſion or Remainder may enter, for it is a Forfeiture; Per Seton. Br. Forfeiture de terres, pl. 20. cites 24 E. 3. 68.

10. If *Tenant for Life attorns in Quod Juris clamat upon other Grant than of him in the Reverſion*, this is a Forfeiture of his Eſtate, and he in the Reverſion may enter. Br. Forfeiture de terres, pl. 100. cites 27 E. 3. 77.

11. If *Tenant pur auter vie* of Land deviſable be, and he *deviſes the Land in Fee* by his Teſtament and dies, this is no Forfeiture nor Diſcontinuance; quod nota; For *there is no Livery of Seiſin*. Br. Forfeiture de terres, pl. 90. cites 33 E. 3. and Fitzh. Deviſe 21.

Br Forfeiture de terres, pl. 21. cites S. C.

12. If *Tenant in Tail after Poſſibility* of Iſſue *pleads any Thing contrary to the Right*, he in Remainder or Reverſion may enter. Br. Entre Cong. pl. 40. cites 39 E. 3. 16.

13. If *two* are *ſeiſed to them and to the Heirs of the one*, and they *leaſe for Life to a Stranger*, this is no Diſcontinuance nor Forfeiture, nor new Fee gain'd, becauſe he who had the Fee join'd in making the Leaſe. Br. Forfeiture de terres, pl. 95. cites 2 H. 5. 7. and Fitzh. Waſte 54.

14. In Quid Juris clamat againſt *Tenant for Life*, if he *claims Fee*, which is found againſt him, this is a Forfeiture of his Eſtate, and the Demandant may enter, and yet *no Land was in Demand* by this Action, *but only Attornment*. *So* upon *Diſclaimer* in præcipe quod reddat, the Demandant may enter. Br. Forfeiture de terres, pl. 92. cites 36 H. 6. 29.

15 If a *Præcipe quod reddat* be brought *againſt the Baron and Feme, ſeiſed in Right of the Feme for Life of the Feme*, and the Baron and Feme *pray Aid of a Stranger*, and he enters into the Aid, and after the *Baron dies* the Leſſor cannot enter for the Forfeiture by the Aid Prayer, for it was the Fact of the Baron, which ſhall not prejudice the Feme-Covert. Br. Forfeiture de Terres, pl. 19. cites 15 E. 4. 29, Per Chocke Juſtice.

16. If

16. If a Man *ſeiſed of Rent in Fee grants it over for Life*, and the Tenant attorns, and the *Grantee grants it over in Fee*, and the *Tenant attorns*, this is no Forfeiture, for of this Livery doth not lie; contrary of Land. Br. Forfeiture de Terre, pl. 96.

17. If a Man were *enfeoffed of two Acres, of one in Fee and the other for Life*, and doth not ſhew in which Acre he ſhall have Fee &c. and the *Feoffee doth enfeoff a Stranger of one* of them *by Metes and Bounds*, this is no Forfeiture; Cauſa Patet. Perk. S. 77.

18. If *Tenant for Life ſuffers a Recovery*, he in *Reverſion* cannot enter, but *is put to his Writ of Entry Ad Terminum qui præterit*, and ſhall falſify the Recovery in this, if he hath Cauſe, for if he would have this ſure the Tenant for Life ought to pray in Aid of him in Reverſion, and if he joins in Aid, and both vouch over, then well upon the Recovery had &c. as between **Corbett and Clifford** in the County of Bucks Anno prædicto. Br. Entre Cong. pl. 115. cites 24 H. 8. S. C. cited 2 Le. 61.

19. *But* if *Tenant for Life prays Aid of a Stranger*, this is a Forfeiture, and he in Reverſion may enter. Br. Entre Cong. pl. 115. cites 24 H. 8. Br. Forfeiture de Terres, pl. 87. cites S. C. ——

Co. Litt. 252. a. S. P. —— Nevertheleſs if Tenant for Life vouches a Stranger, this is no Cauſe of Entry by him in Reverſion, for it may be that he hath Warranty of the Stranger. Br. Entre Cong. pl. 115. cites 5 E. 4. 2.

20. A Leaſe was made upon *Condition that he ſhall not aſſign his Term during his Life without the Aſſent of his Leſſor*; he *deviſed it without Aſſent* and died; Brook and Hales Maſter of the Rolls held that it is a Forfeiture, for when the Deviſee is in he ſhall be ſaid in by the Deviſor; contrary of Aſſignment in Law, as if one had it as Executor. The Book ſays Quære, becauſe no mnre was ſaid. Dy. 45. b. pl. 3. Mich. 31 H. 8. in the Court of Augmentations. Parry v. Herbert. 4 Le. 5. pl. 20. S. C. but ſtates it that the *Condition* was *not to grant it over by Will or otherwiſe*, and he *deviſed the ſame to his Executors, who accepted it only as Executors*, and not as Deviſees; Held that the Condition was broke, becauſe he had done as much as in him lay to have it granted over; and mentions it as adjudged Hill. 19 Eliz. —— 3 Le. 67. pl. 100. in C. B. S. C. in totidem Verbis, but adds See 31 H. 8. 45. —— Leſſee for Years on Condition not to aſſign deviſed his Term to his Son and his Wife, and made them Executors. It was ſaid that had they not been Executors the Condition had been broke. D. 45. in Marg. pl. 3. cites 24 Eliz. Barton v. Horton. —— Ibid. Marg. cites 19 & 20 Eliz. B. R. Knight's Caſe, as was ruled that the Deviſe was a Breach of the Condition.

21. Tenant for Life *bargained and ſold* his Lands *to A. and his Heirs*, and *afterwards levied a Fine* to A. this is a Forfeiture committed by A. and not by Tenant for Life, who at the Time had nothing to forfeit. Le. 264. pl. 354. 19 Eliz. C. B. Anon.

22. A *Termor for* 1000 *Years made a Deed of Feoffment by Dedi conceſſi & Feoffavi*, and a *Letter of Attorney* to make Livery, *and after the Attorney delivered Seiſin, the Leſſor being preſent upon the Land not contradicting*. Quære if the Land paſſes by the Feoffment, ſo that the Leſſor may enter for a Forfeiture, or that the Term paſſes firſt by Words Dedi & conceſſi Terram, or before Livery &c. as Wray thought Prima Facie; But Dyer e contra; but by both the Livery by Attorney is good enough, and the Preſence of the Leſſor upon the Land is no Impediment to the Feoffment. D. 362. b. pl 20. Paſch. 20 Eliz. Anon. Dy. 362 b. Marg pl 20. cites Paſch. 35 Eliz. B. R. that this came in Queſtion between **Read** & **Errington**, and adjudged accordingly, viz. that the Leſſee for Years may make Feoffment notwithſtanding the Preſence of the Leſſor, and that this is a Forfeiture of his Leaſe, for the Leſſee hath the Poſſeſſion and may diſpoſe of it, but the Leſſor may enter for a Forfeiture.

23. If the Defendant in an Action of Treſpaſs *prays Aid of a Stranger* it is a Forfeiture, and if it be counterpleaded yet it is a Forfeiture; Per Anderſon Ch. J. Gouldsb. 41. in pl. 18. Mich. 29 Eliz. in Dickley's Caſe.

24. *In Writ of Waſte* the *Tenant claimed Fee*, and it was fonnd againſt him that he *had only an Eſtate for Life*, and yet it was no Forfeiture. Godb. 105. pl. 124. Rhodes J. cited 33 E. 3. Judgment 255. and Rhodes ſaid that the *Tenant ſhall not forfeit* his Eſtate in any Action *by claiming of the Fee Simple, but in a Quid Juris clamat.* Walmſley and Fenner ſaid, that where he claims in Fee Generally, and it is found againſt him, there perhaps he ſhall forfeit his Eſtate; but where he *ſhews a ſpecial Conveyance which reſts doubtful in Law*, it is no Reaſon that his Eſtate ſhould be thereby forfeited, though it be found againſt him; but Rhodes cites 6 R. 2. Quid Juris clamat 20, where the Tenant claimed by ſpecial Conveyance, and yet it was a Forfeiture. Godb. 105. pl. 124. Mich. 28 & 29 Eliz. C. B.

26. Tenant for Life by the firſt Limitation of the Uſe on a Feoffment with Power reſerved to *make Leaſes for three Lives* makes a Leaſe for three Lives *by Livery*, it is a Forfeiture; Arg. ſaid it was ſo held. Mo. 514. in pl. 687. Mich. 37 & 38 Eliz. in Canc. Lord Buckhurſt's Caſe.

27. If *Tenant for Life or Years* of Land, the Reverſion or *Remainder* being *in the King*, *makes a Feoffment in Fee*, this is a Forfeiture, yet no Reverſion or Remainder is deveſted out of the King, and the Reaſon is in reſpect of the Solemnity of the Feoffment by Livery tending to the King's Diſheriſon. Co. Litt. 251. b.

28. *Truſt of a Term* limited to A. for Life, and after to his eldeſt Iſſue Male; A *Feoffment* by A. will not deſtroy this executory Deviſe, and he in the Reverſion ſhall not have the Term as forfeited. Poller. 26. 1 May, 14 Car. 1. Cotton v. Heath.

29. *Leſſee for* 99 *Years levies a Fine*; this is a Forfeiture. 2 Lev. 52. Trin. 24 Car. 2. B. R. admitted in the Caſe of Whaley v. Tankard.

Raym. 219. Whaley v. Tankred, S P. admitted. —— Vent. 241. S. C. accordingly.

30. Leſſee for 21 Years makes a *Leaſe for a longer Term*, viz. for 30 Years; This was admitted to be no Forfeiture, becauſe it is only a Contract between him and his Leſſee, which does not operate on the Intereſt of the Leſſor to affect it with any Prejudice. 1 Salk. 187. pl. 5. Trin. 10 W. 3. C. B. in Caſe of Eaſtcourt v. Weeks.

(I. b) Eſtate for Life or Years. Forfeiture.

Le. 125. S. C. Piers v. Hoe adjudg'd Contra, by all except Gawdy, that it is a Forfeiture. —Cro. E. 131. pl. 5.

1. IF the Baron ſeis'd of Land in Right of his Feme for the Life of the Feme makes a Charter of Feoffment, by which he grants the Land to another, to have and to hold to him, his Heirs and Aſſigns to the only Uſe and Behoof of his ſaid Wife during the Life of the ſaid Wife, this is not any Forfeiture for the laſt Words (during the Life of the Feme) ſhall guide all the precedent Sentence, ut res magis valeat quam pereat. H. 32 El. B. R. between *Piers* Plaintiff, *and Aleway and Home* Defendants, dubitatur.

S. C. adjudg'd by all except Gawdy to be a Forfeiture; and Wray ſaid that the Juſtices of his Houſe held it clearly a Forfeiture, and that the Words (for Life &c.) ſhall refer only to the Uſe. ——So is Owen 64. Hone v. Clark. S. C.——It is a Forfeiture becauſe the Habend' is abſolute, the Uſe is another Clauſe, and though he limits the Uſe but for Life, yet the Law limits the Remainder of the Uſe to the Feoffor. Godb. 141. Sir Ra. Egerton's Caſe. (Nelſ. a. 911. pl. 15. S. C. ſays to the Feoffee).—The Uſe cannot abridge the Eſtate, but that it is forfeited, but yet it ſeems the Uſe

Uſe may enlarge an Eſtate. Arg. Roll Rep. 385. cites it as adjudged in the Caſe of Piers v. Home. ——The Words (during Life of the Feoffor) ſhall be but to the Uſe limited. Cited per Tanfield Ch. B. Lane. 38. as adjudged in the Caſe of Goar v. Piers.——The Words (pro Termino vitæ of the Wife) refers ad ſolum Uſum, and not to the Eſtate and Uſe. D. 169. Marg. pl. 22. cites Hill. 37 Eliz. B. R. Price v. Hone.——If Tenant for Life aliens to B. Habendum ſibi & Hæredibus ſuis for the Life of Tenant for Life; this is no Forfeiture; For all of it is nothing more than the Limitation of the Eſtate. Br. Forfeiture, pl. 87. cites 24 H. 8.

2. **If Leſſee for Life** levies a Fine to B. for the Life of the Leſſee to the Uſe of B. for his Life, **this is not any Forfeiture; for the Eſtate granted by the Fine is but for the Life of the Leſſee, and the Limitation of a greater Uſe cannot be any Forfeiture. Trin. 5 Jac. B. between** *Caſtle and Dod.* Cro. J. 200. pl. 32. S. C. but S. P. does not clearly appear.

3. **If A. Leſſee for Life** leaſes to B. for the Life of B. if A. ſo long live, **this is a Forfeiture, becauſe B. has an Eſtate for his own Life. Trin. 5 Jac. B.**

4. Baron **ſeis'd Land** in Right of his Feme in Tail, and of the Reverſion pur auter vie in his own Right; **He** and his Feme levy a Fine come ceo &c. **and after the** Feme dies without Iſſue; **The levying of this Fine is not any Forfeiture, for it is more ſtrong [than] or at leaſt all one with** *Bredon's Caſe*, **for the Law conſtrues, that every one paſs that which lawfully he may paſs. M. 7 Jac. B. adjudged between Ld.** *Clanrickard.* Hob. 273. pl. 360. Clanrickard v. Ld. Liſle. S C. ſays, it is no Forfeiture, becauſe the Tenant for Life gives not the Fee alone, but gives only ſo much of the Fee as he hath, and joins with another in giving a Fee that hath Power to give a Fee during his Eſtate, without Wrong to any, and therein differs from Mich. 16 & 17 Eliz. Dyer 339. of Tenant for Life, Remainder for Life joining in a Feoffment in Fee, and from 41 E. 3. 21. of Tenant for Life making Feoffment in Fee to him in the Remainder in Tail and his Wife. And if we need (as in **Bredon's Caſe**) to avoid Diſcontinuance it was deviſed that the Remainder in Tail ſhould be taken to paſs firſt, ſo here to avoid Forfeiture, the Remainder for Life may be ſaid to paſs firſt.

5. **If Leſſee for Life, Remainder in Tail,** Remainder in Fee to the Right Heirs of the Leſſee **are, and the** Leſſee makes Feoffment in Fee, **this is a Forfeiture of his Eſtate for Life.** 42 E. 3. 18. 50 E. 3. 4. See (C. b) pl. 1. ſupra, and the Notes there.

6. **If** Leſſee for Life makes a Leaſe for Years, and Leſſee for Years afterwards makes Feoffment in Fee, **and after Leſſee for Life** releaſes all his Right to the Feoffee, **this is not any Forfeiture of the Eſtate for Life, ſo that he in Reverſion may enter for a Forfeiture, becauſe the Leſſee for Life has not done any Act to take away the Reverſion out of him that has the Reverſion in Fee. Mich. 13 Car. B. R. Per Cur. reſolv'd upon Evidence at the Bar, between** *Hiblyn and Slack.* Fol. 855.

7. **If** A. **be Tenant** for Life, **the Remainder** to B. in Tail, **the Remainder** to C. in Tail, **the Remainder to the right Heirs of** A. in Fee, **and** A. makes a Feoffment in Fee to B. and his Wife, **and after** B. dies without Iſſue, and his Feme enters; **This is a Forfeiture to C. ſo that he may enter, for this Feoffment by the Entry of the Feme after the Death of her Baron is all one, as if A. and B. had alienated to a Stranger, by which the Remainder to C. would be deveſted.** 41 E. 3. 21. 41 Aſſ. 2. adjudg'd. 1 Rep. 76. b. *Bredon's Caſe.*

8. **If Tenant** for Life **Remainder** for Life **Remainder** in Tail, **Remainder** to the right Heirs of Tenant for Life in Remainder for Life, **and after** the two Tenants for Life join in a Feoffment in Fee by Deed, **this is a Forfeiture of both Remainders for Life, ſo that he in Remainder in Tail may enter for a Forfeiture in the** Life * Bendl. 222, 223. pl. 253. Martin v. Savery ſeems to be S. C.

adjudged that the Entry was lawful, becauſe Remainder-man for Life was Particeps Criminis —— And. 45. pl. 116. S. C. adjudg'd accordingly. —— Le. 262. pl. 349. Anon. but ſeems to be S. C. and adjudg'd accordingly. S. C. cited Cro. E. 253. —— 2 And. 66. S. P. in Caſe of Gardiner v. Brydon. S. C. —— Co. Litt. 251. b. S. P —— So if the firſt Remainder-man for Life levies a Fine, this has been adjudged to be a Forfeiture, and yet it operates no Diſplacing; Per Hale Ch. J. who ſaid it had been ſo adjudged. Hardr. 402 and cites Gallant's Caſe.

Life of him in Remainder for Life. * D. 17 El. 339. 44. per Cur. 1 Rep. 76. b. *Bredon's Caſe.*

Sty. 192. S. C. the Court divided; and the Reporter ſays, Quære what Judgment was given. —— S. C. cited 1 Jo. 65. 70. —— S. C. 3 Keb 733, 734.

9. If there be Tenant for Life Remainder for Life Remainder in Tail Remainder to the right Heirs of him in Remainder for Life, and he in Remainder for Life who has the Fee expectant levies a Fine come ceo &c. to another, this is a Forfeiture of his Remainder for Life, ſo that after the Death of the Tenant for Life in Poſſeſſion, he in Remainder in Tail may enter for the Forfeiture, becauſe he is eſtopp'd by this Fine Come ceo, to ſay, but that he paſſed a Fee in Poſſeſſion without any Fraction of Eſtates; For this is not like to *Bredon's Caſe*; For there the Eſtate for Life and Remainder in Tail are immediate the one to the other, and no Fraction of the Eſtate paſſed. But this Interpretation cannot be made in this Caſe to paſs only an Eſtate in Remainder for Life, and a Remainder in Fee expectant upon an Eſtate Tail, and ſo a Fraction of Eſtates and not one entire Eſtate in Poſſeſſion according to the Purport of the Fine. Tr. 1650. between *Garret and Blizard* adjudged upon a Special Verdict. Intratur Hill. 24 Car. B. R. Rot. 383. This was adjudg'd after diverſe Arguments at the Bar, and after it was argued at Bench by the Court, and adjudg'd per tot. Cur. præter Jermyn, who argued againſt the Judgment.

10. Land was given to Baron and Feme for their Lives, the *Baron alien'd*, he in *Reverſion enter'd*, the *Baron died*, and it was found by Office that he in Reverſion was an Ideot, by which the King ſeiſed, and the Feme ſued to re-have the Land, and the Title of the Feme was travers'd for the King, and found for the Feme, and the Feme recovered, and ſo ſee that the *Forfeiture* ſhall not ſerve in Perpetuum, *but for the Life of the Baron*. And if the King had not been ſeiſed, it ſeems that the Feme had been put to a Cui in vita. Br. Diſcontinuance de Poſſeſſion, pl. 11 cites 21 Aſſ. 43.

11. O. S. brought Aſſiſe againſt E. and the Caſe was, That *B.* was *ſeiſed of the Land*, and *held of E. the Defendant, and gave the Land to R. T. Baſtard, and to J. his Feme, and to the Heirs of R. and R. and J. had Iſſue Cicelie*. R. died, and *J. ſurviv'd*; and after *O. the Plaintiff took C. to Wife*, and then *J. Mother of C. gave the Land to C. and O. her Baron*, now Plaintiff *in Tail, ſaving the Reverſion to herſelf for Term of her Life*, the *Remainder over to O* the Plaintiff *in Fee*, and C. was now within Age, and after *C. died without Heir of the Part of the Father, but had Heir of the Part of the Mother*, the *Lord enter'd for Eſcheat*, becauſe C. had no Heir of the Part of the Father, and by his Pretence C. was remitted, and in her beſt Right by the *taking of the Eſtate Tail with her Baron from J.* which *made a Forfeiture and Cauſe of Entry given to C. and* then when ſhe is in, *the Law adjudges her in her beſt Right, and* of this Entry O brought Aſſiſe againſt E. the Lord, and by the beſt Opinion *by the Forfeiture the Feme is remitted*, and ſee Libro Aſſiſe the Plaintiff was Nonſuited. But *Quære* of the Forfeiture during the Life of the Baron; For where he takes with his Feme, there can be no Remitter nor Forfeiture during his Life; *For the Feme has no Power in the Life of the Baron to claim in by the Forfeiture, and the Baron ſurviv'd the Feme,* and

and ſome held that it was a Surrender; But Quære inde; For the *Baron took with the Feme, therefore it ſeems no Surrender during the Life of the Baron, therefore Quære.* Br. Remitter, pl. 15. cites 39 E. 3. 29.

12. If *Tenant for Life alien'd to B. to hold to him and his Heirs for Term of Life of the Tenant for Life*, this is no Forfeiture; For all is only the Limitation of the Eſtate. Br. Forfeiture de terres, pl. 87. cites 24 H. 8.

13. If *Leſſee for Life* of Land *leaſes the ſame unto his Leſſor* for Years, the Remainder to a Stranger, and makes Livery of Seiſin unto his Feoffor, it is no Forfeiture &c. Perk. S. 203.

14. *Husband and Wife Tenants in Tail had Iſſue two Sons*, the *Baron died*, the *Feme made a Feoffment in Fee* to divers Perſons, *to the Uſe of the Wife for Life*, without Impeachment of Waſte, and after her Deceaſe to the Uſe of the *Heirs of the Body of her late Husband, upon the Body of the ſaid Feme* lawfully begotten, *Remainder in Fee to W. R.* Afterwards the *Mother with her ſecond Baron and her youngeſt Son levied a Fine* to a Stranger ſur Conuſance de Droit come ceo &c. *with Warranty* againſt her and her Heirs, and the *Conuſee* in that Fine *render'd to the Younger Son* an Eſtate *for* 60 *Years*, rendring the Reverſion and Rent to the Feme by the ſame Fine, and to the Heirs of her Body, and of the Body of her firſt Husband lawfully begotten, Remainder in Fee to the ſaid W. R. whereupon the Eldeſt Son entered, and after the Mother died, and then the Youngeſt Son claimed this Leaſe. Quære, becauſe it ſeems the Youngeſt had no Title. D. 111. a. b. pl. 45. Hill. 1 & 2 P. & M. Coward v. Coward.

Nelſ. a. 859. pl. 2. reports it ſomething different, and adjudged that he had no Title to it, becauſe by the Entry of his elder Brother, as for a Forfeiture, at leaſt all the other Eſtates are avoided. But he cites only D. 111. and no ſuch Thing is ſaid there.

15. A *Feoffment without Livery*, or inſufficient Livery, which is all one, made by Tenant for Life or Years, being a void Feoffment, is no Forfeiture; Arg. 2 Show. 274. cites D. 577.

Leſſee for Years makes Feoffment and Livery in the Preſence of Leſſor, though it does not deveſt the Freehold nor can it be a Diſſeiſin to the Leſſor, yet it is a Forfeiture; Per Popham. Cro. E. 322. pl. 10. Paſch. 36 Eliz. B. R. Read and Morgeh v. Errington als' Mitford v. Fenwick.

16. In Quid Juris clamat againſt *Tenant in Tail after Poſſibility*, and he *pleads that he was ſeiſed in Fee* at the Time of the Fine and not for Life only, adjudged that this is no Forfeiture. Cro. E. 671. pl. 29. Paſch. 41 Eliz. C. B. Veal v. Read.

11 Rep 80. b. S. C. cited per Cur. as adjudged for the Defendant;

ſendant; For Tenant in Tail after Poſſibility ſhall not in Judgment of Law be included in Writ or Fine &c. in the general Allegation of a Tenant for Life. And cites 19 E. 3. 1. b.

17. If *Tenant for Life* and he in the Remainder for Life had *joined in a Feoffment in Fee*, this had been a Forfeiture of both their Eſtates, becauſe he in Remainder is particeps Injuriæ, and ſo it is if he in the *Remainder* for Life had entred and *diſſeiſed Tenant for Life*, and made a Feoffment in Fee, this had been a Forfeiture of the Right of his Remainder. Co. Litt. 251. b.

18. *Two Jointenants for Life*; *One grants his Eſtate for the Life of his Companion*, it is a Forfeiture; For firſt it is a Severance of the Jointure, and then it is a Leaſe for the Life of another. 4 Le. 236. pl. 372. Anon.

19. A. ſeiſed in Fee has two Sons B. and C. A. makes Feoffment to the Uſe of himſelf for Life, and after *to C.* the ſecond Son *for Life*, *Remainder* after his Deceaſe *to the Uſe of the firſt Son of C. which ſhould have Iſſue Male of his Body, and to his Heirs for ever*; *And for want of ſuch*

Litt. R. 159. 285. 315. 345. S C by name of Burton v.

Nichols and Smith als' Beck's Caſe.

ſuch Iſſue, the Remainder *to the right Heirs of C. for ever*; And for want of ſuch Iſſue, the Remainder to the Uſe of the firſt Daughter of C. which ſhould have Iſſue of her Body, and to her Heirs for ever. A. died. C. entred and had Iſſue D. but D. died without Iſſue, then *C. levied a Fine come ceo &c.* with Proclamation to W. R. and W. S. It was adjudged in C. B. and affirmed in B. R. that this Remainder to C. and to the firſt Son of C. who ſhould have Iſſue, is but a contingent Remainder, and a Remainder to the right Heirs veſted in C and that this Fine is no Cauſe of Forfeiture, nor could B. or the Iſſue of B. take Advantage of it. Cro. C. 363, 364. pl. 5. Paſch. 10 Car. B. R. Boreton (als' Moreton als' Burton) v. Nichols.

20. If *A. ſeiſed in Fee makes a voluntary Settlement* to the Uſe *of himſelf for Life, Remainder* to his Brother *in Tail, with Power of Revocation*, if A. levies a *Fine without any Deed declaring the Uſes till a Month after*, and then declares the Uſes to himſelf and his Heirs, this is no Forfeiture of his Eſtate for Life, but is a good Revocation though the Deed was ſubſequent to the Fine, becauſe the whole Eſtate moved from him; But had he come to the Eſtate for Life by the Grant of another Perſon, it had been a Forfeiture. Carth. 22. Hill. 3 & 4 Jac. 2. B. R. in Cam. Scacc. Herring v. Brown.

21. Tenant for Years make *Feoffment* it is a Forfeiture, but if he makes a *Leaſe for a longer Term* it is not, becauſe it is only a Contract between him and the Leſſee, which does not operate on the Intereſt of the Leſſor to affect it with any Prejudice. Per three J. 1 Salk. 187. pl. 5. Trin 10 W. 3. C. B. in Caſe of Eaſtcourt v. Weekes.

Chan. Prec. 591. pl. 354. S. C. Trin. 1722. at the Ld. Chancellor's and held it a Forfeiture and that there was no Relief for the Mortgagee and ſo he loſt his whole Money.

22. By Marriage ſettlement Lands were conveyed *to Truſtees and their Heirs, to the Uſe of the Husband for Life*, Remainder to the Uſe *of Truſtees and their Heirs during his Life to preſerve &c.* Remainder to the Uſe *of the Wife for Life*, Remainder to the Uſe *of the firſt &c. Son* of the Marriage in Tail Male. The Husband and Wife *levied a Fine* (they having then a Son an Infant) and mortgaged the Lands to J. S. The Husband died. And J. S. brought a Bill againſt the Wife and Son then of Age. The Son pleaded the Settlement and inſiſted that his Mother's Eſtate was Forfeited, and Equity ought not to relieve, and Ld C. upon Argument allowed the Plea. But the Cauſe coming on to be heard by the Maſter of the Rolls he obſerved, that the *Uſe and legal Eſtate were veſted in the Truſtees*, and the *Limitations to the Huſband, Wife, and Sons, were but Truſts*, and a *Truſt for Life is not forfeited by a Fine*, and ſo the Plea falſe, not being warranted by the Settlement; And decreed the Plaintiff to hold and enjoy during the Life of the Wife. Trin. 1723. 2 Wms's Rep. 147. Lady Whettone v. Saintsbury.

(K. b) What ſhall be a Forfeiture.

In reſpect of the Perſon to whom it is made.

Who may diſpenſe with a Forfeiture.

1. IF **Leſſee** for Life makes a Feoffment in Fee to Baron and Feme in Reverſion **ſeiſed** in Right of the Feme, **this is a Forfeiture to the Feme.** 39 E. 3. 29 b. per Thorpe, and ſo the Feme remitted. Contra 39 Aſſ. pl. 7.

2. If

2. If Baron and Feme ſeiſed in Right of the Wife for the Life of the Wife, leaſes by Indenture to him in Reverſion who is within Age for the Life of the Baron, this is a Forfeiture; For the Acceptance of the Eſtate by the Infant ſhall not prejudice him. 29 Aſſ. 64. Fitzh. Aſſ. pl. 292. cites S. C. —— Co. Litt. 42. a. S. P. e contra ſuppoſing the Reverſioner not an Infant.

3. If *Tenant for Life aliens to him in Reverſion for Term of another's Life*, this is no Forfeiture, becauſe he in Reverſion is Party to it; But by 24 E. 3. 68. it is a Surrender in ſuch Caſe as here. Br. Forfeiture de terres, pl. 83. cites 29 Aſſ. 64.

4. *Tenant for Life infeoffs Remainder-man for Life* with Warranty, this enures by way of Surrender, and is no Forfeiture. 1 Rep. 76. b. in Bredon's Caſe, cites 30 Aſſ. 47. So of a Grant or Leaſe (where there is no warranty;) But if the Grant or Demiſe had been to a Stranger for Life it had been a Forfeiture; Per Wilby. Br. Forfeiture de terres, pl. 20. cites 24. E. 3. 68.

5. *Tenant for Life*, the *Remainder to W. in Fee*, *aliened to him in Remainder for Life of him in Remainder*, and He in *Remainder died*, and the Feme of him in Remainder brought Writ of Dower, and was barred; For this Alienation is no Forfeiture nor Surrender, inaſmuch as it was to him in the next Remainder; quære Legem inde. Br. Forfeiture de terres, pl. 91. cites 13 R. 2.

(L. b) Who may Diſpenſe [with a Forfeiture] in reſpect of Eſtate.

1. It ſeems Tenant in Tail Remainder or Reverſion cannot diſpenſe with a Forfeiture of the Leſſee by Alienation.

2. If Tenant for Life, Remainder in Tail, he, and he in Remainder * releaſes in Fee to the Leſſee, and after Leſſee aliens in Fee, it ſeems that he in Remainder cannot enter for the Forfeiture againſt his Releaſe, yet after his Death his Iſſue may enter for the Forfeiture; For now the Releaſe is void. 43 Aſſ. 45. adjudged. *Fol. 856.

(M. b) What Act ſhall be a Diſpenſation of the Forfeiture.

1. If Baron and Feme, ſeiſed in Right of the Feme for Life of the Feme, leaſes by Indenture to him in Reverſion for the Life of the Baron, this is not any Forfeiture, for he has diſpenſed with it by the Acceptance of the Eſtate. 29 Aſſ. 64. per Cur. and the Reverſion is not diſcontinued. Fitzh. Aſſiſe, pl. 292. cites S. C.

2. If a Man leaſe Lands for Life, and the *Leſſee infeoffs* thereof *a Stranger*, and makes a *Letter of Attorney unto his Leſſor* to make Livery of Seiſin accordingly, *and he makes Livery*, in this Caſe it has been ſaid by ſome Perſons, that the Leſſor may enter upon the Feoffee for a Forfeiture, notwithſtanding the Livery of Seiſin made by him; For they

they ſay that the *Feoffee took nothing* by him, for the Leſſor had nothing to do upon the Land, if not to ſee whether Waſte were done, or to diſtrain for his Rent and Services if they were behind; And againſt that it may be ſaid, that the Leſſor ſhall not enter for the Forfeiture, becauſe he is *Party to the Wrong*, viz. the Diſcontinuance of the Reverſion, for nothing of the Freehold paſſes unto the Feoffee if not by the Livery of Seiſin, and the Leſſor himſelf made the Livery of Seiſin, which is an Agreement of him that the Feoffee ſhall take by Force of the Feoffment, and he who is Party to the doing of Wrong ſhall not take Advantage thereof. Perk. S. 200, 201.

3. If *Tenant for Life levies a Fine* of the Lands he is ſo ſeiſed of, whereby he ſhould forfeit his Eſtate, yet *if he in the Remainder joins* with the Tenant for Life *in declaring the Uſes*, this is a Diſpenſation with the Forfeiture; Per Glyn Ch. J. in Evidence on a Trial at Bar. Sty. 464. Mich. 1655. Wagſtaff v. Tempeſt.

(N. b) What Thing will excuſe a Forfeiture.

Cro. C. 391. pl. 2. Gymlet v. Sands, S. C. & S. P. reſolved by Jones, Berkley and Croke. — S. C. cited Vent 201. by Rainsford J.

1. IF Baron and Feme **are ſeiſed** for Life, **the Remainder** to B. their Son and Heir apparent in Tail, **the Remainder** to the right Heirs of B. **and** the Baron makes Feoffment **to C.** with general Warranty **and dies, and after the Feme enters, and** ſhe and B. (neither of them, **by any Thing appearing,** having Knowledge of this Warranty **deſcended upon B. or of the** Feoffment) join in a Feoffment in Fee **to D. this is a Forfeiture of the Eſtate for Life of the Feme, ſo that C. may enter now for this Forfeiture; For the Eſtates in Remainder in Tail and Fee limited to B. were bound by the** collateral Warranty, **ſo that the Feoffment was made by the Leſſee and another, who nothing had in the Reverſion,** and **though the Eſtate of B. was bound by a Warranty only,** which **does not deſtroy the Right, and though the Feme had not any Notice of it, yet** inaſmuch as no Man was bound to give Notice, the Feme ought to take Notice **of it at her Peril, and therefore** inaſmuch **as ſhe joined with** B. **in a Conveyance, which was voluntary, and did not grant her Eſtate by herſelf, the not having Notice of the Bar of the Eſtate of B. ſhall not excuſe the Forfeiture.** Hill. 10 **Car. B. R. per Cur. upon a ſpecial Verdict between** *Gimlett and Saundrey.* **Intratur Trin. 8 Car. Rot.** 1000. **I myſelf being of Counſel with the Plaintiff.**

See Tit. Forfeiture (A. a)

(N. b. 2) Forfeiture.

Relieved in Equity.

1. AN *Entail was cut off contrary to a Proviſo*, to the Intent only *to make a Jointure, and then the Remainders were ſettled in Tail as before*, wherefore the Forfeiture was diſpenſed with in Equity. Toth. 146. 38 Eliz. li. A. fol. 728. Baile v. Read.

2. Tenant

2. Tenant for Life, the Remainder over. *Tenant for Life*, becauſe he *admits of a Recovery to be ſuffered* forfeited his Eſtate, but was relieved here. Toth. 282. 10 Car. cites Stafford v. Stafford.

3. Leſſees of the *Patent for Printing Law Books* were at 2000 l. Charges at Law; The Patentee had *promiſed to be at a fourth Part of the Charge*, but not allowing it, the Leſſees *ſtopt their Rent*. On a Bill for the Rent Defendants offered Payment, he performing his Agreement. Decreed an Account, and on Payment of what is due to the Patentee, he to Seal a new Leaſe for the Remainder of the Term in the former Leaſe, and with the ſame Covenants. Fin. Rep. 235. Mich. 27 Car. 2. Atkins & al' v. Darford & al'.

4 Leſſee rendring Rent granted an Annuity. which being in Arrear, *Leſſee confeſſed a Judgment to his Grantee of the Annuity*; *Leſſor entered for Nonpayment* of the Rent, and made a *new Leaſe to another*, when Leſſor and ſecond Leſſee had *Notice* of the ſaid Annuity and Judgment. Decreed the original Leaſe be *revived*, during the Term, for the Benefit of the Annuitant, and that the Leſſor execute a new Leaſe accordingly, and of the ſame Date, Covenants and Rent the ſame, to be ſubject to all prior Eſtates, which are to remain and be in the ſame Condition as before the Forfeiture or Surrender of the old Leaſe, and the new Leaſe to be cancelled. Fin. R. 328. Mich. 29 Car. 2. Chelſam v. Auſtin and Smith.

5. A. was *Deviſee for Life*, Remainder to B. in Fee. *A mortgages to C. for Years and levies a Fine* to ſtrengthen the Mortgage, and declared the Uſe to C. for the Term, and after to A. and his Heirs. B. brought Ejectment and recovered; But on a Bill by the Aſſignee of C. to be relieved, it was decreed by the Maſter of the Rolls, that the Mortſtagee hold againſt B. during A's Life, and A. to pay Coſts and the Money, or to be foreclоſed. Note, A. on making the Mortgage, made Affidavit that the Teſtator made no Will,, and he knew of no Incumbrances on the Eſtate, and he *was his Heir at Law*. Ch. Prec. 108. pl. 95. Hill. 1699. Willis v. Fineux.

6. By a Marriage Settlement *A. and M his Wife were Tenants for Life*, Remainder *to their firſt &c. Sons ſucceſſively in Tail Male*. After a Son and ſeveral other Children born, *A. and M. by Leaſe and Releaſe and Fine*, make a *Mortgage* to J. S. this is a Forfeiture, and no Relief for J. S. ſo he loſt all his Money; Per Ld. Macclesfield. Ch. Prec. 591. pl. 354. Trin. 1722. Lady Whetſtone v. Sainsbury.

(O. b) What Act or Thing will purge a Forfeiture.

1. **If Leſſee** for Life makes Feoffment upon Condition, and enters for its being broken, **yet the Forfeiture by the Alienation remains, and Leſſor may enter.** * 39 Aſſ. 15. **adjudged.** 43 Aſſ. 47. **adjudged.**

* Fitzh. Entre Congeable, pl. 47 cites S. C. —Br. Forfeiture de terres &c. pl. 39. cites S. C. —— Br Entre Congeable, pl. 79. cites S. C. —— S. C. cited And. 352. —— Co. Litt. 202. b. 252. a. S. P.

2. **If Tenant for Life** aliens upon Condition, that if he himſelf pays 10 l. to the Alienee that he may re-enter, **and** it not that he ſhall have

S. P. Br. Forfeiture de Terres, pl.

39. cites 39. Aſſ. 15. Brooke ſays, and ſo ſee that by the Payment have Fee, and at the Day he pays the 10 l. and re-enters, yet he in Reverſion may enter for the Forfeiture, becauſe by the Alienation the Reverſion was once diſcontinued. 43 E. 3. Entry Congeable 30. adjudged.

and Re-entry the Forfeiture is not purged, and yet the Reverſion was reveſted in the Leſſor. —— Br. Entre Congeable, pl. 79 cites S. C. & S. P. by Brooke —— And becauſe he had lawful Cauſe to enter at one Time, which cannot be defeated after by the Performance of the Condition, and the Re-entry of the Tenant for Life. Br. Entre Cong. pl. 86. cites 43 Aſſ. 47.

3. If a Gift be to two, and to the Heirs of the Body of one by her Baron begotten, and he who has but for Life aliens his Part in Fee, and the other enters for a Forfeiture, and after Baron dies without Iſſue, by which her Eſtate is determined as to this Moiety, (admitting this to be Law), Quære, whether or not ſhe be not Tenant after Poſſibility of this Moiety? yet this ſhall not deveſt the Title executed by the Entry for the Forfeiture. 45 Aſſ. 7.

4. Where *Tenant for Life leaſed to J. S.* by Deed *for his Life*, and *J. S. died*, living his Leſſor, there his *Leſſor cannot enter, but he in Reverſion may* enter; for the firſt Tenant for Life had granted a greater Eſtate than he had, which is a Forfeiture, and therefore the other may enter for the Forfeiture, which *is not purged by the Death of the ſecond Leſſee*; Per Littleton. Br. Entre Cong. pl. 100. cites 13 E. 4. 4.

5. *But* otherwiſe it is where a Man *leaſed to two and to the Heirs of one*, and *they leaſed for Life*, and the Leſſee died, they ſhall have the Land jointly as they had before, for there *he who had the Fee had no Reverſion, and* alſo he himſelf *was Party to* the Leaſe which made the Forfeiture. Br. Entre Cong. pl. 100. cites 13 E. 4. 4. per Littleton.

Arg Show. 340. S. C. cited. 6. *Acceptance of Rent* will not prevent a Forfeiture of which the Leſſor had *no Notice*. 3 Rep 65. b. Trin. 38 Eliz. B. R. Pennant's Caſe.

7. Tenant for Life levies a *Fine*; *five Years paſs*, Leſſor is barr'd in Point of Forfeiture, though not in Point of Reverſion. Palm. 236. Mich. 19 Jac. B. R.

Sid. 90. pl. 10. Mich. 14 Car. 2. B. R. L' Eſtrange v. Temple, S. C. held by all the Court to be a Forfeiture. 8. *No Act* done *by the Party* which commits the Forfeiture ſhall purge the Forfeiture, and for this the Caſe between Templer and Bortinglaſs is cited; which was, *Tenant for Life ſuffers a Common Recovery*, and after *reverſes it* by Writ of Error, ſo that now he was Tenant for Life again; yet the Forfeiture remains; Arg. Skinn. 74. Mich. 34 Car. 2. B. R. in Caſe of Herring v. Brown.

The Reporter adds a Nota that in this Caſe Sir R. T. entered before the Common Recovery was reverſed.

Arg Skinn. 75. cites 1 Inſt. 72. S. P. 10. Tenant for Life makes a *Feoffment in Fee* on Condition, and *enters for Condition broken* before Leſſor takes Advantage of the Forfeiture, yet this does not purge it; Per Eyres J. 12 Mod. 28. Trin. 4 W. & M. in Caſe of the King v. Glide.

(P. b) Forfeiture.

Upon whom Entry may be for Forfeiture.

Fol. 857.

In reſpect of Eſtate.

1. IF Leſſee for Life aliens for Life the Remainder over, and Remainder enters after the Death of the Leſſee, the firſt Leſſor may enter upon him for the Forfeiture; for by Agreement to the Remainder he agrees to the Whole, and ſo Party. * 50 E. 3. 21. b. 43 Aſſ. 17. adjudged. 45. adjudged. * For he to whom the Remainder is limited, and the Tenant for Life, who take by the ſame Livery, are one and the ſame Tenant in Law. Br. Entre Congeable, pl. 17. cites S. C. —— And it makes but one and the ſame Degree as to the bringing a Writ of Entry Sur Diſſeiſin. Br. Done &c pl. 7. cites S. C. —— Fitzh. Entre Congeable, pl. 36. cites S. C.

2. So Leſſor may enter upon the Alienee of his Leſſee, or any who is Party to the Forfeiture. * 50 E. 3. 21. b. 43 Aſſ. 24. adjudged. 25 Aſſ. 11. * Br. Entre Congeable, pl. 17. cites S. C. —— Br. Done, pl. 7. cites S. C.

3. So he may enter upon the Alienee of the Alienee, or any who has the Land though he be not Party to the Forfeiture. Contra * 50 E. 3. 22. Dubitatur 25 Aſſ. 11. * Br. Entre Congeable, pl. 17. cites S. C. ſays it was argued that he could not enter upon the Feoffee of the Feoffee, becauſe this is two Eſtates; but ſays it is all one at this Day, and that he may enter upon the one or the other if there be no Deſcent.

4. If Leſſee for Life gives in Tail the Remainder in Fee to another, and after he in Remainder dies, and after Donee dies without Iſſue the Leſſor may enter upon the Heir of him in Remainder; for by his Entry he agrees to his Diſinheritance which is made by the Alienation. Contra 43 Aſſ. 17. per Finchden.

5. If Tenant for Life gives it in Tail, and Donee dies, Leſſor may enter upon the Donor for the Forfeiture. Contra 43 Aſſ. 45. per Finchden.

6. Per Manwood, If *Leſſee for Life* be *diſſeiſſed*, and *levies a Fine to Diſſeiſor Sur Conuſance de Droit &c.* Leſſor ſhall re-enter, Quod Dyer Negavit', becauſe Leſſor at the Time of the Fine levied had not any Thing in the Reverſion but only a Right. 4 Le. 217. pl. 350. Trin. 19 Eliz. B. R. Anon.

7. *Tenant for Life* with Power on a Condition precedent to ſell the Fee, *grants to A. in Fee. Reverſioner releaſes* to A. but does *not* ſay for him and *his Heirs*. Reverſioner dies. Tenant for Life dies. *A. levies a Fine.* It is a Forfeiture to the now Reverſioner. Jo. 328. pl. 9. Mich. 9 Car. B. R. Dike v. Ricks. Cro. C. 335. pl. 21. S. C.

(Q. b) At

(Q. b) At what Time he may enter for the Forfeiture.

1. IF Leſſee for Life aliens in Fee and dies, he in Remainder or Reverſion may enter after the Death of the Leſſee. Contra 18 E. 3. 35. 17 Aſſ. 27. Curia.

Jo 389. 391. S. C. & S. P. agreed, and Judgment accordingly. —— Watſ. Comp. Incumbent, 8vo. 134. cap. 10. cites S. C. and Ibid 181. cap 11. cites S. C.

2. If Tenant for Life of an Advowſon in Groſs levies a Fine come ceo &c. of it, and before any Claim made by him in Reverſion, the Church voids, after he in Reverſion ſhall not have Advantage of the Forfeiture as to the preſent Preſentation; becauſe before Election made by him in Reverſion, the Eſtate of the Leſſee was not defeated nor deſtroyed, the which Election ought to be by Claim, and then this was a Chattel veſted in Leſſee before the Election made by him in Reverſion, which cannot be deveſted after by the Preſentation of him in Reverſion. Trin. 13 Jac. B. R. adjudged in Writ of Error upon a Judgment in Bank, in a Quare Impedit brought by the Leſſee between *Spring and Sir Julius Cæſar.* Jutratur Mich. 11 Car.

S. P held according to the Opinion of Windham. Raym. 219. Hill. 24 & 25 Car. 2.

3. If *Tenant for Life in Poſſeſſion levies a Fine*, &c. the Leſſor ſhall be bounden if he does not enter within five Years after; Per Anderſon and Periam; But Windham contra, for by him it is in the Election of the Leſſor to *enter immediately for the Forfeiture, or to expect the Death of the Leſſee.* Le. 40. pl. 51. Mich. 28 & 29 Eliz. C. B. in Braybrook's Caſe.

B. R. in Caſe of Whaley v. Tancred, per tot. Cur. and that there is no Difference between Leſſee for Life and Leſſee for Years as to this Point, contrary to the Opinion of Lord Coke in Podger's Caſe 9 Rep 106, and of Catlin Ch. J. in Pl. Com. 374 a. ——— 2 Lev. 52. S. C. & S. P. held accordingly. ——— Vent. 241. S. C. & S. P. held accordingly.

2 Le. 60. pl. 89. S. C adjudg'd.— 4 Le. 123. pl. 251. S. C in totidem Verbis.—Mo. 271. pl. 423. Page v. Haward S. C adjudged a Forfeiture, but ſays nothing as to its being after Execution. ——And. 227. pl. 243. Page v. Griffin. S. C. adjudged; but ſays that Error was brought in the Exchequer-Chamber, but before Judgment the Parties agreed; and the Ch. Juſtice of B. R. was of Opinion that the Judgement was well given; But the Reporter ſays, Vide Brook Entre Congeable to the Contrary, and that the Law ſeems to be ſo.

4. If *Tenant for Life ſuffers a common Recovery*, though there be afterwards an Execution of it, yet *the Forfeiture* which was by the ſuffering the Recovery *is not toll'd by the Execution*; For ſince a common Recovery by Aſſent is now by Common Uſage as a common Aſſurance and Conveyange, whereupon a Uſe may be limited and averr'd as well as upon a Fine or Feoffment, it was reſolv'd by all the Barons upon great Deliberation, that the *Entry of the Remainder-man was lawful as well after the Execution as after the Judgment*, and that the ſuing Execution did not toll the Entry. 1 Rep. 14. b. 15. b. Hill. 32 Eliz. Pelham's Caſe.

If A. is Tenant for Life, Remainder to B. in Tail, and A and B. make Feoffment by Deed, this is no Diſcontinuance, nor deveſting of the ſecond Remainder for each gives what he lawfully may, and though B. dies without Iſſue, yet the Feoffee ſhall enjoy it during A's. Life, and no Feoffment

6. *Tenant for Life and Remainder-man in Tail levy a Fine*, it is no Diſcontinuance of the Eſtate Tail, but is a Forfeiture of the Tenancy for Life, of which the Remainder-man in Fee may take Advantage after the Death of Remainder-man in Tail. Ow. 130. Hill. 43 Eliz. C. B. Peck v. Charnell.

Forfeiture in the caſe. This is a nota by the Reporter, that it ſeemed ſo to the Juſtices. 1 Rep. 76. b 77. 39 & 40 Eliz. B. B in Bredon's Caſe.——This part of Bredon's Caſe has often been denied, and has been adjudged by Bramſton Ch. J. and his Companions a Diſcontinuance, becauſe a Feoffment is of another Nature than a Fine. Sid. 83. pl. 10. Trin. 14 Car. 2. B. R. cites Baker v. Hacker.——In Bredon's Caſe 1 Rep. 76. a. the Joining in a Fine held no Forfeiture, becauſe the Law (which abhors Wrong) will conſtrue it to be firſt the Grant of him in Remainder in Tail, and afterwards the Grant of Tenant for Life; But per Hale Ch J. Vent. 160. Mich. 23 Car. 2. B. R. in Caſe of Bulmer v. Pawlet, the Reaſon makes againſt the Reſolution; For if the Remainder in Tail paſſes firſt, the Freehold muſt go by way of Surrender, and ſo drown; but they ſhall rather be conſtrued to paſs Inſimul & Uno Flatu.

6. If A. be *Tenant for Life, and makes a Leaſe to B. for his Life*, and *B. dies*, and the *Leſſee re-enters*, yet the Forfeiture remains. Co. Litt. 252. a.

7. *Tenant for Life in Remainder* may enter for the Forfeiture of the firſt Tenant for Life, and if the Tenant for Life in Remainder *makes continual Claim, and* the *Alienee dies ſeiſed*, then *he in the Remainder for Life may enter*, and *if he dies before he enters*, then *he in the Remainder in Fee ſhall enter*, becauſe he in the Remainder in Fee could not make any Claim; and therefore the Right of Entry which Tenant for Life in Remainder by his Entry ſhall go to him in the Remainder in Fee, in reſpect of the Privity of Eſtate, and ſo it is of him in the Reverſion in Fee in like Caſe, for he is alſo Privy in Eſtate. Co. Litt. 252. a.

(R. b) What Perſon ſhall take Advantage of a Forfeiture.

Who in reſpect of Eſtate.

1. IF Leſſee for Life Remainder in Tail, Remainder in Tail, Remainder in Fee to Leſſee are, and Leſſee inteoffs the firſt Remainder, if he after dies without Iſſue the ſecond Remainder may enter for a Forfeiture; For the Feoffment deveſted his Eſtate, and the other could not diſpenſe with the Forfeiture as to him. *41 Aſſ. 2. adjudged. Contra †41 E. 3. 21.

* Br. Entre Congeable, pl. 82. cites S. C. That in Aſſiſe it was found by Verdict that A. leaſed to B. for Life, Remainder to C. in Tail, Remainder to W. the Plaintiff in Aſſiſe in Tail, and that B. enfeoffed C. and his Wife now Tenant in the Aſſiſe, C died without Heir of his Body, and his Wife held herſelf in, and after B. died, and the Plaintiff freſhly entred, and the Wife of C. ouſted him, and W. brought Aſſiſe, and recover'd by Judgment; For though W. cannot enter for Alienation of B. to his Diſinheritance in the Life of C. who took the Eſtate which was in the firſt Remainder, yet, when C. died without Iſſue, now Entry is given to W for Alienation to his Diſinheritance, by Reaſon that the Wife of C. agreed to the Eſtate, and did not waive the Poſſeſſion, quod nota. Br. Entre Cong. pl. 82. cites 41 Aſſ. 2.——Br. Forfeiture, de terres, pl. 84. cites S. C.

† Br. Entre congeable, pl. 8. cites S C. Per Wichengham, quod non Negatur, where the Feoffment was to the firſt Remainder-man in Tail, and his Wife who ſurvived her Husband.—— Fitzh. Entre Congeable, pl. 25. cites S. C.——Br. Surrender, pl. 3. cites S. C.

2. If Tenant for Life, Remainder in Tail, Reverſion in Fee are, and Leſſee inteoffs Reverſioner, Remainder in Tail may enter for Forfeiture. 1 Rep. 140. adjudged. *Chudleigh's Caſe.*

3. Leſſee for Life, Remainder in Tail, Remainder to the right Heirs of Leſſee, and he makes Feoffment, Remainder in Tail may enter. 42 E. 3. 18. 15 E. 3. 3 b. 45 Aſſ. 7.

4. If Tenant for Life be the Remainder in Tail, and he in Remainder * releaſes in Fee to the Leſſee, and after Leſſee aliens in Fee, and after

*Fol 858.

after he in Remainder dies, his Iſſue may enter for a Forfeiture; For his Eſtate was not amended by the Releaſe, (and though his Father could not take Advantage of it by Reaſon of his Releaſe, yet that it is now gone). 43 Aſſ. 45.

5. If Leſſee for Life aliens he in Remainder in Fee may enter. 17 Aſſ. 27. 18 E. 3. 35.

6. If Leſſee for Life the Remander in Tail are, and Leſſee aliens, the Remainder may enter for it. 2 H. 4. 20. b. 43 Aſſ. 45. 45 Aſſ. 7. admitted.

7. The ſame Law of a Reverſion in Tail. 3 H. 4. 10.

8. If Tenant for Life Remainder for Life, Remainder in Fee are, and Leſſee aliens in Fee, the Remainder for Life may enter for the Forfeiture. 50 E. 3. 4.

9. And in this Caſe if the Remainder for Life does not enter, the Remainder in Fee may enter to the uſe of the Remainder for Life to defeat the Alienation. 50 E. 3. 4.

Remainder-man in Fee cannot enter during the Life of Remainder-man for Life, but he may enter afterwards. Mo. 18. pl. 64. Mich. 2 Eliz.

10. If Tenant for Life, the Remainder in Tail, the Remainder in Fee are, and Tenant for Life makes Feoffment, and after he in Remainder in Tail dies, his Iſſue may enter for the Forfeiture. 43 Aſſ. 45.

11. So if after the Alienation he in Remainder in Tail dies without Iſſue, he in Remainder in Fee may enter for the Forfeiture. For his Remainder was deveſted by the Alienation. 43 Aſſ. 45.

S. P. per Dyer and Brown, and yet during the Life of him in the Meſne Remainder he could not have enter'd; For he is eſtopp'd to claim any Thing therein during the Life of the Meſne Remainder-man, though the Alienation was originally to his Diſinheritance. Mo. 18. pl 64. Mich. 2 Eliz.

12. If a Gift be to two, and to the Heirs of one, if he who has but for Life aliens in Fee, the other who has the Fee may enter for the Forfeiture. 45 Aſſ. 7. admitted.

13. If the Lord of a Copyhold for Life leaſes for Years to commence at the end of Forfeiture or Surrender of the Tenant for Life, and after the Tenant for Life commits a Forfeiture by making of a Feoffment, if the Lord will not enter for the Forfeiture yet the Leſſee for Years may; P. 8 Ja. B. per Cur. between Were v. Ridout.

14. If a Gift be to a Feme Covert and J. S. and to the Heirs of the Body of the Feme by her Baron begotten and after the Baron dies without Iſſue, and after aliens his Part in Fee, the Feme ſhall not enter into this for a Forfeiture; For by the Death of her Baron without Iſſue ſhe ought to be Tenant after Poſſibility of the Remainder; But becauſe ſhe was ſeiſed of this per My & per tout for her Life before this Eſtate vaniſhes, and ſhe had not any Eſtate in Remainder at the time of the Forfeiture. 45 Aſſ. 7. adjudged.

15. If a Leſſee for Life aliens for Fee, and afterwards he in Reverſion dies, his Heir may enter for this Forfeiture. 27 Aſſ. 32. adjudged. * 41 Ed. 3. 21. b. adjudged. † 50 Ed. 3. 21. adjudged.

* Br. Entre congeable, pl. 8. cites S. C. —— Fitzh. Entre Congeable, pl. 34 cites S. C. † Br. Entre congeable, pl. 17 cites S. C. For titl of Entry may deſcend from the Anceſtor to the Heir. ——Fitzh. Entre Congeable, pl. 36. cites S. C.——Br. Done, pl. 7. cites S. C. ——See pl. 1. and the Notes.

16. Where the *Tenant for Life had aliened* in Fee, *he in Reverſion brought Writ of Entry* with thoſe Words, *Quia ea alienavit contra formam Statuti Glouceſt'* &c. and it was abated; For this Statute makes mention

mention of Tenant in Dower aliening. Thel. Dig. 117. Lib. 10. cap. 28. S. 1. cites Hill. 3 E. 2. Entre 8.

17. If *Tenant for Life*, the *Reverſion to a Feme Covert in Fee aliens to the Baron and his ſaid Feme*, who has the Fee, and the *Feme dies without Heir*, the Lord cannot enter by the Eſcheat, nor for Forfeiture; For this is given to the Heir only, and here is no Heir, which was in a Manner agreed. Br. Forfeiture de terres, pl. 97. cites 39 E 3. 29.

18. In Aſſiſe a Man *leaſed to A. for Life, Remainder to B. in Tail, Remainder to C. in Fee. A. aliened in Fee. B. died without Iſſue and did not enter.* C. may enter now, for the Alienation was to the Diſinheritance of them all, and yet at firſt he could not have entered, and ſo might the *Iſſue in Tail* if B. had had Iſſue, and died; for when Entry is veſted in the Father, it ſhall deſcend to the Son, and there if the Alienee for Life had died, and he in Remainder entred, the Iſſue of him in the firſt Remainder may enter upon him in Remainder who is in by his Tenant for Life, as well as upon the Tenant for Life, to whom his Tenant for Life aliened, For when he entered and agreed to the Remainder, he is in immediately by his Tenant who aliened, for *all the Remainders which paſſed by one Livery make only one Tenant in Law, and therefore the Entry lawful upon any in the Remainder, as well as upon the firſt Alienee, though he be in by Title*, for now he is a Party to the Alienation when he hath agreed to the Remainder, for at this Day a Man cannot have an Entry upon him who was in by Title, unleſs in ſpecial Caſes as here, where he is Party to a Wrong, and cannot have an Entry upon him who was ſeiſed a Year and a Day, which appears often in the Book of Aſſiſes Nevertheleſs it is contrary at this Day, for now a Man may enter *upon the 20th Alienee if no Deſcent be* had which takes away the Entry, or ſuch like. Br. Entre Cong. pl. 85. cites 43 Aſſ. 45. Br. Forfeiture de terres, pl. 85. cites S. C

19. Land was given *to W. and to A. and B. his Wife, and to the Heirs of the Body of A. and B.* after which the *Donor releaſes to W. and A. and B. in Fee.* In ſuch Caſe, if *A. dies leaving Iſſue*, and *W. aliens in Fee*, B. may enter; And though the Donor had releaſed in Fee to W. and B. before the Alienation, yet if the *Iſſue died without Iſſue after the Alienation of W. and the Entry of B.* yet W. cannot re-enter, becauſe the Entry of B. was once good; *But if B. had not entred* for the Alienation *in the Life of the Iſſue*, ſhe could not enter after the Death of the Iſſue without Heir of his Body; For then ſhe is in Effect no more than Tenant for life, where before ſhe was Tenant in Tail. Br. Entre Cong. pl. 87. cites. 45 Aſſ. pl. 7.

20. *Leaſe to B. for Term of Life*, the *Remainder to C. in Tail*, the Remainder *to W. in Tail*, and after *B* the Tenant for Life *infeoffed C. and his Feme in Fee*, and after *C. dyed without Iſſue*, by which *W. then entered for the Forfeiture*, and well; For the Feoffment was no Surrender to C. becauſe his Feme was joined with him who had nothing in Remainder with her Baron. Br. Surrender, pl 46. cites 3 H. 4. 12.

21. A. makes a *Leaſe for Life*, Remainder *to the Right Heirs* of *J. S.* The *Leſſee for life makes a Feoffment in Fee, in the Life of J S.*—A. may enter. Jenk. 248. pl. 38. cites 9 H. 6.

22. Where a Man *enfeoffed the Father and the Son and the Heirs of the Father*, and the *Father made a Feoffment in Fee*, the *Son may enter into one Moiety for the Diſſeiſin to him*, and into the other, becauſe it is a Feoffment and an Alienation to his Diſinheritance. Br. Entre Cong. pl. 36. cites 22 H. 6. 51.

33. *And* if a Man *gives Land to the Father and Son, and to the Heirs of the Body of the Father* begotten, and the *Father aliens in Fee with Warranty and dies*, the Son may enter into one Moiety for the Diſſeiſin,

and

and ſhall have his Action of the other Moiety. Br. Entre Cong. pl. 36. cites 22 H. 6. 51. Per all the Juſtices.

4 Le. 217. pl. 350. S. C. & S. P. by Manwood J.

24. If Tenant for *Life be diſſeiſed and takes a Fine* of a Stranger it is a Forfeiture, and yet he in Reverſion has but a Right in Reverſion; Per Manwood J. Le. 264. pl. 354. 19 Eliz. C. B. Anon.

Quod Dyer negavit, becauſe the Leſſor at the Time of the Fine levied had nothing in the Reverſion but only a Right.

2 Le. 108. pl. 139. S. C. agreed per Curiam.

25. *Leſſee for Life and he in the Reverſion join in a Fine* to a Stranger, and after the *Reverſioner reverſed the Fine for Nonage.* It was held that he ſhall not enter for the Forfeiture, becauſe he joined in the Fine and ſo conſented to it; And afterwards the *Fine was reverſed Quoad the the Infant only.* Cro. E. 124. pl. 3. Hill. 31. Eliz. B. R. Pigot v. Ruſſell.

26. The *Right of a particular Eſtate* may be forfeited, and *he that has but a Right of a Remainder, or Reverſion, ſhall take Benefit* of the Forfeiture; *As* if *Tenant for Life* be *diſſeiſed, and he levies a Fine to the Diſſeiſor*, he in the Reverſion or *Remainder ſhall preſently enter* upon the Diſſeiſor for the Forfeiture. Co. Litt. 252. a.

27. And *ſo* it is *if the Leſſee, after the Diſſeiſin*, had *levied a Fine to a Stranger*, though to ſome reſpects Partes Fines nihil habuerunt, yet it is a Forfeiture of his Right. Co. Litt. 252 a.

28. If Leſſor infeoffs firſt Leſſee, ſecond *Leſſee* may enter; Per Croke. Hetl 55 Mich. 3 Car. C. B. Northen's Caſe.

29 A. ſeiſed of a Manor, and having Bona *Fe'onum de ſe* within the Manor, leaſes Parcel of the Manor for Years to B. and then makes *another Leaſe* to commence after the Determination, Surrender, or Forfeiture of the firſt Leaſe. *B was Felo de ſe.* Whether A. or the ſecond Leſſee ſhall enter. Hetl. 55. Mich. 3 Car. C. B. Northen's Caſe.

(S. b) Leaſe at Will.

By what Words it may be created.

1. IF a Man commands another to occupy his Land at his Will, this is a Leaſe at Will. 11 H. 6. 33 b.

Sty 397. Mich 1653. S P. by Roll Ch. J. in Caſe of Farmer v. Lawrence.

2. If A. leaſes to B. habendum at the Will of A. this is a good Leaſe at Will; For by Conſtruction of the Law this is at the Will of A. and B. inaſmuch as a Leaſe at Will is at the Will of the Leſſor and Leſſee, and cannot be at the Will of one only. Co. Lit. 55. [a.]

It was held, that if a Man leaſes *Fol. 859. at the Will of the Leſſee the Leaſe

3. So if A. leaſes to B. habendum at the Will of B. this is a good Leaſe at Will; For by Conſtruction of the Law this is at the Will of both for the Cauſe aforeſaid. Co. Lit. 55 Trin 9 Car. B. R. between *Taylor and Aſhe*, Intratur * P. 9 Car. Rot. 412. adjudged upon Demurrer, where it was pleaded, that it was agreed between A. and B. that A. being poſſeſſed of Land for Years, ſhould permit B. to put a Stack of Hay upon the Land of A. ſo long as it

it pleaſe B. [now] to admit this to be a Leaſe at Will, then it is at the Will as well of A. as of B. is good. Br. Leaſes, pl. 43. cites 9 E. 4. 1. but ſays, that 35 H 6. fol. ult. it was doubted, but it was not much argued in this Point; Quod Nota. In Debt on a Leaſe at the Will of the Plaintiff, it was doubted if ſuch Leaſe was good, and the beſt Opinion was, that it ſhall be taken to be at the Will of the Leſſor and Leſſee, ſo that each ſhall be at Liberty; For otherwiſe it is not indifferent. Br. Leaſes, pl. 39. cites 20 E. 4. 9.

4. **If A. being poſſeſſed of Land for Years,** agrees with B. that he will permit B. to put a Stack of Hay upon his Land ſo long as B. pleaſes, **this is not any Leaſe of the Land where the Hay is put, but only a Licence. Trin. 9 Ja. B. R. per Cur. between** *Taylour and Aſh.* See Tit. Licence, Webb v. Paternoſter.

5. *Abbot leaſed* Land *at Will to J. N. for a Year, and ſo from Year to Year, rendring certain Rent to him and his Succeſſors* at ſuch Feaſts. The Term commenced at Mich. and at Eaſter the *Abbot died*, and *A. was elected Abbot, who* after the Death of his Predeceſſor, and before any Entry, *received the Rent* at the next Time of Payment, and Moore, Brooke, Lee and Grenevile, held it to be a Leaſe at Will, but Pollard e contra, who held it a Leaſe for a Year, and ſo for another Year, till he be diſcharged; For in the principal Caſe the Words (at Will) refer to the Occupation of the Land, and not to the Will of the Years; And per Brooke, a *Leaſe for Years, without ſaying for how many* Years, *is only a Leaſe at Will.* Br. Leaſes, pl. 22. cites 21 H. 7. 38. but Brooke ſays, Quære inde, becauſe Fitzherbert held the contrary in 14 H. 8. which ſee at Br. Leaſes, pl. 13.

6. A Leaſe *for ſo many Years as Leſſor and Leſſee can agree*, is a Leaſe at Will only by reaſon of the Uncertainty. Br. Leaſe, pl. 13. cites 14 H. 8. per Brooke. Leaſe of Lands for one Year, rendring Rent, and afterwards for nine or twelve Years, as W. R. a third Perſon ſhould agree, by whom no Agreement was made, but the Leſſee continued in Poſſeſſion after the Year, all the Court agreed clearly that he was Tenant at Will; For it appears by the Deed that it was the Will of the Leſſor that he ſhould have the Land after the Term, though the Certainty of Years is to be nominated afterwards, and that a naked Agreement makes a Tenancy at Will, is proved by 15 E. 4. 6. 2 Sid. 153. Paſch. 1659. B. R. Bedford v. Johnſon.

7. *Leaſe for a Year, and ſo from Year to Year as long as both Parties pleaſe*, is only a Leaſe at Will; Quære. Br. General Brief, pl. 20. cites 14 H. 8. 10. By the beſt Opinion, this is a Leaſe for Years, and not at Will. Br. Tenant per Copie, pl. 17. cites 14 H. 8. 20.

8. *Leaſe to J. S. habend' to J. S. and J. N.* for their Lives, rendring Rent; As to J. N. it is a void Leaſe, he not being Party, and he is not ſo much as Tenant at Will though he entred and paid the Rent; Per Wray. Cro. E. 116. pl. 16. Mich. 30 & 31 Eliz. B R. in Caſe of Reynold v. Kingman and Brown.

9. Leſſee for Years of a Meſſuage grants *totum Meſuagium ſuum*; Grantee has but at Will; But by Grant of *all his Intereſt and Eſtate* the whole Leaſe paſſes. 2 Le. 78. pl. 102. Trin. 31 Eliz. in the Exchequer, Griffin's Caſe. And ſo it was ſaid to be lately adjudged in the Caſe of one Winnibank. Ibid.

10. If a Man having Lands or Tenements will *let* ſuch *Lands* or Tenements to another, to have and *to hold to him and to his Heirs*, at the Will of the Leſſor, theſe Words (to the Heirs of the Leſſee) are void; for in this Caſe, if the Leſſee dies, and his Heir enters, the Leſſor ſhall have a good Action of Treſpaſs againſt him. Litt. S. 82.

11. *So that by the Death of the Leſſee* the Leaſe is *abſolutely determined* which is proved by this, that if the Heir enters, the Leſſor ſhall have an Action of Treſpaſs Quare Vi & Armis, before any Entry made by the Leſſor. Co. Litt. 62. b.

12. If one makes a *Leaſe* of his Land to B. *until his Debts are paid*, it was reſolved Trin. Paſch. 24 Eliz. C. B. as appears in the Biſhop of Bath's Caſe, 6 Rep. 35. b. that this is but a Leaſe at Will, *without Livery* made, but if he makes Livery then he hath a Freehold; Per Coke Ch. J. 3 Bulſt. 100. Mich. 13 Jac. in the Caſe of Blamford v. Blamford.

13. Grant to A. that he *ſhall have the Rents and Profits of the Land* makes him Tenant at Will. Cart. 60. cites Cro. J. 659 [pl. 9. Hill. 20 Jac. B. R.] Powſly and Blackman's Caſe.

Same Caſes cited by Yelverton J. in S. C. Litt Rep. 235.

14 Leaſe for Years, *provided that the Leſſee may enter at his Will*, this is a good Leaſe determinable at Will, being Uno Flatu ſo; Per Yelverton J. Het. 128. Mich. 4 Car. 2. C. B. in Caſe of Turner v. Hodges cites 21 H. 7. 14 H. 8.

15. A bare *Agreement that J. S. ſhall have the Land* will not amount to a Leaſe at Will, Dictum fuit & non negatur. Keb. 26. pl. 74. Paſch. 13 Car. 2. in Caſe of Moniſas v. Baker.

16. If A. is *poſſeſſed* of Bl. Acre for a *Term of Years, and grants it* to B. generally, *(not ſaying and to his Executors nor for what Term and Intereſt)* in ſuch Caſe B. is only Tenant at Will of the Term to the Grantor; but if he *deviſes* Bl. Acre to B. the whole Term paſſes; for if it ſhould be an Eſtate at Will it would either never begin or determine as ſoon as it begins by the Death of A. 1 Salk. 347. Mich. 3 W. & M. in B. R. ſays that this Difference was taken in Caſe of Germain v. Orchard.

Comb 177. S. C. adjudged. —— Carth 202. S. C. held accordingly. —— 3 Salk. 156. pl. 1. S. C. adjudged accordingly.

17. A. leaſes a Meſſuage to B. but after excepts *and reſerves a Part for the Uſe of himſelf when he ſhall be there, but* that the *Tenant may enjoy it at other Times*, the Leſſee is only Tenant at Will of the Part ſo excepted and reſerved. The Court at firſt doubted, but after ſome Time taken by them to conſider of it, Judgment was given that the Defendant was only Tenant at Will. 4 Mod. 12. Hill. 2 & 3 W. & M. in B. R. Cudlip v. Rundall.

—— 12 Mod. 14. S. C. & S. P. admitted. —— Show. 310. S. C. held accordingly.

[S. b. 2] Created.

By Act of the Party.

5. [1.] If Leſſor **at Will** determines the Will, and Leſſee continues Poſſeſſion, and pays the accuſtomable Rent incurr'd afterwards, **he is Tenant at Will again.** D. 2 Eliz. 173. 15.

6. [2.] If a Man makes a Deed of Leaſe for Life, and bids him enter **into the Land according to the Deed** without **making** any Livery, (**it ſeems it is intended to be out of the Land, and ſo no Livery within the View**) **this is a good Leaſe at Will, becauſe he has** agreed

agreed that Leſſee ſhall have an Eſtate, and he cannot have other Eſtate without Livery. 18 H. 6. 16. b.

7. [3.] If a Man delivers a Deed of Feoffment to another the * Feoffee is Tenant at Will till Livery made, for he ſhews his Will by Delivery of the Deed that he ſhall have the Land.

* In the Original it is (Leſſee.)

8. [4.] But it ſeems if a Man delivers a Deed of Feoffment to A. which purports a Feoffment in Fee to A. to the Uſe of B. there A. ſhall not be Tenant at Will till Livery made; for it appears that the Intent was that he ſhall not have any Thing to his own uſe.

9. [5.] So it ſeems in this Caſe Ceſtuy que Uſe ſhall not be Tenant at Will, for he cannot take any Thing by the Intent of the Deed but that which was before in the Feoffee.

10. [6.] If a Man covenants to permit and ſuffer another to have, hold, and occupy certain Lands from the Day of the Date for Life, this is but a Covenant, and no Leaſe, and ſo the Law will not expect any Livery, and therefore he ſhall not be Tenant at Will. Tr. 5 Jac. B. R. between *Tooker and Squier.*

11. [7.] Before 27 H. 8. of Uſes, if a Man had made Feoffment of Land to his own Uſe, and after the Feoffee ſuffered him to take the Profits, yet he is not Tenant at Will, but only at Sufferance. 17 H. 7. Kellowey 41. b. 42. Vide Littleton Sect. 462.

12. [8.] If A. bargains and ſells Land to B. by Way of Mortgage, upon Condition to pay certain ſeveral Sums annually for ſix Years enſuing, and in the Deed is ſuch Covenant, "And it is covenanted and agreed between the Parties that the Bargainee ſhall not take "any Profits of the Land till there be Default of any of the Payments "aforeſaid" this will not make any Leaſe at Will, becauſe it is not that the Bargainor ſhall take the Profits, but only that the Bargainee ſhall not take them, which ſounds in Covenant, and ſo he is Tenant at Sufferance and not Tenant at Will. Mich. 20 Jac. B. R. per Cur. between *Powſeley and Blackman.*

Cro. J. 659. pl. 9. S. C. the Law accounts that the Bargainor is in of his former Eſtate, and the Will of the Bargainee is good, and Judgment for the Bargainor. —— 2 Roll Rep. 241. 284. S. C. and the Chief Juſtice and Chamberlaine held, that A the Bargainor was Tenant at Sufferance; but Doderidge and Haughton cited Litt. fol. 108. that it was a Leaſe at Will, to which the others ſeemed to agree. —— Palm. 201. S. C. —— Bridgm. 12. S. C. —— 4 Mod. 48. Arg. cites S. C. thus, viz. A Mortgage was made of Lands for Payment of Money within the Space of five Years at ſeveral Payments; and in the ſame Deed it was agreed, that the Mortgagee ſhould not intermeddle with the actual Poſſeſſion of the Profits until Default of Payment &c. afterwards the Mortgagor made a Leaſe of the Lands for ſix Years; the Leſſee entered. the Money was not paid, and at the End of the Term the Leſſor had his Eſtate again; The Mortgagee without any lawful Entry, deviſed the Lands to his Son and died; and it was adjudged that the Deviſe was good, which could not be if the Leaſe made by the Mortgagor had been a Diſſeiſin.

9. If *A. enters upon B. by the Agreement of the ſaid B.* he is Tenant at Will, and not a Diſſeiſor; quod nota bene. Br. Tenant per Copie, pl. 5. cites 15 E. 4. 4. 5.

10. *Before* the Statute of 27 *H.* 8. of Uſes if *Ceſtuy que Uſe of a Manor to which an Advowſon is appendant preſents* upon an Avoidance *by Sufferance of the Feoffee*, yet if he be diſturbed he could not maintain a Quare Impedit, for he had not any Eſtate at Will. Kelw. 42. b. 17 H. 7.

11. If *Leſſor makes Livery* to another upon the Land *by Aſſent of Leſſee*, and in his Preſence, it is a good Livery; for the Aſſent of Leſſee ſhall make a Leaſe at Will or a Surrender *for the Time.* 2 Roll Rep. 5. pl. 17. cites 40 Eliz. 6. per Cur. between Shepherd and Grey.

12. If

Bridgm. 14. S. C. and by ſuch Re entry he has reduced the Eſtate to the Leſſor, and cites Ld Abergavenny's Caſe, D. 173. —— Palm. 201. S.C. —— 2 Roll Rep. 241. 284.

12. If *Tenant at Will* be *ouſted by a Stranger*, and he *re-enters*, he is Tenant at Will to the Leſſor; Held per Cur. Cro. J. 660. pl. 9. Hill. 20 Jac. B. R. in Caſe of Powſeley v. Blackman.

13. Leaſe *by Tenant in Tail and him in Reverſion for Life of the Leſſee*; Tenant in Tail dies without Iſſue. This is a Diſcontinuance by Tenant in Tail, and the Leſſee is only Tenant at Will to him in Reverſion, notwithſtanding his joining with Tenant in Tail. Cro. Car. 405. pl. 4. Paſch. 12 Car. B. R. Baker v. Hawkins.

Brownl. 30. 43. S. P.

14. If *Tenant for Years holds over* his Term, *and continues to pay his Rent* quarterly as before, that this Payment and Acceptance of the Rent amounts to a Leaſe at Will; Per Roll Ch. J. on a Trial at Bar. All. 4. Mich. 22 Car. B. R. Sir Tho. Bowe's Caſe.

15. When a *Feoffment* is made *on Confidence to perform the laſt Will* of the Feoffor, it ſhall be intended by the Law that the Feoffor ought preſently to occupy the Land at the Will of the Feoffees. Cart. 60. Paſch. 18 Car. 2. per Brown Arg. cites Litt. S. 463.

Entry by Agreement makes him Tenant at Will, and Ceſtuy que Truſt is ſuch; Arg. Show. 315. Mich. 3 W. & M. —— A bare Agreement will make a Tenancy at Will. 2 Sid. 153. Paſch. 1659. B. R. Bedford v. Johnſon. —— To make Eſtate at Will, it is not always requiſite that there be expreſs Conſent of both Parties, but it ſuffices if there be ſomething tantamount, which the Law ſays there is in the Caſe of a Ceſtuy que Truſt; For every ſuch Truſt implies that the Leſſor ſhall take the Profits, becauſe he is Ceſtuy que Truſt, which includes an Eſtate at Will; Reſolved. Sid. 458. pl. 1. Trin. 22 Car. 2. B. R. in Caſe of Freeman v. Barnes. —— An Entry by the Conſent of the Parties makes a Tenancy at Will; Arg. See Carth. 101.

16. There cannot be Tenant at Will till there is *Agreement of both Parties*, or till there is an *Entry*; Per Bridgman. Cart. 67. Paſch. 18 Car. 2. C. B.

Vent. 80. Freeman v. Barns, S. C. & S. P. held accordingly by all, præter Morton.

17. If *Leſſor enters on his Leſſee for Years*, he is Tenant at Will. Sid. 349. pl. 16. Trin. 19 Car. 2. C. B. Reſolved in Caſe of Barns v. Freeman.

18. *One that could read* made an *Agreement for a Leaſe for* 21 *Years*; The *Leſſor* himſelf *drew the Leaſe but for one Year*, and *read it for* 21 Years, and after the Expiration of a Year ejected the Leſſee, and he brought a Bill in Chancery to be relieved upon all this Matter, which was in Proof; but it was *diſmiſſed with Coſts*, for it was within the Statute of Frauds and Perjuries, and being able to read it was his own *Folly*; otherwiſe if he had been *unlettered*. Skin. 159. Hill. 35 & 36 Car. 2. Anon. in Chancery.

(T. b) In what Manner a Leaſe at Will may be made.

By Act in Law.

1. IF the Grandfather enjoys the Land of the Son for Cauſe of Nurture, he is Tenant at Will. 42 E. 3. 7.

2. If

2. If the King grants Land to another and his Heirs Males, this Grant is void for the Uncertainty, and Grantee ſhall not be Tenant at Will. 18 H. 8. § 1 Rep. 43. b. * *Altonwood's Caſe.* Da. 1. 43. Fol. 860. * 2 And. 156 pl. 86. S. C. & S. P.

3. So if the King grants Rent or Land without limiting any Eſtate, the Grant is void for the Uncertainty, and the Grantee ſhall not be Tenant at Will. Da. 1. 45. *Dean and Chapter of Ferne's Caſe.* Contra 17 E. 3. 45.

4. If the King grants Land Probis Homiuibus de Dale, rendring Rent, they are Tenants at Will. D. 1 Ma. 100. Da. 1. 43. b.

5. If the King grants an Office to another at Will, and grants a Rent to him for the Exerciſe for his Life, yet this is determinable upon the Determination of the Office. Co. Litt. 42.

6. A *Feoffment* was made *habendum a Die Datus for Life* of the Leſſee, and a *Letter of Attorney* to make Livery. The Attorney *made Livery the ſame Day* it bore Date. The Livery is void as to the making it a good Leaſe, and yet the Leſſee entring and *paying his Rent* is Tenant at Will; As one entring without Livery is Tenant at Will to the Feoffor. Cro. C. 338. pl. 21. Mich. 10 Car. B. R. Bull v. Wyatt.

(U. b) [Leaſe at Will.]

Out of what Eſtate it may be made.

1. If the King ſeizes Lands of Priors aliens, for Cauſe of War, he may leaſe it at Will. 17 E. 3. 2. 17. b.

2. A. and J. his Wife, and T. and M. his Wife, were agreed upon Exchange of Land for Land, by which T. and M. entred, and after *infeoffed A. and his Father in Fee, where they ought to have given to A. and J. his Wife in Tail*, the *Remainder to the right Heirs of the Wife*, and alſo T. and M. his Wife ſhould pay annually 40s. 8d. to the ſaid A. and J. his Wife. This was arrear for four Years, wherefore A. and his Wife entred, and T. and his Wife ouſted them, and they brought an Aſſiſe and recovered by Judgment, for *by the Miſ-making of the Eſtate* A. and his Wife *were only Tenants at Will*, and therefore the Entry of A. lawful. Br. Ent. Cong. pl. 10. cites 45 E. 3. 20.

(X. b) [Leaſe at Will.]

To whom it may be made.

In reſpect of the Eſtate.

1. One Jointenant in Fee cannot leaſe at Will to his Companion, becauſe by the Law they hold per mie & per tout, and the one may take all the Profits, and the other has no Remedy, 11 H. 6. 34. (But Quære, for if the one takes all the Profits, this is One Jointenant may leaſe his Part for 15 Years or

at Will to his Companion. Co. Litt. 286. a.

is a Tort, and the other may take all from him, and this Leaſe at Will tolls them both.)

Ow. 702. James v. Portman. S. C. and Judgment accordingly. And by Popham, the Saying, "that he will not occupy" are Words in the Negatiive, which will not exclude him of his Intereſt, but in the Caſe at Bar they will, becauſe they are in the Affirmative ſo, viz. that he ſhall occupy the Land ſolely.

2. Two are *Jointenants for Life*; one aſſents that the other ſhould occupy and take the Profits to his own Uſe, this amounts to a Leaſe at Will, which one Jointenant may make to the other; But if one ſays to the other, "I will not occupy it." this is no Aſſent, nor is material. Cro. E. 314. pl. 7. Hill. 36 Eliz. B. R. Geanes v. Portman.

(Y. b) Leaſe at Will Determination.

What Act ſhall be a Determination.

1. **If a Man leaſes Land at Will, and after** grants a Rent-charge in Fee to another, **this is not any Determination of the Will**; admitted 11 H. 6. 33. (**But Quære for what Rewedy ſhall the the Grantee have for the Rent, for he ſhall not diſtrain the Beaſts of the Leſſee if the Leaſe continues, becauſe this was Paramount the Charge).**

But by the Feoffment of the Leſſor the Will was determined. D. 18. b. Marg. pl. 106 cites 21 H. 6. 17 Fitzh. Aid de Roy, pl. 22. per Newton. —— D. 18. a. b. pl. 106 S P. but takes a Difference between a Feoffment by the Leſſor of Tenant at Will, and where it is made by a Stranger who had a Right of Entry into the ſame Land, for that is no Determination of the Will of the Leſſor.

2. If Leſſor **at Will of Black Acre** covenants with a Stranger to make a Feoffment to him of it, **this is not any Determination of the Will** till the Feoffment made; **for notwithſtanding the Covenant peradventure he never will make the Feoffment.** M. 38 & 39 **Eliz. B. R. per Gawdy.**

S. C but if the Trees are excepted then it is no Determination of the Will; for then the Act is lawful albeit the Will does continue. Co. Litt. 55. b.

3. If Leſſor **at Will** enters into the Land without the Aſſent of the Leſſee, and cuts down a Tree, **this is a Determination of the Will, becauſe otherwiſe would be a Wrong in the Leſſor. Co. Litt. 55 b.**

Br. Tenant by Copy &c. pl. 18 cites 14 E. 4. 6. —— Ibid. pl. 29. cites 14 E. 4 7.

4. **If a Man leaſes at Will a Manor to which a Common is appendant, and afterwards** puts in his Beaſts to uſe the Common, **it is a Determination of the Will. Co. Litt. 55. b.**

5. **The Leſſor may by** actual Entry **into the Land determine his Will** in the Abſence of the Leſſee, bnt by Words ſpoken out of the Land **the Will** is not **determined** till the Leſſee has Notice. **Co. Litt. 55 b.**

4 Le. 167. pl. 271. Trin.

6. If Tenant **at Will** cuts down Timber Trees, or voluntarily pulls down **or proſtrates** Houſes, **this determines the Will, and the Leſſor may**

may have Treſpaſs for it. Mich. 28 & 29 Eliz. B. between *Walgrave and Somerſet.* Rot. 318. adjudged, cited Co. Litt. 57.

29 Eliz. C. B. Walgrave v. Somerſet, S. P. admitted, the Court being clear of Opinion that Treſpaſs lay againſt him, and cites Litt. S. 25. —— Gouldsb. 72 pl. 17. S. C.

7. If Tenant at Will grants over his Eſtate to another, though it *be a void Grant, yet it amounts to a Determination of his Will. Co. Litt. 57.

* Fol. 861.

8. When a Man *diſtrains his Tenant at Will for Rent, and makes a Pound in the ſame Land*, this making of the Pound there is a Diſcharge of the Leſſee; Per Keble, quod non negatur. Br. Diſtreſs, pl. 30. cites 21 H. 7. 32.

9. *I agree to ſurrender my Lands*, is not a preſent and expreſs Surrender. Le. 178. pl. 230. Trin. 31 Eliz. B. R. Sweeper v. Randall.

Cro E 156. pl 39. S C. adjudged.

10. If Tenant at Will *takes Feoffment of a Stranger* it is a Determination of his Will. Cro. E. 116. pl. 16. Mich. 30 & 31 Eliz. B. R. Per Wray in Caſe of Reynold v. Kingman.

11. There is an *expreſs* Ouſter and an *implied Ouſter*; Expreſs, as when the Leſſor comes upon the Land and expreſly *forewarns* the Leſſee to occupy the Ground no longer; and Implied, as if the Leſſor without the Conſent of the Leſſee enters into the Lands and cuts *down a Tree*, this is a Determination of the Will; for that it ſhould otherwiſe be a Wrong in him, unleſs the Trees were excepted, and then it is no Determination of the Will; for then the Act is lawful, albeit the Will does continue. Co. Litt. 55. b.

12. Tenant at Will is at the Will of both Parties, but the Will ſhall not be determined by every Act; If *Feme Leſſee at Will* takes Baron, or *a Feme Leſſor at Will takes Baron*, although the Feme has put her Will in her Husband, yet it ſhall not be ſaid a Determination without the Election of the Leſſor or Husband to the contrary. Cro. C. 303, 304. per Cur. Paſch. 9 Car. B. R.

13. If A. makes a Leaſe at Will to B. and he is *ouſted*, and then enters again, and *takes a new Eſtate*, the Will is determined; but a Stranger cannot determine his Eſtate without his Conſent; but in the principal Caſe he determined his firſt Eſtate by making a new Contract with the Diſſeiſor of his Leſſor; Per Roll Ch. J. Sty. 363. Hill. 1652. Locky v. Dumiloe.

14. In Debt for Rent the Plaintiff made a Leaſe at Will, and after makes *Leaſe to another for Years, to commence immediately, but* Leſſor and Leſſee for Years *agree* that he ſhall *not enter till* after the Rent is due by Tenant at Will, this was a Determination of the Eſtate at Will; and Action for the Rent lies not againſt him. 2 Lev. 88. Paſch. 25 Car. 2. B. R. Dinſdale v. Iles.

If Leſſor does any Act inconſiſteut with the Continuance of the Eſtate at Will, it ſhall determine it from ſuch Time as the Tenant at Will takes Notice of it, and before the Entry of the Leſſor, though this may prove a miſchievous Caſe in regard of the Frequency of Conveyancing by Leaſe and Releaſe; Per Hale Ch. J. Vent. 247. Mich. 25 Car. 2. B. R. Hinchman v. Iles, S. C. —— Raym. 224. S. C. but is ſtated as an Action of Treſpaſs brought by Leſſee at Will againſt the Leſſor for diſtraining his Goods for the Rent Arrear at the End of the Year, and adjudged for the Plaintiff, becauſe the Leaſe for Years was a Determination of the Eſtate at Will eſpecially the Plaintiff in his Pleading having acknowledged the Leaſe for Years to commence in Intereſt at a Time prior to the End of the Leaſe at Will. —— 3 Keb. 207. pl. 6. S. C. in Treſpaſs, and adjudged per tot. Cur. for the Plaintiff.

15. If a Settlement be made by *Leaſe and Releaſe*, if Tenant at Will knows nothing of it, it is no Determination; ſo to ſay *I do determine my Will* is not enough without Notice to the Leſſee at Will, and that he will take Advantage of it. 3 Keb. 208. pl. 6. Mich. 25 Car. 2. B. R. in Caſe of Dinſdale v. Iles.

16. If

16. If a Leſſor *ſays the Leſſee ſhall hold it no longer*, the Leſſee (as ſoon as he knows of the Words) may take an Advantage of them as a Determination of the Will. Vent. 248. Mich. 25 Car. 2. B. R. Hinchman v. Iles.

17. A Man leaſes at Will, reſerving Rent, from Michaelmas as long as both Parties ſhall pleaſe, the *Leſſor puts in Cattle, and yet diſtrains for Rent*; The Leſſee brings Treſpaſs; The Leſſor avows for Rent upon the Leaſe; The Leſſee replies the Determination is good &c. Et Judic' pro Quer'; But if the Cattle had been *put in privately without the Leſſor's Knowledge, or Privity*, or Notice, the Leſſee will be liable for the Rent. And per Parker Ch. J. it ought only to be ſhewn that the Will was determined and the Manner of the Determination ought to come in Evidence. Hill. 9. Geo. B. R. Harold v. Norman.

(Z. b) What Act in Law [*is a Determination*, of an Eſtate at will.]

Yet the Leſſee ſhall have the Emblements. 5 Rep. 116. b. S. C. —— Mo 394, 395. S. C. but S. P. does not appear.——Cro. E. 450. (bis) pl. 10 S. C. but S. P. does not appear.——Gouldsb. 190. pl. 136. S. C. & S. P.——The outlawry is no Determination till Seiſure. 5 Rep. 116. b S. C.——3 Keb. 207.——Outlawry is a Determination of Eſtate at Will, though not of a Copyhold Eſtate. Het. 127. Arg.——But it is no Determination till a Seiſure in Caſe of Leſſor, nor an Extent till a Liberate; Per Hale Ch. J. Vent. 248. Mich. 25. Car. 2. B. R. Hinchman v. Iles.

1. **If the Leſſor at Will be outlawed in a Perſonal Action, the the Will is determined; For the King ſhall have the Profits afterwards.** 5 Rep. 116. b. *Oland's Caſe* 9 H. 6. 21.

And in ſuch caſe the King ſhall have the Emblements. Ibid.

2. **If Leſſee at Will be outlawed in a Perſonal Action the Will is determined by it.** 5 Rep. 116. b. *Oland's Caſe.*

5 Rep. 10 a Mich. 36 & 37 Eliz. C. B. Henſtead's Caſe S. P. reſolved, that without expreſs Matter done by the Baron after the Marriage to determine the Will, it is not determined.——Cro. C. 304. Paſch. 9 Car. B. R. per Cur. S. P. accordingly.——Kelw. 162, 163. Arg. cites 35 H. 6. and 18 H. 6. S. P.

3. **If a** Feme leaſe at Will, rendring Rent, and **after** takes, Baron, **this does not determine the Leaſe, but Baron and Feme ſhall have Action for the Rent. Co. Litt. 55. b.**

5 Rep. 10 a. S. P. reſolved in Henſtead's Caſe —— Cro. Car. 304. S. P. per Cur.

4. So **if a** Leaſe **at Will be made** to a Feme rendring Rent who takes Baron, **this does not determine the Leaſe, but an Action lies againſt them for the Rent or a Diſtreſs. Co. Litt. 55. b.**

5 Rep 10. b. S. P. in Henſtead's Caſe.

5. **So if** Baron and Feme leaſe at Will the Land of the Feme, **Rendring Rent, and the** Baron dies, **yet the Leaſe ſhall continue. Co. Litt. 55. b.**

5 Rep 10. a. S. P. in Henſtead's Caſe as to a Leaſe made to ſeveral, and held to be no Determination of the Will, and though nothing can ſurvive, yet inaſmuch as every Jointenant is poſſeſſed per My & per tout, they ſhall be charged with the whole Rent;

6. **So if a Leaſe at Will be made** by two to two, and **after** one of the Leſſors or Leſſees ſhould die, **the Leaſe at Will is not determined in either of theſe Caſes. Co. Litt. 55. b.**

Rent; And that ſo the Quære in 10 Eliz. D. 269. [pl. 20.] is well reſolved. And as to the Leaſe at Will by two reſolved accordingly, Ibid. 10. b.

7. Where the *Leſſor at Will dies* the Leaſe is determined; For the Will is determined by his Death; and where it is determined of the one Part, it is determined of both; and there if he occupies after, it ſeems that he is a Tenant by Sufferance, and ſo it appears in Lib. Littleton. Br. Tenant per Copie, pl. 4. cites 21 H. 6. 37. D. 18. b. Marg. pl. 106. cites 21 H. 6. * 17. Fitzh. Aid de Roy, pl. 22 per (37.)

Newton.——* Fitzh. is (17) but it ſhould be as it is in Br.

8. If *Tenant at Will be ouſted, and his Leſſor diſſeiſſed*, he may have Treſpaſs without Regreſs, and per Forteſcue and Yelverton J. *he by his re-entry cannot re-continue his Eſtate, not the Eſtate of the Leſſor*, and may have Treſpaſs without Regreſs, but there he did, and brought Treſpaſs; and recovered, and yet by them he cannot re-enter; For by the Diſſeiſin the Will of his Leſſor is determined, and therefore cannot re-enter. Br. Entre Cong. pl. 46. cites 38 H. 6. 28. Br. Repleader, 26. cites S. C.—— Br. Treſpaſs, pl. 217. cites S. C.

9. If the Leſſor diſtrains for Rent, and *impounds the Diſtreſs upon the Ground letten at Will*, the Will is determined. Co. Litt. 57. b.

10. If a Man makes a Leaſe at Will and * *dies*, now is the Will determined, and if the Leſſee continues in Poſſeſſion he is Tenant at Sufferance, and yet the Heir by Admiſſion may have an Aſſiſe of Mortdanceſter againſt him. Co. Litt. 57. b. If in ſuch Caſe Leſſee continues in Poſſeſſion, and claims Fee, the Heir ſhall have a Mortdanceſter; Arg. Ow. 28. cites 10 E. 4.——* Br. Tenant by Copy &c. pl. 20. cites 21 H. 6. 37. But quære if it be not otherwiſe of Tenant by Copy of Court-Roll.

11. If a Man &c. will let Lands and Tenements to another, to have and *to hold to him and to his Heirs at the Will of the Leſſor*, theſe Words (to the Heirs of the Leſſee) are void; For in this Caſe, if the Leſſee dies, and his Heir enters, the Leſſor ſhall have a good Action of Treſpaſs againſt him &c. Litt. S. 82.

12. By which it is proved, that *by the Death of Leſſee the Leaſe is abſolutely determined*, which is proved by this, that if the Heir enter the Leſſor ſhall have an Action of Treſpaſs Quare vi et Armis before any Entry made by the Leſſor. Co. Litt. 62. b.

13. An *Extent upon the Leſſee* will not determine the Will *until the Liberate*; Per Hale Ch. J. Vent. 248. Mich. 25 Car. 2. B. R. Hinchman v. Iles.

14. If a Man makes a Leaſe at Will *to two, and one dies*, the Leaſe is not determin'd. Freem. Rep. 450. pl. 613. Paſch. 1677. in an Anonymous Caſe.

(A. c) Eſtate at Will.

Who may determine it.

1. IF a Stranger enters upon my Tenant at Will and ouſts him, and diſſeiſes me, **yet this is not any Determination of the Will, but my Tenant at Will** may **well** re-enter. **Mich. 3 Ja. B. R.** * Yelv. 73. S. C and Ibid. 74 is a Nota, that

no Entry of a Stranger upon the Leſſee, though it be by his Agreement, ſhall determine the Leaſe againſt the Leſſor, becauſe it is Covin, unleſs the Leſſor be Privy to, and acquainted with it; Quod fuit conceſſum.——Mo 774, 775. pl. 1069 S C. adjudg'd that if one enters by Title on the Leſſee the Will is determined.——Brownl. 88, 89. S. C. but ſeems only a Tranſlation of Yelv.——By the Diſſeiſin the Will of the Leſſor is determined. Br. Tenant by Copy &c. pl. 6. cites 38 H. 27.——Tenant at Will ouſted by a Stranger may re-enter without Commandment of his Leſſor; For the Act of a Stranger is no Determination of the Will of the Leſſor. Br. Tenant by Copy &c. pl. 11. cites 11 E. 4. 3.——Br. Treſpaſs, pl. 227. S. P. Ut videtur cites 38 H. 6. 27.

B. R. between *Carpenter and Collins.* **Per two againſt one, and that he is chargeable to the Leſſor for the Rent afterwards.**

2 By *Diſſeiſin* the Will of the Leſſor is determin'd. Br. Tenant per Copie &c. pl. 6. cites 38 H. 6. 27.

3. If the Leſſee at Will be *ouſted by a Stranger*, he may *re-enter* notwithſtanding it has been heretofore controverted, and the Reaſon is, becauſe he hath the firſt Poſſeſſion. Sty. 250. Hill. 1650. Per Roll Ch. J. and Nicholas J. in the Caſe of Bawſey v. Lowdall.

(B. c) Tenant at Will.

At what Time it may be determined.

Yelv. 73, 74. S. C & S. P.—Mo. 774. pl. 1069. S C. but S. P. does not appear.——Brownl. 88, 89. S. C. but ſeems only a Tranſlation of Yelv.——3 Mod. 150. Arg. cites S. C ——Leſſee at Will rendering Rent cannot determine his Will but at Rent Day, unleſs he pay the Rent to the Day of Payment next after his Departure. Per Cur. Sid. 339 Knightly v. Bulkly.——All. 4. Mich. 22 Car. B. R. Bowes's Caſe. S P.——If he enters upon a Quarter, though but one Day, he cannot determine his Will. 2 Ld. Raym. Rep. 1008. Hill. 2 Ann. Per Holt Ch. J. at the Sittings at Weſtminſter. Title v. Grevet.

1. **A Tenant at Will rendering Rent cannot determine his Will** a Day before the Rent Day, and ſo avoid Payment **of the Rent. Dubitatur Mich. 3 Ja. B. R. between** *Carpenter and Collins.*

2. If *Tenant at Will rendering Rent Quarterly begins a new Quarter*, and *voluntarily determines the Will before the Quarter ended*, yet he ſhall pay the Rent for that Quarter. All. 4. Mich. 22 Car. B. R. Sir Thomas Bowe's Caſe.

3. *After Commencement of the Year* the Leſſee at Will *cannot* determine it *to the Prejudice of the Leſſor for his Rent.* 2 Jo. 5. per Cur. Trin. 21 Car. 2. C. B. in Caſe of Timberley v. How.

Kelw. 65. b. Trin. 20 H. 7——But he may determine it immediately when the firſt Year is ended, or before. Kelw. 163. pl. 5. Mich. 3 H. 8.

4. A. demiſes Lands to B. *for a Year, and ſo from Year to Year*, this is not a Leaſe for two Years and afterwards at Will; but it is a Leaſe for every particular Year, and after the Year is begun Leſſee cannot determine the Leaſe before the Year is ended. Per Holt Ch. J. at Lincoln. 2 Salk. 413. pl. 4. 1699. Anon.

Collected from the ſeveral Books.

5. A Leaſe at Will is determinable at the Will of either Party, Leſſor or Leſſee; but yet this Contract is to have a reaſonable Conſtruction. For *neither Party can determine the Will to the Prejudice of the other*; For if they ſhould, ſuch a Determination of the Will would be fraudulent, and a fraudulent and injurious Determination of the Will is none at all; And therefore *if the Leſſee ſhould determine the Will before*

fore the Rent Day, he muſt pay the Rent, becauſe it is a fraudulent Determination of the Will to avoid ſuch Payment; So *if the Leſſee takes the Farm at Will from Lady-Day he cannot determine it at Michaelmas*, though the Yearly Rent be payable by equal Portions, becauſe having receiv'd the Summer Profits ſuch Determination would be in Fraud of of his Landlord; *But if he comes in at Michaelmas into Meadow or Paſture Ground, he may determine it at Lady Day if the Rent be payable Half-Yearly*, becauſe that is no fraudulent Determination, nor prejudicial to the Landlord, ſince the Landlord receives the Summer Profits. But *if he be Tenant at Will of arable Land, and comes in at Michaelmas, he cannot determine the Will at Lady Day unleſs he has ſown it*; becauſe the Time of ſowing being over, it would be prejudicial to the Landlord to let it lie fallow till the next Year; *But if he determines it, having ſown it, he ſhall looſe the Emblements*; So in the Caſe of the Landlord, *If the Landlord determines his Will before the Rent Day he loſes his Rent*; And *if the Tenant comes in at Michaelmas into Paſture Meadow or arable Ground, the Landlord cannot determine his Will at Lady Day, becauſe that would be prejudicial to the Tenant, ſince he cannot receive the Summer Profit*; *But if the Tenant comes in at Lady Day the Landlord may determine his Will at Michaelmas, ſince the Tenant has received the Summer Profits*; *But in Houſes, If the Rent be reſerved Quarterly or Half-Yearly, the Landlord or the Tenant may determine the Will at every Rent Day, becauſe there is no Difference touching the Profits*; But if the Landlord determines it before the Rent Day he loſes his Rent, and he muſt give the Tenant a reaſonable Time to remove, and if he determines it at the Quarter Day he muſt give him a reaſonable Notice before, or a reaſonable Time afterwards to remove; And if the Leſſee determines the Will before Rent Day he muſt pay the Rent, and it ſhall not be apportioned; And if either Party dies before Rent Day, this Act of God ſhall do neither Party an Injury, and therefore the Leaſe in Caſe of Houſes ſhall continue till the next Rent Day; And if it be a Leaſe of Lands commenceing at Michaelmas, it ſhall continue till the Summer Profits be receiv'd by the Tenant at Will or his Executors. 13 H. 8. 16. Keylw. 65. Cro. Eliz. 775. Wynch. 32. Yelv. 74. Allen 4. 1 Sid. 339. Salk. 413, 414. 3 Salk. 222. and Cumb. 255. and 6 Mod. 115. &c.

(C. c) Tenant at Will. Determination.

How it may be determined.

1. A **Tenant at Will cannot determine his Will** ſecretly without Notice to the Leſſor. **Mich. 3 Ja. B. R. between** *Carpenter v. Collins*. Yelv. 73, 74. S. C. & S. P.—— Brownl. 89. S. C. & S. P. but ſeems only a Tranſlation of Yelv.—— Mo. 774 pl. 1069. S. C. but S. P does not appear.—— Br. Leaſes, pl. 53. Brooke ſays, that it ſeems the Leſſee ſhould have half a Year's Warning.—— By the Cuſtom of London where a Meſſuage is above 40 l. a Year Rent, there ought to be half a Year's Warning given, and a Quarter's Warning where it is under. Skinn. 649. pl. 7. Tyley v. Seed.

2. So if Leſſor ſays, I do determine my Will, this is no Determination of the Will unleſs the Leſſee at Will has Notice of it, and will take Advantage of it. 3 Keb. 208. in pl. 6. Mich. 25 Car. 2. B. R. in Caſe of Dinſdale v. Iſles.

(C. c. 2) Eſtate at Will.

How the Rent to be on Determination.

1. THE Leſſor is always at Liberty to ouſt the Leſſee if he makes his Leaſe with ſuch Words, (to have at Will of the Leſſor,) and the Tenant is at no Prejudice; For if he holds till the *laſt Day of the Year*, and then *Leſſor ouſts him*, he ſhall take all his Occupation to his own Advantage. Per Frowike Ch. J. Kelw. 65. b. Trin. 20 H. 7.

2. If Tenant at Will is *ouſted by a Stranger* he ſhall not pay his Rent to the Leſſor. The Reaſon ſeems to be, becauſe it is a Determination of the Will of the Leſſee when he permits it, and will not re-enter; For ſuch Leaſe is at the Will of both. Br. Leaſe, pl. 13. cites 14 H. 8. 10. Per Fitzherbert.

After Commencement of the Year he cannot determine his Will to the Prejudice of the Leſſor for his Rent. Per Cur 2 Jo. 5. C. B. in Caſe of Timberley v. Grubham How.

3. Leaſe *de Anno in Annum Quamdiu* ambabus Partibus placuerit, *Leſſee enters on a third Year and dies*; Per Gawdy and Fenner, though it was a Leaſe certain at firſt but for two Years, yet when he enjoy'd Part of the Third there it is a Leaſe certain for that Year alſo not determinable by either, ſo that Action lies for the Rent of that Year; but per Popham it was a Leaſe at Will for the third Year, and then determined by the Death of Leſſee. Et adjornatur. Cro. E. 775. pl. 6. Mich. 42 & 43 Eliz. B. R. Agard v. King.

4. Leſſee at Will cannot determine his Will *within the Year* to the Prejudice of the Leſſor, but that he ſhall anſwer the whole Rent to the Leſſor. Brownl. 89. Mich. 3 Jac. Carpenter v. Collins.

5. A. leaſes a Chamber to B. *to hold as long as Leſſee pleaſes*; Per Roll Ch. J. by the old Books this is as long as both Parties pleaſe, and if Leſſor bring Action for the Rent it ſhall be intended that the Term was determined, unleſs Defendant ſhewed that he would have held it longer, and if the Time be determined Leſſee ought to pay the Rent preſently if no Time be expreſſed for the Payment thereof, and the *Averment* ought to be on the Defendant's Side, viz. to allege that Plaintiff did not ſuffer Defendant to hold the Chamber ſo long as ſhe pleas'd. Sty. 397. Mich. 1653. B. R. Farmer v. Lawrence.

1 Salk. 262. S. C. but Dolben J. inclined that it being uncertain how long the Tenant would continue in Poſſeſſion, being only Tenant at Will it might be a good Reſervation. 4 Mod. 79. S. C.

6. Demiſe at Will paying *after the Rate of* 18 *l.* per Ann. during the Continuance of that Demiſe, the Reſervation ad Ratam on Leaſe at Will is not good where Time of Payment ſhould be very certain; for if the Tenant hold over a Day he muſt pay the Rent of the next Quarter. 4 Mod. 76. Hill. 3 & 4 W. & M in B. R. Parker v. Harris.

7. A. makes a Leaſe at Will to B. and afterwards a *Leaſe for Years, to commence preſently, but Leſſor and Leſſee for Years agreed* that Leſſee for Years ſhould *not enter till after Rent-Day*. Adjudged that this determined the Eſtate at Will, and that Action for the Rent lies not againſt B. 2 Lev. 88. Paſch. 25 Car. 2. B. R. Dinſdale v. Iſles.

8. If there be a Tenant at Will, and the *Leſſor dies the Day before the Rent-Day*, the Tenant may keep his Rent; Per Eyres J. Cumb. 255. Paſch. 6 W. & M. B. R. Harding v. Brook.

9. A *Compoſition for Tithes* between the Parſon and his Pariſhioners *Quamdiu Ambabus partibus placuerit*, if the Pariſhioner plows and ſows the Parſon ſhall not that Year recede and demand Tithes in Kind, but muſt make his Election at the Beginning of the next Year; for the Pariſhioner would not perhaps have ſowed his Land but that he relied upon his Contract; Per Holt Ch J. cited as a Caſe before Hale Ch. J. 2 Salk. 414. pl. 6. Hill. 7 W. 3. B. R. in Caſe of Legg v. Strudwick. Ibid. cites Cro. E. 775. Kelw. 65. Aleyn 4. 2 Jo. 5. Sid. 359. 14 H. 8. 10.

10. In a Leaſe at Will the Tenant may *determine his Will* after Payment of the Rent at the *End of a Quarter*, but not the Beginning, leaſt the Leſſor ſhould loſe his Rent. 2 Salk. 413. pl. 4. per Holt Ch. J. at Summer Aſſizes at Lincoln 1699. Kelw. 65. b. Trin. 20 H. 7.

11. The Leſſor cannot determine his Will in the *Middle of a Quarter* without permitting the Tenant to have the Emblements; Per Holt Ch. J. at Aſſizes. 2 Salk. 413 pl. 4. 1699.

12. A. holds at Will *rendering Rent quarterly*, Leſſor may determine his Will when he pleaſes; But *if* he determines it *within a Quarter* he ſhall loſe the Rent which ſhould have been paid for that Quarter in which he determines it; ſo the Leſſee may determine it when he pleaſes, but then he muſt pay the Quarter's Rent; Per Holt Ch. J. 2 Salk. 413. pl. 5. Hill. 13 W. 3. B. R. Leighton v. Theed. 3 Salk. 222. S. C. —— Though he holds over but one Day. 4 Mod. 79. Hill. 3 & 4 W. & M.

B. R. in Caſe of Parker v. Harris. —— 2 Ld. Raym. Rep. 1008. Hill. 2 Ann. S. P. by Holt Ch. J at the Sittings at Weſtminſter. Title v. Grevet.

13. 11 *Geo.* 2. *Whereas great Inconveniencies may happen to Landlords whoſe* Tenants have Power to determine their Leaſes by giving Notice to quit *the Premiſſes by them holden, and yet refuſing to deliver up the Poſſeſſion when the Landlord hath agreed with another Tenant for the ſame; It is enacted, that in Caſe any Tenant ſhall give Notice of his Intention to quit the Premiſſes by him holden at a Time mentioned in ſuch Notice, and ſhall not accordingly deliver up the Poſſeſſion thereof at the Time in ſuch Notice contained, that then the ſaid Tenant, his Executors, or Adminiſtrators, ſhall from thenceforward* pay *to the Landlord or Leſſor* double the Rent *or Sum which he ſhould otherwiſe have paid, to be levied, ſued for, and recovered at the ſame Times, and in the ſame Manner as the ſingle Rent or Sum before the giving ſuch Notice, could be levied, ſued for, or recovered; and ſuch double Rent or Sum ſhall continue to be paid during all the Time ſueh Tenant ſhall continue in Poſſeſſion as aforeſaid.*

(C. c. 3) At Will.

What Actions ſuch Tenants may have; And where.

1. THE old Law doubted whether a Leſſee at Will could bring an Action of *Treſpaſs in his own Name*; Per Bridgman Ch. J. Carth. 66. cites 18 H. 6. though now he ſaid it is otherwiſe.

2. If I *leaſe Land at Will*, and *a Stranger enters and manures the Land*, the *Tenant ſhall have Treſpaſs of his Loſs, and I ſhall have Treſpaſs for the Loſs and Deſtruction of my Land.* Br. Treſpaſs, pl. 131. cites 18 H. 6. 44, 45.

3. Tenant at Will brought *Writ of Treſpaſs*, where *J. S. was ſeiſed, and leaſed to A. for Life*, which *A. leaſed* his Eſtate *to H.* which *H.*

leaſed to the Plaintiff at Will, and a Stranger diſſeiſed the Tenant for Life, and ouſted the Tenant at Will, and he re-entered, and brought Treſpaſs, and *averr'd the Life of the Tenant for Life* as he ought; Per Cur. *but he did not aver the Life of H. his Leſſor*, and yet the Plaintiff recover'd; for his Life ſhall be intended, quære inde; for the Law is contrary by the Reporter; But Brooke doubts. Br. Averment, pl. 25. cites 38 H. 6. 27.

If Leſſee at Will of Tenant for Life be ouſted, and then the Leſſor dies, now the Leſſee ſhall have Treſpaſs with a Continuando without Regreſs, for when he may not enter the Law ſupplies it, and the mean Profits belong to him; Per Gawdy J. Godb. 145. cites 38 H. 6. ——— Br. Entre Cong pl. 46. cites S. C.

4. Tenant at Will who *is ouſted by one, who diſſeiſed* the *Leſſor*, *may re-enter* as it ſeems there; for *he re-entered, and brought Treſpaſs, and recover'd.* Br. Tenant per Copie, pl. 6. cites 38 H. 6. 27.

5. *Alſo he may have Treſpaſs without any Regreſs*; for by his Regreſs he does not re-continue his own Eſtate, nor the Eſtate of his Leſſor; Per Forteſcue and Yelverton; for by the Diſſeiſin the Will of the Leſſor is determined, and he *cannot have* Action to recover his Eſtate as Tenant for Life or for Years may by *Aſſize or Ejectment*; *for* Tenant at Will *has not any Eſtate certain*, and yet he made Regreſs, and brought Treſpaſs, and upon all the Matter apparent in Pleading he ſhall recover by Award. Br. Tenant per Copie, pl. 6. cites 38 H. 6. 27.

6. If the Leſſee be diſturbed of his free *Entry, Egreſs and Regreſs*, which the Law gives him, he ſhall have his Action upon his *Caſe*, and recover his Damages, and this Action the Law gives to him &c. Co. Litt. 56. a.

(C. c. 4) Tenant at Will. What he may do. And where an Action lies againſt him &c. And what Action.

1. TReſpaſs upon the Caſe lies againſt *Tenant at Will* who *does Waſte*, or burns Houſes voluntarily, and not Action of Waſte. Br. Action ſur le Caſe, pl. 25. cites 48 E. 3. 25.

Br. Tenant by Copy &c. pl. 9. cites S. C. ——— Br. Waſte, pl. 131. cites 2 E. 4. 22. S. P. per Cur. and Littleton quod fuit conceſſum. ——— Some held that the may cut Underwood, or ſeaſonable Wood, before that he is diſcharged or countermanded. Br. Treſpaſs, pl. 316. cites 8 E. 4. 6. 7.

2. He cannot *cut Underwood* without Licence. Br. Treſpaſs, pl. 302. cites 2 E. 4. 24.

Leſſee at Will of 20 Acres of Wood may cut ſeaſonable Trees, but not great Trees, and he may give or ſell the ſeaſonable Wood. Br. Treſpaſs, pl. 327. cites 12 E. 4. 8. per Choke. ——— He may Underwoods or Shreds, but not Oaks nor Timber Trees; Per Tremayle, quod non Negatur, and therefore he may grant them over. Br. Tenant by Copy, pl. 14. cites 21 E. 4. 5.

3. It ſeems that as long as Tenant at Will is not countermanded he may *cut ſeaſonable Wood* &c. But Littleton ſaid, that then he ought to ſay that they have uſed ſuch Cuſtom in the Country to cut ſuch Underwood; For otherwiſe the Juſtification is not good; Quære inde. Br. Waſte, pl. 114. cites 8 E. 4. 6. 7.

4. If a Man *leaſes* 20 *Acres of Wood at Will*, the Leſſee may cut Trees ſeaſonable, but not the great Trees, and he may ſell the Wood ſeaſonable

able, or give, or do as he will with it; For it cannot otherwiſe be intended; For he cannot make thereof other Profit. But of Eſtovers, viz. Houſebote, he ſhall have only for Reparation of the Houſe, and cannot expend to other Uſe; Per Choke. Br. Waſte, pl. 126. cites 12 E. 4. 8.

5. Leſſee at Will *of a Mine may take the Oar and ſell it*, for he can make no other Profit. Br. Treſpaſs, pl. 327. cites 12 E. 4. 8. Per Catesby. Br. Waſte, pl. 126. cites S. C. & S. P. But if J. leaſe 20 Acres of Land at Will in which is a Mine, the Leſſee cannot dig.

6. Tenant at Will *may grant* to another *that which he himſelf may lawfully do.* Br. Treſpaſs, pl. 362. cites 22 E. 4. 5.

7. *But* he *cannot grant over his* * *Intereſt*; Per Brian. Ibid. * S P. no more than he who has Licence may grant it over; For this continues only till he has Warning, and ſo ſee that he ſhall have Warning. Br. Tenant per Copie, pl. 14. cites 21 E. 4. 5.——S. P. For he has no Intereſt certain. Ibid pl. 15. cites 27 H. 6. 3.

8. If Tenant at Will *cuts down Timber Trees*, or voluntarily pulls down and proſtrates Houſes, the Leſſor ſhall have an Action of *Treſpaſs* againſt him, Quare *vi & Armis*; For the taking upon him Power to cut Timber, or proſtrate Houſes, concerns ſo much the Freehold and Inheritance, as it amounts in Law to a Determination of his Will, and ſo it has been adjudged. Litt. S. 71. and Co. Litt. 57. a. The Leſſor cannot take them, but but ſhall have an Action upon the Caſe; Per Catesby. But Fairfax and Jenner Contra; For he cannot have Waſte, as againſt Tenant for Years. Br. Treſpaſs, pl. 327. cites 12 E. 4. 8.——Cart. 66. per Bridgman Ch. J. S. P. cites Litt. S. 71. and 22 E. 4. 6. and 27 H. 8. 3.

9. If I *lend* to a Man *my Sheep* &c. *he kills them*, an Action of *Treſpaſs* lies notwithſtanding the Lending. Litt. S. 71. And the Reaſon is, that when the Bailee having but a bare Uſe of them, takes upon him as an Owner to kill them, he loſes the Benefit of the Uſe of them, or in theſe Caſes he may have an Action of *Treſpaſs upon the Caſe* for this Converſion at his Election. Co. Litt. 57. a.

10. *Treſpaſs quare vi & armis* &c. was brought againſt Tenant at Will *for cutting down Trees*; and upon Demurrer to the Declaration it was agreed by all, that Waſte would not lie againſt him; and therefore adjudged that this Action was well brought. Goldsb. 72. pl. 17. Mich 29 & 30 Eliz Walgrave v. Somerſet. 4 Le. 167. pl. 271. S C. held clearly accordingly.

11. For *negligent burning the Houſe* by Tenant at Will no Action lies; For he comes in by Act of the Party, and it was his Folly that he did not provide for his Remedy. Cro. E. 777. pl. 10. Mich. 42 & 43 Eliz. B. R. Counteſs of Salop v. Crompton. But if he does it voluntarily Treſpaſs lies; And reſolved, that for the negligent burning the Action lay not. Cro. E. 784. pl. 22. S. C.

12. *Statute of Glouceſter, cap.* 5. extends not to a Tenant at Will, and therefore for permiſſive Waſte the Leſſor has no Remedy at all. Co. Litt. 57. a.

13. *Waſte* lies not againſt Tenant at Will for pulling down Houſes, *cutting Trees* &c. but an *Action on the Caſe*; Arg. Hetl. 35. Mich. 3 Car. B. R. Br. Treſpaſs, pl. 327. cites 12. E. 4. 8.—— But if he pulls down the Houſe he is a Treſpaſſor Ab Initio; Arg. Arg. Cro. C. 196.——For the Privity of the Leaſe is determined by this Act done, which his Eſtate permits not. Cro. E 784 Counteſs Salop v Crompton; Per Gawdy J.—— His Intereſt is determined, and he is become a Stranger by voluntarily doing an Act which could not be done by his Intereſt, and determines his Will; Per Popham. Ibid.

14. *Inditement*

14. *Inditement* lies againſt a Tenant at Will for ſuffering a *Houſe on the Highway to be ruinous* and likely to fall down. 1 Salk. 357. pl. 3. Trin. 2 Ann. B. R. The Queen v. Watts.

(C. c. 5) Leaſes or Grants by Tenant at Will. Good or not.

Cited per three J. Jo. 317. as held per Cur. 41 Eliz. that the Leaſe was good except againſt the firſt Leſſor in the Caſe of Sparke v. Sparke.

1. LEASE for Years by Tenant at Will is *not good between the Parties* to it, but that the Leſſee might well ſay that he had nothing; Per Anderſon. But per Mead Contra. 4 Le. 148. pl. 259. Paſch. 25 Eliz. C. B. in an Anon. Caſe.

2 Le. 46. in pl. 59. S. C. Arg cites 12 E. 4. 12. S. P. as holden by all the juſtices. —— S. C. cited 4 Le. 149. per Anderſon. —— But it is not a Diſſeiſin Partibus Invitis; for if it were otherwiſe, neither a Fine nor Recovery ſuffered by Leſſor during the Poſſeſſion of his Leſſee for Years is good, for he holds by Agreement, and whoever holds by Agreement is my Tenant at Will, and I have the Eſtate; Arg. Cart. 198. pl. 6. Paſch. 9 Car. B. R. cites Cro. C. 302. Blunden v. Baugh. —— Jo. 316. S. C. and Judgment in C. B. was reverſed.

2. If Tenant at Will, or for Years, or at Sufferance, make a Leaſe for Years, it is a *Diſſeiſin*, and a Tenant at Will thereby gains a Freehold, and claims a greater Eſtate than he ought; Per omnes Juſticiarios. Ow. 28. 30 Eliz. in Rouſe's Caſe.

3. If Tenant at Will leaſe for Years, rendring Rent, he ſhall have *no Rent till Entry of Leſſee*, for it was not a perfect Coutract; otherwiſe it is where a Man ſeiſed of Lands leaſes the ſame; Per Dyer Ch. J. 4 Le. 35. pl. 95. 15 Eliz. C. B. in an Anonimous Caſe.

Mo. 189. in pl. 336. it was ſaid by Coke, that it is commonly agreed, that the Leſſee of a Leſſee at Will is a Diſſeiſor. —— 3 Mod. 150. Arg. cites Ld. Coke's Comment on Litt. S. 71. and ſays, that what Ground Ld. Coke had for ſuch an Opinion is not known, and that the Year Books quoted in the Margin will not warrant it; for they are in no Sort parallel.

4. If Tenant at Will grants over his Eſtate to another, and the *Grantee enters*, he is a *Diſſeiſor*, and the Leſſor may have an Action of *Treſpaſs* againſt the Grantee; for albeit the Grant was void, yet it amounts to a Determination of his Will. Co. Litt. 57. a.

Agreed per Anderſon and Meade Juſtices, Godb. 15. and denied 14 E. 4. to be Law.

5. If Leſſee at Will makes a Leaſe for Years to commence *in futuro*, it is not a preſent *Diſſeiſin*. Noy 56. in Caſe of Cooper v. Columbell.

Cro. E. 830. pl. 38. Paſch. 43 Eliz. C. B. Shaw v. Barbor, S. P. agreed per totam Curiam, and that a Releaſe or Confirmation to Tenant at Will afterwards is void, becauſe the Privity is determined; and Walmſley ſaid, that ſo it had been reſolved againſt the Opinion in 12 E. 4. 12.

6. If Leſſee at Will leaſes to B. for Years, and *Leſſee enters*, Leſſee only is the *Diſſeiſor*. Noy 56. in Caſe of Cooper v. Columbell.

(C. c. 6) Actions.

Tenant at Will and Leſſor.

Inter ſe.

1. LEASE at Will *Quamdiu ambabus Partibus placeret, yielding* 10 *l. Quarterly*, in this Caſe *every Quarter's Rent* is a *ſeveral Debt*, and *diſtinct Actions may be brought for each Quarter's Rent.* 2 Vent. 129. Hill. 1 & 2 W. & M. in C. B. Welby v. Phillips.

2. In *Debt for Rent*, the Plaintiff declared on a Leaſe of a Rectory for one Year, and ſo from Year to Year as long as both Parties pleaſe, rendring Rent, and this Action was brought *for Rent arrear the third Year* after the Demiſe, *without averring the Continuance of Poſſeſſion.* After a Verdict for the Plaintiff, it was moved in Arreſt of Judgment, that this was but an Eſtate at Will in the third Year, and therefore the Plaintiff ought to have averred that the Poſſeſſion continued; but per Cur. this is *aided after Verdict*, and ſo would not arreſt the Judgment. Sid. 423. pl. 2. Mich. 21 Car. 2. B. R. Goſtwick v. Maſon.

Mod. 3. pl. 10 S. C accordingly, per Twiſden.

(C. c. 7) Tenant at Will.

What ſuch Tenant may claim as appertaining to him.

1. WHERE *Tenant at Will of a Manor* is, *which has Villeins regardant* to it, if the *Villein purchaſes Land, and the Tenant at Will enters*, he ſhall retain it as *Perquiſite.* Br. Tenant per Copie, pl. 4. cites 21 H. 6. 37. per Paſton.

2. A Tenant at Will ſhall *not be allowed in Chancery* any Thing *for Improvement*, unleſs it were in his Bargain; *So for Reparations*, for he is not bound to repair; So if he ſets up a Malt-Mill, for this he might have carried away &c. Per Trevor Maſter of the Rolls, Mich. 2 Geo.

(C. c. 8) Tenant at Will.

Pleadings.

1. TRespaſs *of Trees cut*; The Defendant *ſaid*, that the Place &c. was the Franktenement of J. N. who *leaſed to him at Will* &c. and no Plea, per Cur. if he *does not ſay that he entred and cut*, and ſo juſtifies; Quod Nota; wherefore he ſaid ſo accordingly to the Part, and the firſt Plea for the reſt to try the Law, but the Court was againſt him. Br. Treſpaſs, pl. 8. cites 2 H. 6. 13.

2. In *Treſpaſs*, a Man *cannot ſay that A. was ſeiſed and leaſed to B. at Will who granted his Eſtate to the Defendant*, for it is no Eſtate, and therefore cannot be granted, and therefore a Que Eſtate *of the Tenant at Will* is not good. Br. Que Eſtate, pl. 38. cites 27 H. 6. 3.

S. P. wherefore he ſhewed certain by Demiſe of the Lord &c. and then well. Br. Tenant per Copie &c. pl. 8. cites S. C.

3. He who pleads that he is Tenant at Will ſhall *ſhew How*, viz. by Demiſe, or as Copyholder, or as Tenant by Sufferance, or the like. Br. Pleadings, pl. 85. cites 5 E. 4. 12.

4. It was ſaid by Littleton in a Note, that *Tenant at Will of a Manor to which Villeins are regardant*, cannot diſable them in Action brought by them againſt him as a Termor may; Quære inde. Br. Tenant per Copie &c. pl. 18. cites 14 E. 4. 6.

5. In Treſpaſs, the *Defendant intitled himſelf by a Leaſe for Years made by* one who was *Tenant for Life, the Reverſion to the Plaintiff, and that the Tenant for Life, who leaſed to the Defendant, died ſuch a Day before the Term ended; and that the Defendant, as ſoon as he had Notice of the Death of the Tenant for Life, his Leſſor chaſed out his Beaſts, and the Treſpaſs meſne between the Death of the Tenant for Life and the Chaſing.* And by all the Juſtices of B. R. this is no Plea after Notice; For he ought to take Notice in convenient Time, and therefore ought to plead *what Day his Leſſor died*, and *at what Place*, and *where the Land lies*, and *that he chaſed out his Beaſts ſuch a Day after the Death of his Leſſor*, and then it lies in the Diſcretion of the Juſtices, if he chaſed out in reaſonable Time or not, and if he took Notice accordingly or not; and ſo was the Opinion of all the Juſtices there. Br. Treſpaſs, pl. 386. cites 22 E. 4. 27.

(D. c.) Tenant at Sufferance.

[*Who is.*]

Every Tenant at Sufferance is made by Laches of the Leſſor, which Laches cannot be imputed to the King; Per Manwood Ch. B. 2 Le. 143. pl. 178. 33 Eliz. in the Exchequer, in Sir Moile Finch's Caſe. —— And therefore where the King leaſes upon Condition, the Leſſee, when the Condition is broken, is not a Tenant at Sufferance, nor ſhall have the Profits of the Lands to his own Uſe, but the Law ſhall account him to be a Bailiff of his own Wrong, and ſo be accountable to the Queen, but no Intruder till Office be found. Ibid.

1. **If Leſſee for Years of the King holds over his Term, yet he is not any Tenant at Sufferance, but an Intruder, becauſe no Laches of Entry can be imputed to the King. Co. Litt. 57. b.**

Grandfather, Tenant at Will, Father and Son; The Grandfather died; The Father entred and paid the Rent to the Leſſor, and died in Poſſeſſion. Adjudged that it was not any Deſcent; For the paying the Rent explains by what Title he entred, and ſo he ſhall not be a Diſſeiſor but at the Election of another; Arg. Le. 121. pl. 143. cites Skipwith's Caſe. —— And. 134. pl. 184. Hill. 27 Eliz. Skipwith v. Conies, S. C. adjudged.

2. **If a Man leaſes at Will and dies, and afterwards Leſſee continues Poſſeſſion, though the Leaſe was determined by the Death of the Leſſor, yet Leſſee is Tenant at Sufferance. Co. Litt. 57. b.**

Co. Litt. 271. a. S. P. —— 2 Inſt. 134. S. P. 2 Le. 147. in pl. 182. he is not a Diſſeiſor, nor has any greater Eſtate in the Land.

3. **If a Guardian after the full Age of the Heir continues in Poſſeſſion, he is not Tenant at Sufferance, but an Abator, becauſe his Eſtate is created by Act in Law. Co. Litt. 57. b.**

4. *Ceſtuy*

4. *Ceſtuy que Uſe* is only Tenant at Sufferance if he continues Poſſeſſion, and cannot juſtify the Occupation of Land againſt the Feoffees. Kelw. 41. b. pl. 2. and 42. b. at the End of pl. 7. Paſch. 7 H. 7. per Frowike. Kelw. 46. b. pl 2. Mich. 18 H. 7. and merely at the Will and Will of the

Pleaſure of the Feoffee by the Common Law, and if his Occupation be againſt the Feoffee it is a mere Tort; Per Frowick Ch. J.

5. A. *Ceſtuy que Uſe for Life*, Remainder to B. in Tail. A. *made a Leaſe to C. for the Life of C.* and *C. continued in Poſſeſſion after A's Death.* It was held by the Juſtices of B. R. and C. B. that C. is only Tenant at Sufferance; For the Leaſe made no Diſcontinuance of the Remainder, becauſe he had Authority by the Statute 1 R. 3. 1. to make a Leaſe, Grant or Feoffment, but this ought to be intended of ſuch Eſtate only as he may lawfully make. D. 57. b. pl. 1. Mich. 35 H. 8. Zouche's Caſe.

6. If *Tenant for Years holds over* his Term, he is Tenant at Sufferance, and his *Deſcent* ſhall not *toll an Entry*; Per Dyer. Ow. 35. Mich. 13 & 14 Eliz. Anon.

7. But if *Tenant pur auter vie holds over his Term*, he is an Intruder, and his Deſcent ſhall take away an Entry; Sic dictum fuit, and conceſſum fuit; Per Dyer. Ow. 35. Mich. 13 & 14 Eliz. Anon. Cro. E 238. pl. 5. Trin. 30 Eliz. B. R. Wray ſaid that it

was held at an Aſſembly of all the Juſtices, that if Tenant pur auter Vie continues in Poſſeſſion after the Death of Ceſtuy que Vie, he is but Tenant at Sufferance, and his Deſcent ſhall not take away an Entry; which Gawdy agreed, and that 18 E. 4. 25. is not Law.

8. Leaſe made October 18th. for 21 Years from Mich. preceding; Leſſee *entred* Craſtino Mich. Per Coke of Counſel, Leſſee *is* Tenant at Sufferance, and not a Diſſeiſor, becauſe of the precedent Communication of a Leaſe. 2 Le. 71. pl. 96. Mich. 29 Eliz. B. R. Criſp v. Golding. Le. 296. pl. 405. S. C. in totidem Verbis — Cro. E. 50. pl. 1. S. C. but S. P. does not appear.

9. Tenancy at Sufferance cannot be *after the Ceſſer of an Eſtate of Inheritance*; Arg. Le. 91. pl. 117. Mich 29 & 30 Eliz. in Caſe of the Earl of Arundel v. Ld. Dacres.

10. *Leaſe for Life on Condition to be void*; After the Condition broken he is but Tenant at Sufferance, and not capable of a *Releaſe*. Cro. E. 238. pl. 5. Trin. 30 Eliz. B. R. Allen v. Hill. 3 Le. 152. pl. 204. S. C. —— 2 Le. 135. Arg. ſays it was

lately the Opinion of the Court of C. B. — 2 Le. 145. per Manwood Ch. B. in Sir Moile Finch's Caſe.

11. None can be Tenant at Sufferance but he that *comes in by Title*; Arg. 2 Le. 147. pl. 182. Trin. 30 Eliz. B. R. in Caſe of Berry, alias, Perry v. Goodman.

12. Tenant at Sufferance is in Truth *a Tortfeaſor*, by which his taking the Profits is not ſuch as is intended by the Statute 32 *H.* 8. 9. *of buying Titles*; Per Wray Ch. J. 3 Le. 233. pl. 317. Mich. 31 Eliz. B. R. in Caſe of Pike v. Haſſen.

13. In Caſe of a common Perſon, when *Leſſee for Years holds over* his Term, he is become Tenant at Sufferance, and ſuch a Tenant *ſhall not pay Rent*, for it is the Folly of his Leſſor, to ſuffer his Leſſee at Sufferance to continue Poſſeſſion of the Land after his Term. 2 Le. 143. pl. 178. 33 Eliz. in the Exchequer, in Sir Moile Finch's Caſe.

14. If *Tenant in Tail makes Feoffment in Fee to the Uſe of himſelf in Fee, and* after *leaſes for Years* and *dies*, the Iſſue is immediately remitted

ted by the Deſcent of the Reverſion, before Entry into the Land, and the Eſtate of the Leſſee immediately *changed into* a Tenancy at Sufferance. Roll Rep. 260. pl. 31. Mich. 13 Jac. B. R. Bridgman v. Charlton.

15. If Leſſee for Years, after his *Term expired*, *takes a new Leaſe for Years of a Stranger*, rendring Rent, and pays it, yet he remains Tenant at Sufferance as to the firſt Leſſor, and in ſuch Caſe the Leſſor may leaſe it to another before any *Entry by Leſſor*, for it is not out of his Poſſeſſion. Noy 120. Preſton v. Love.

16. A. and B. have each a Manor on the Side of a River, A. on the South Side, and B. on the North Side. The River being crooked and ſubject to Floods, they *agree to cut a ſtrait Channel*, and the Nooks, by Parol Agreement, were to be on whoſe Side of the new Cut it ſhould lie. A. dies. His Heir takes the Profits and the Nooks of his Side. They *are* only Tenants at Sufferance, and there is no Deſcent of the Nooks and Land ſo exchanged, ſo as to make the Heir to ſue Livery. Ley 61. Hill. 16 Jac. Green v. Lapworth.

17. If one enters into my Land, and *claims* 20 *Years* therein, and I ſuffer him to continue there, and *accept the Rent*, and afterwards he commits Waſte, I ſhall maintain Action of Waſte, and declare on the ſpecial Matter, and though by his Entry he is a *Diſſeiſor*, and cannot qualify his own Wrong, according to D. 134. Trap's Caſe, yet per Sir H. Yelverton, I may admit him to be Tenant for Years if I accept the Rent, or bring Waſte, as Carrel ſaid, 14 H. 4. But he has not but for Years in reſpect of his Claim; But I am *concluded* by Acceptance of the Rent, or by bringing of the Action of Waſte. Godb. 384. pl. 472. Paſch. 3 Car. B. R. Green v. Moody.

(D. c. 2) Tenant at Will and Sufferance; And the Difference between them.

1. TEnant at Will ſhall *have Aid*, ſo ſhall not a Tenant at Sufferance. Ow. 28. 29. Arg. in Rouſe's Caſe, cites 2 H. 4.

2. Where the *Leſſor at Will dies*, the Leaſe is determined; For the Will is determined by his Death, and where it is determined of the one Part, it is determined of both, and there if he occupies after, it ſeems that he is Tenant by Sufferance, and ſo it appears in lib. Littleton. Br. Tenant per Copie, pl. 4. cites 21 H. 6. 37.

3. If one *enters* into my Land, and *occupies* it *of his own Head*, claiming to hold the ſame at my Will, and afterwards I *demand a certain Rent* of him for the Occupation of my Land, he is now my Tenant at Will; Per omnes Juſticiarios. 4 Le. 35. pl. 95. in C. B. 15 Eliz. in an Anonimous Caſe.

Cro. E. 238. S. C. 4. *Deviſee*, *on Condition* that his Eſtate ſhall ceaſe, *after Breach continues in Poſſeſſion*, he is only Tenant at Sufferance; Per Gawdy J. 3 Le. 153. pl. 204. Mich. 29 & 30 Eliz. B. R. Allen v. Hill.

Becauſe between Tenant at Will and his Leſſor there is a Poſſeſſion with a Privity; 5. A *Releaſe* to Tenant at Will is good, but not to Tenant at Sufferance, and when Tenant at Will holds over, he does aſſume an Intereſt which ſhall not be thought wrongful; For he is neither Abator nor Diſſeiſor. Ow. 29. Trin. 30 Eliz. in Rouſe's Caſe.

But a Releaſe to a Tenant at Sufferance is void, Becauſe he has a Poſſeſſion without Privity. Co. Litt. 270. b. —— S P. reſolved accordingly. Cro. J. 169. pl. 9. Trin. 5 Jac. B. R. Butler v. Duckmanton.

6. Tenant

6. Tenant at *Will* cannot be in the *Caſe of the King* without a Patent to ſhew the Will of the King; and in the King's Caſe there cannot by any Means be a Tenant at *Sufferance*; Per Manwood Ch. B. Mo. 295 pl. 440. Paſch. 30 Eliz. in Scacc. in Sir Moil Finche's Caſe.

He that holds over in ſuch Caſe is an Intruder upon the King;

becauſe there is no Lacheſs imputed to the King for not entering. Co. Litt. 57. b.

7. If Tenant *pur Auter Vie* continues in Poſſeſſion after the Death of Ceſtuy que Vie, he is but Tenant at Sufferance, and his Deſcent ſhall not toll an Entry; cited per Wray as adjudged. Cro. E. 238. Trin. 33 Eliz. B. R. Allen v. Hill.

3 Le. 153. pl. 204. S. C. —— He is an Intruder, and his De-

ſcent ſhall toll Entry; quod fuit conceſſum per Dyer. Ow. 35. Anon.

8. There is a great *Diverſity* between a Tenant at Will and a Tenant at Sufferance; for *Tenant at Will is always by Right*, and *Tenant at Sufferance enters by a lawful Leaſe, and holds over by Wrong*; A Tenant at Sufferance *is* he that at the firſt came in by lawful Demiſe, and after his Eſtate ended centinues the Poſſeſſion, and wrongfully holds over, as Tenant for Term of another's Life continues in Poſſeſſion after the Deceaſe of Ceſtuy que Vie, or Tenant for Years holds over his Term. Co. Litt. 57. b.

S. P. Br. Tenant by Copy, pl. 15. cites 27 H. 6. 3. for he that enters of his own Head is a Diſſeiſor.

9. There is a Diverſity between *particular Eſtates* made *by the Terretenant*, and particular Eſtates created *by Act in Law*, As if a Cuardian after the full Age of the Heir continues in Poſſeſſion, he is no Tenant at Sufferance, but an Abator, againſt whom an Aſſiſe of Mortdanceſtor doth lie. Co. Litt. 57. b.

10. *Leſſor at Will dies*, the Will is determined, and if *Leſſee continues Poſſeſſion* he is Tenant at Sufferance, but tho Heir by Admiſſion may have Aſſiſe of Mortdanceſtor againſt him. Co. Litt. 57. b.

Le. 14. Arg. cites 10 E. 4. 18.

11. Tenant at Will ſhall pay his *Rent when he holds over his Term*, but Tenant at Sufferance ſhall not pay any Rent; If a Man holds over his Term, and pays his old Rent, he ſhall be accounted Tenant at Will. Brownl. 30. Hill. 6 Jac. Anon.

Ibid. 43. Trin. 15 Jac. Anon. S. P. —If Leſſor accepts the Rent the

Diſſeiſin is purged. D. 173. Marg. pl. 15. cites P. 6 Jac. Mullineux v. Maleverers. And Ibid. cites it as ſo agreed in Caſe of the Ld. Chancellor Egerton v. Kinaſton.

12. If a Man makes a *Leaſe of Land worth 20 s. per Ann. till 21 l. is paid* by the Iſſues and Profits, this is only a Leaſe at Will if there is no Livery; for it is not certain that the Land ſhall be every Year of one annual Value; But if the Land was leaſed for 20 s. per Ann. and a Grant was of the Rent till 21 l. levied, that would be a Leaſe for 21 Years. 6 Rep. 35. b. Trin. 3 Jac. C. B. in the Biſhop of Bath's Caſe.

13. There are *two Sorts* of Tenants at Sufferance *proper, and* * *Quaſi*; Per Bridgman. Cart. 66. Paſch. 18 Car. 2. in Caſe of Geary v. Bearcroft.

A proper Tenant at Sufferance is a Tenant without

Agreement after a particular Eſtate ended; Per Bridgman Ch. J. Cart. 64. in S. C. ——— But if a Man occupies by a tacit or preſumed Conſent of another, that other may to ſome Purpoſes admit him Tenant at Sufferance and not at Will. But an Agreement that he ſhall receive the Profits makes him Tenant at Will according to Litt. and Powſeley and Blackman's Caſe. Ibid. per eundem.

* As where the Eſtate at Will determines by the Act of God, as if Leſſor dies. See Ibid.

14. Lands are *limited to A. and his Heir Quouſq'* he pay ſo much Money, and if he fail to pay, then to remain to B. and his Heirs, A. is but Tenant at Sufferance if he *holds over*; Per Bridgm. Cart.

78. Trin. 18 Car. 2 C. B. 75. by Bridgman Ch. J. in delivering the Opinion of the Court in the Caſe of Thomaſin v. Mackworth.

The Original Covenant to ſuffer Mortgagor to continue in Poſſeſſion governs all the ſubſequent Aſſignments. For he covenants for himſelf, his Executors, Adminiſtrators and Aſſigns, that the Mortgagor ſhall hold till Default of Payment, which creates a Tenancy at Will upon all the meſne Aſſignments; Per Eyres J. to which Holt Ch J. agreed, and ſaid it was well obſerved. Comb. 249, 250. S. C. ——— 3 Lev. 387. S. C. held accordingly.

15. Mortgagee *covenants* that *Mortgagor* ſhall *quietly enjoy till* Default of Payment; Mortgagee aſſigns; *Mortgagor after Aſſignment* is only Tenant at Sufferance, but his continuing in Poſſeſſion does not turn the Term to a Right. 1 Salk. 245. pl. 1. Paſch. 6 W. & M. in B. R. Smartle v. Williams.

16. But if the Mortgagor had died, and *Mortgagor's Heir entered*, it would be otherwiſe; for the Heir was never Tenant at Will, but his firſt Entry was tortious. Ibid.

17. *Acceptance of Rent after the Term ended* makes a Tenancy at Will. Cumb. 383. Trin. 8 W. 3. B. R. Taylor v. Seed.

18. By the *Cuſtom of London* the Landlord cannot recover againſt ſuch Tenant at Will in Ejectment, unleſs he had given him *Half a Year's Warning*; Per omnes J. Angliæ præter Holt & Treby. The Cuſtom was found in an old Book called Liber Albus, and is for a Quarter's Warning to Tenant renting under 40 s. per Ann. and Half a Year's Warning to more than 40 s. Cumb. 383. 8 W. 3. B. R. Taylor v. Seed.

19. A. *mortgages for* 500 *Years* to B. and afterwards *in Fee to C.* and levies a *Fine* to C. and five Years paſs, but continues in Poſſeſſion all the Time, and pays the Intereſt to B. A. was Tenant at Will to B. and admit that the Fine did work a Diſſeiſin, yet the Entry of A. immediately on ſuch *Diſſeiſin* did *purge*, and he became again Tenant at Will as before. Carth. 414. Trin. 9 W. 3. B. R. Holland v. Hatton.

(E. c) Tenant at Sufferance.

His Power.

Tenant at Sufferance can neither take Beaſts Damage-feaſant nor have an Action; Per Frowike. Keilw 47. a. in pl. 2. Mich. 18 H. 7. ——— Ow. 29. cites S. C. ——— That is if he diſtrain the Beaſts of a Stranger and not of the Tenant of the Freehold. Arg. admitted 2 Le. 47. pl. 59. Hill. 29 Eliz. B. R.

1. TENANT at Sufferance may *juſtify for taking Beaſts Damage-Feaſant*; Per Keble; Contra per Vaviſor; quod nota bene. Br. Tenant by Copy &c. pl. 19. cites 4 H. 7. 3.

2. Tenant at Sufferance cannot *grant new Eſtates* nor *preſent to Advowſons*. Arg. Cro. J. 55. pl. 27. Mich. 2 Jac. C. B. in Caſe of Shopland v. Ryder.

(F. c) Tenant at Sufferance.

Actions &c. Againſt him, or for him.

1. IT was held clearly by all the Juſtices of C. B. that if I make a Leaſe for a Year reſerving certain Rent, and after the Year ended the *Termor holds in*, that I may diſtrain him for my Rent though the Year is ended, and alſo if I will I may diſtrain the Beaſts *Damage-feaſant*. Kelw. 96. a. pl. 5. Mich. 22 H. 7. Hankford and Hill were of contrary Opinions. 11 H. 4. 31. Ideo. Quære.

See 11 H. 7. fol. 12. Treſpaſs. Kelw. 96. pl. 5.

2. *Leſſee for Years of Leſſee for Life* is not in as a Termor after the Death of Leſſee for Life, and ſo ſhall not have Covenant if ouſted by him in Reverſion. Arg. Ow. 105. cites 9 Eliz. D. 257.

3. If Leſſee at Will continues in Poſſeſſion he is Tenant at Sufferance, and yet the Heir by Admiſſion may have an *Aſſiſe of Mortdanceſtor againſt him*. Co. Litt. 57. b.

4. A Writ of *Entry ad Terminum qui præteriit* lies againſt Tenant at Sufferance, but it is rather by Admiſſion of the Demandant than for any Eſtate of Freehold that is in him; For in Judgment of Law he has but a bare Poſſeſſion. Co. Litt. 57. b.

5. Leaſe for one Year, and ſo from Year to Year yielding 10 s. Rent ſo long as Leſſee ſhall occupy, after the Year Leſſee dies, *Adminiſtrator enters and occupies* another Year, adjudged Adminiſtrator ſhall be charged with the Rent. Arg. Lat. 255 cites. Mich. 3 Jac. C. B. Barker v. Barret. Palm. 481. Arg. cites S. C. — Noy 96. cites S. C.

6. Winch doubted if the Leſſee hold over his Term ſo that he is Tenant at Sufferance, what *Remedy* the Leſſor has for his *Rent*. Winch. 32. Trin. 20 Jac. C. B. Per Manwood Ch. B. ſuch Leſſee ſhall not pay Rent, for it is Leſſor's Folly to let him continue in Poſſeſſion after his Term. 2 Le. 143. pl. 178. 33 Eliz. in Scacc. in Sir Moil Finch's Caſe.

7. A. Leſſee for Years leaſes for ſix Months to B. who continues in after the ſix Months, and *pulled down the Windows &c.* A. may bring either *Treſpaſs or Caſe*. But properly in this Caſe it ſhould be Action on the Caſe to recover as much as he may be damnified, becauſe he is ſubject to an Action of Waſte. Cro. C. 187. pl. 7. Paſch. 6 Car. B. R. Weſt v. Treude, alias Trefuſis. Jo. 224. pl. 4. Weſt v. Trefuſye. S. C. and adjudg'd Una Voce, that Action on the Caſe lies.

8. Leſſee for a Year *Covenants for himſelf and his Aſſigns to pay the Rent* ſo long as they ſhall be in Poſſeſſion of the Lands demis'd; He aſſigns his Term to B. the *Leaſe expired*, and *Aſſignee continues in Poſſeſſion*. Rent became due after the Term ended, and the Leſſor brought an Action againſt the Aſſignee, adjudged that though he is not an Aſſignee ſtrictly within the Rules of Law after the Term is ended, yet he ſhall be ſuch an Aſſignee as ſhall be liable to perform the Covenants for Payment of Rent &c. Sty. 407. Hill. 1654. B. R. Bromefield v. Williamſon.

9. If Leſſee holds over his Term Leſſor cannot bring an Action of *Treſpaſs* without an *actual Entry*. 5 Mod. 384. Hill. 9 W. 3. B. R. Trevillian v. Andrew. Co. Litt. 57. b. S. P.

10. 4 *Geo.* 2. 28. *If any Tenant for Life, Lives, or Years, or other Perſon or Perſons in Poſſeſſion of any Lands, Tenements &c. by ſuch Tenants or*

or by Colluſion with them ſhall hold over after Notice in Writing for delivering Poſſeſſion by the Perſon intitled, or his Agent lawfully authorized; He ſhall pay double the Yearly Value for the Time, to be recovered by Action of Debt, and Defendant to give Bail, and no Relief in Equity.

For more of Eſtate in General, See **Copyhold. Dower. Faits. Feoffments. Grants. Heirs. Jointreſs. Jointenants. Uſes** and other Proper Titles.

Eſtoppel.

Fol 862.

(A) Where the Plea ſtands with the Deed recorded. And where not.

1. **A Man ſhall not be receiv'd to take an** Averment directly contrary **to the Record.** 9 H. 6. 60.

A Bond inroll'd eſtops the Party to plead Non eſt Factum; Per Holt Ch. J. Comb. 248. Paſch 6 W. & M. in B. R. in Caſe of Smart v. Williams.

2 **If a** Debt be inroll'd **of Record he ſhall not be received afterwards to ſay** not his Deed, **for this is againſt the Record directly.** 9 H. 6. 60.

Br. Faits Enroll. pl. 17. cites 16 H. 7. 5. Contra per Curiam. ——But the Year Book is according to Roll. Wood there ſaid that the Pleading it to be per Dureſs was conſiſtent with the Inrolment. For it was a Confeſſion of the Deed to be ſuch as it was; But the Opinion of the Court was clearly contrary; Et ſurrexerunt.

3. **Againſt a Deed inroll'd a Man ſhall not take Averment that it was** by Dureſs, **For this is contrary to the Record.** 16 H. 7. 5. b. **Curia.**

S. P. in Caſe of a Deviſe of Lands to M. his Wife till P. his Daughter ſhould be 19, and then to P. in Tail, and if P. failed afterwards to pay M. the Wife 12 l. a Year in Recompence of her Dower, then ſhe to have the Land for her Life. M. brought Dower and recover'd a Third Part, and afterwards P. came to her Age of 19, adjudg'd that M. having recovered a Third Part for Dower, ſhall not have the 12 l. Rent by the Will. Cro. E. 128. pl. 3. Hill. 31 Eliz B R. Goſling v. Warburton ——Ow. 154. Goodridge v. Warburton. S. C. adjudged.——Le 136. pl. 187. Geſlin v. Warburton. S. C. adjudged.

4. **If a Man ſeiſed in Fee of Land in D.** conveys Part **to his Wife for Life** for her Jointure in Satisfaction of Dower **and dies, and after** the Feme enters ſecretly **into her Jointure,** but waives the Poſſeſſion, and brings her Writ of Dower of the Whole and recovers. **This ſhall eſtop her to claim this for her Jointure which was aſſured to her, though ſhe had accepted it before the Writ of Dower brought, ſo that ſhe could not waive it, yet inaſmuch as ſhe has brought her Writ of Dower of the Whole, by this it is implied that ſhe does not claim other Eſtate in any Part of it.** 4 Rep. 5. *Vernon's Caſe.*

5. So **it is if the** Feme after ſuch Entry into her Jointure brings Writ of Dower of the Reſidue and recovers **it, ſhe ſhall by this be eſtopped to claim her Jointure into which ſhe had entered before; For by the bringing the Writ of Dower ſhe has tacitly affirmed that ſhe has not**

not agreed to any Jointure made to her. 4 Rep. 5. b. Vernon's Caſe.

6. *Aſſiſe of Franktenement in E. and Fine of his Anceſtor, proving the the ſame Tenements to be in C. was pleaded in Abatement of the Writ*; & non allocatur. Br. Eſtoppel, pl 114. cites 6 Aſſ 1.

7. A *Deed inrolled* may be *avoided by Matter, which is not contrary to the Record*, as 19 R. 2. Eſtoppel 281. in ſur Cui in Vita a Releaſe of the Mother of the Demandant with warranty was pleaded in Bar, and that inrolled; to which the Demandant ſaid, that at the Time of the Releaſe ſuppoſed to be made, our Mother *had a Husband, one F. and ſo the Deed was void*, and ſo avoided the Deed by Matter de-hors, viz. Coverture. Le 184. pl. 257. Hill. 31 Eliz. B. R. in Caſe of Holland v. Franklin.

8. *So of Infancy*, but not by a general Averment. Ibid.

9. So a *Man not letter'd* ſhall avoid a Deed inrolled *by* ſuch *ſpecial Matter*. Ibid.

10. So an *Obligation made againſt the Statute of* 23 *H.* 6. and theſe ſpecial Matters ſhall utterly avoid the Deeds againſt whom they are pleaded. Le. 184. in S. C.

11. A Man ſhall *not have an Averment againſt the Purport of a Record, but* againſt *the Operation* of a Record, as *not put in view, not compriſed, Partes ad Finem nihil habuerunt* &c. And againſt Letters Patents of the King, non conceſſit, is a good Plea, which ſee 18 Eliz. for by ſuch Plea it is agreed, that it is a Record, but that nihil operatur; Arg. Le. 184, 185. pl. 257. Hill. 31. Eliz. B. R. in Caſe of Holland v. Franklin.

In Debt on a Bail Bond, if the Defendant has put in Common Bail he cannot plead that he has put in Common Bail, but Comperuit ad Diem; For he muſt plead according to the Operation Things have in Law 1 Salk. 8. pl. 19. Mich. 6 Ann. B. R. per Curiam.

12. A Man may take Averment which ſtands with the Record, and which does *not impugn any Thing appearing within the Record and which is only as to the Operation of it*. 4 Rep. 71. b. Trin. 33 Eliz. C. B. in Hynde's Caſe.

Though a Man cannot take an Averment againſt a Record, yet when the time is material he may aver in what Time of the Term a Fine is levied. Cro J. 451. Mich. 15 Jac. cites S. C.

13. A *Feoffment inrolled without Livery*, is of no Force to make the Land paſs, but *the Inrolment may Eſtop the Feoffor to ſay, not his Deed.* Agreed per Omnes. Poph. 8. Mich. 34 & 35 Eliz. C. B. Gibbons v. Maltyard and Martin.

14. A Woman *recovered Dower* in C. B. and had a Writ to the Sheriff to put her in Poſſeſſion of the ſame; The *Sheriff returned* the Writ, *that he delivered her* 84 *Acres, and that ſhe had entred into* 24 *Acres Parcel thereof, and accepted of the ſame.* Reſolved it was a good Bar to her, although it was a leſs Quantity then the three Parts of the Land mentioned in the Record. Mo. 679. pl. 928. Mich. 44 & 45 Eliz. C. B. Anon.

15. If *A. B. is outlawed by the Name of A. B. Eſq*; and *comes in gratis, and reverſes it for want of Proclamations*, he ſhall not be eſtopped to *ſay afterwards, that he was a Knight, and no Eſquire.* It ſeems to be admitted. Sty. 395. 440. Mich. 1653. Boyle v. Scarborough.

16. Scire Facias upon a *Recognizance* (given *in a Writ of Error*) *againſt the Bail, to pay* &c. if the Judgment were affirmed in the Exchequer Chamber. The Defendants *plead, that the Judgment was not affirmed, prout patet per Recordum in the Exchequer Chamber.* The Plaintiff *replies, that the Judgment was affirmed in the Exchequer Chamber,*

prout patet per Recordum, that was *ſent by Mittitur into B. R.* and demands Judgment whether the Defendants ſhall be admitted to aver againſt this Record. Reſolved they were Eſtopped. Freem. Rep. 375. pl. 485. Mich. 1684. Freke v. Finch.

17. If a Man *enters into a Recognizance to a Corporation*, he is *eſtopped* by his Recognizance *to ſay that they were not a Corporation.* 2 Ld. Raym. Rep. 1535. Trin. 2 Geo. 2. B. R. Henriques v. The Weſt-India Company.

(A. 2) The ſeveral ſorts of Eſtopels; and Notes, and Rules relating thereto.

1. THE Eſtoppel *is to Eſtop the other Party to ſay that which he laſt pleaded.* Br. Eſtoppel, pl. 136. cites 30 Aſſ. 29.

2. Eſtoppel ſhall be *good to every Common intent*, and otherwiſe it is not good. Br. Eſtoppel, pl. 172. cites 21 E. 4. 51. 53. and 54.

3. Eſtoppel ought to be *certain in every Intent.* Per Bridges. Br. Eſtoppel, pl. 177. cites 21 E. 4. 83.

Co. Litt. 352. b. S. P. and not to be taken by Argument or Inference; becauſe it concludes a Man to allege the Truth.

4. If Eſtoppel be *good to common Intent* it is ſufficient. Br. Eſtoppel, pl. 90. cites 22 H. 6. 53.

5. There be *three Kinds* of Eſtoppels, viz. *by Matter of Record*, by Matter *in Writing*, and by Matter *in Paiis.* By Matter of Record, viz. By Letters Patents, Fine, Recovery, Pleading, Taking of Continuance, Confeſſion, Imparlance, Warrant of Attorney, Admittance. By Matter in Writing as by Deed indented, by making of an Acquittance by Deed indented, or Deed Poll, by Defeaſance by Deed indented, or Deed Poll. By Matter in Paiis, as by Livery, by Entry, by Acceptance of Rent, by Partition, and by Acceptance of an Eſtate. Co. Litt. 352. a.

6 Every Eſtoppel *ought to be reciprocal*, that is to bind both Parties, and this is the Reaſon, that regularly *a Stranger* ſhall neither take Advantage, nor be bound by the Eſtoppel, Privies in Blood, as the Heir, Privies in Eſtates, as the Feoffee, Leſſee &c. Privies in Law, as the Lords by Eſcheat; Tenant by the Curteſy, Tenant in Dower, the Incumbent of a Benefice, and others that come under by Act in Law, or in the Poſt, ſhall be bound and take Advantage of Eſtoppels, and a Rebutter is a kind of Eſtoppel. Co. Litt. 352. a.

7. 2dly. That every Eſtoppel, becauſe it concludes a Man to allege the Truth, muſt be *certain to every Intent*, and not to be taken by Argument or Inference. Co. Litt. 352. b.

8. 3dly, Every Eſtoppel ought to be *a preciſe Affirmation* of that which makes the Eſtoppel, and *not* to be ſpoke imperſonally; as if it be ſaid, *Ut dicitur*, quia imperſonalitas non concludit nec ligat; imperſonalis dicitur, quia ſine Perſona. Neither does a Recital conclude, becauſe it is no direct Affirmation. Ibid.

9. 4thly, A *Matter* alleged that is *neither traverſable nor material* ſhall not eſtopp. Co. Litt. 352. b.

10. 5thly, Regularly a Man ſhall not be concluded *by Acceptance* or the like, *before the Tittle accrued.* Ibid.

11. 6thly,

11. 6thly, Eſtoppel *againſt Eſtoppel* does put the Matter at Large. Ibid.

12. 7thly, Matters alleged by way of *Suppoſal in Count ſhall not conclude after Nonſuit*; *otherwiſe* it is *after Judgment* given, and after Nonſuit, although the Suppoſal in the Count ſhall not conclude, yet the Bar, Title, Replication, or other pleading of either Party, which is preciſely alleged, ſhall conclude after Nonſuit; and hereby are the Books reconciled. Ibid.

13. 8thly, Where the Verity is apparent in the ſame Record, there the adverſe Party ſhall not be eſtopped to take Advantage of the Truth, for he *cannot be eſtopped to allege the Truth, when the Truth appears of Record.* Ibid.

If a Fine be levied without any Original it is voidable but not void; but if an Original be brought and a Retraxit entred, and after that a Concord is made, or a Fine levied, this is void in reſpect the Verity appears of Record. Ibid.

An Impropriation if made after the Death of an Incumbent, to a Biſhop and his Succeſſors, the Biſhop by Indenture demiſes the Parſonage for 40 Years, to begin after the Death of the Incumbent, the Dean and Chapter confirms it, * [the Biſhop dies] the Incumbent dies, the Demiſe ſhall not conclude * [the Succeſſor] for it appears that he had nothing in the Impropriation till after the Death of the Incumbent, * [who ſurviv'd the Leſſor.] Ibid. * D. 244. a. b. pl. 60. S. C.

14. 9thly, Where the *Record* of the Eſtoppel *does run to the Diſability or Legitimation of the Perſon*, there Strangers ſhall take Benefit of that Record, *as Outlawry* Excommengment, Profeſſion, Attainder of Præmunire, of Felony &c. Baſtardy, Mulierty, and ſhall conclude the Party, though they be Strangers to the Record. *But* of a Record *concerning the Name* of the Perſon *Quality or Addition*, no Eſtranger ſhall take Advantage, becauſe he ſhall not be bound by it. But Nota, that in Caſe of the *Mulierty*, prima facie an Eſtranger ſhall take Benefit of it &c. But yet becauſe he may be a Mulier by the Eccleſiaſtical Law, and a Baſtard by the Common Law; therefore againſt ſuch Certificate pleaded, the adverſe Party may allege the Special Matter; and confeſs the Certificate of the Biſhop according to the Eccleſiaſtical Law, and allege further the Special Matter according to the Common Law, whereunto the adverſe Party muſt anſwer; and ſo are the Books that treat of this Matter to be reconciled. Co. Litt. 352. b.

15. Eſtoppels are odious in Law, and *admitted merely out of Neceſſity*, becauſe they are concluding to ſpeak the Truth; as for Inſtance, a *Stranger joined with the Owner of the Land in making a Leaſe*; now though in Reality this was the Leaſe of the Owner, yet it is likewiſe the Leaſe of the Stranger by Concluſion, otherwiſe his ſigning it would be to no Purpoſe, ſo that it is an Eſtoppel by Neceſſity. Arg. 8 Mod. 312. and Ibid. 313. agreed per Cur. Mich. 11 Geo. in Caſe of Skipwith v. Green.

(B) Where the Plea ſtands with the Record [*or Deed*], and where not.

1. A Man may acknowledge a Record and void it by Plea which ſtands with the Record. 9 H. 6. 60.

2. As if a Deed of Feoffment be inroll'd in a Court of Record the Party ſhall ſay, that nothing paſſed by the Deed, for this ſtands with the Record. 9 H. 6. 60.

3. So

* Br. Faits enrol, pl. 1. cites S. C. & S. P. per Cur.

3. So if a Releaſe be inroll'd he may ſay that the Releſſee had nothing in the Land at the Releaſe made, for this ſtands with the Record. 9 H. 6. 60. * 16 H. 7. 5. b. ‡ 49 E. 3. 15. † 12 H. 4. 12. b.

‡ Br. Eſtoppel, pl. 49 S. P. but the large Edition cites 50 E. 3. 22, 23. and ſo is miſprinted, but the other Edition cites 49 E 3. 14, 15. which is right, and agreeable to Roll.——Fitzh. Eſtoppel, pl. 207. cites S. C. according to Roll.

† Br. Faits enrol, pl. 2. cites 22 H. 4. 12. S. P. but it ſhould be 12 H. 4. 12. and ſo is the ther Edition.——Fitzh Eſtoppel, pl. 103. cites S. C.

* Br. Faits Enrol. pl 17. cites S. C.

4. So he may ſay againſt a Fine ſur Releaſe. * 16 H. 7. 5. b. 4 Rep. 71. b. Hynd. Contra † 50 E. 3. 6. b. ‡ 8 H. 4. 8.

† Br. Eſtoppel, pl. 200. cites S. C. —— Fitzh. Eſtoppel, pl. 208. cites S. C. ‡ Br. Eſtoppel, pl. 60. cites S. C.

Fitzh. Eſtoppel, pl. 23. cites Same Caſes. —— Br. Eſtoppel, pl 6. cites 9 H. 6. 59.

5. In Detinue Defendant had Garniſhment againſt the Obligor, who pleaded to Iſſue that the Conditions are not performed, and found againſt him, yet in Debt againſt him upon this Obligation he may plead that he was illiterate, and it was read to him to be upon a Condition where it has not any, and ſo not his Deed; for this ſtands with the Deed, and this had not been any Plea in the Garniſhment. Dubitatur 9 H. 6. 59. b. 11 H. 6. 5. Quære, for there it is objected that the Demand was of a Deed, the which he then acknowledged, and he might have ſaved it by Proteſtation.

6. So in Detinue if Infant Garniſhee loſes by Iſſue tried of the Conditions performed, yet in Debt upon it againſt him he ſhall ſay Not his Deed by reaſon of Infancy. Dubitatur 9 H. 6. 60.

* Fol. 863. Br. Eſtoppel, pl. 6. cites 9 H 6. 59. Per Babb.

7. In Indictment of Treſpaſs, if Defendant renders himſelf, and makes Fine, yet he may after plead Not Guilty in Action of Treſpaſs for it; * for the Entry is Quod poſuit ſe in Gratiam Regis & petit ſe admitti per Finem, and ſo it ſtands with the Conuſance that he is Not Guilty. 9 H. 6. 60.

—— Br. Eſtoppel, pl. 59. cites 7 H 4. 30. Per Hulſ. contra, and ſays that it is denied in the written Book. —— So if it had been tried for the King, it ſeems it is no Eſtoppel for the Plaintiff to take Advantage, becauſe he was a Stranger to the Record; but a Stranger may have Advantage of a Confeſſion; for it cannot be reverſed; but Record upon Verdict may be reverſed by Error or Attaint. Note the Diverſity. Br. Eſtoppel, pl. 64. cites 11 H. 4. 65.

8. So after Charter of Pardon pleaded and allowed in Indictment of Felony, he may plead Not Guilty. 9 H. 6. 60.

Br Eſtoppel. pl. 106. cites S. C. —— Fitzh. Eſtoppel, pl. 31. cites S C.

9. If a Man be bound in an Obligation by Name of J. S. of D. yet he may ſay in Debt upon it that there are two D's in the ſame County, ſcilicet, &c. and none without Addition; for this ſtands with the Deed, for he acknowledges the Obligation and more. 14 H. 6. 8.

—— Debt upon a Bond againſt H. P. late of L. Gent. the Defendant ſaid that he was dwelling at S. the Day of the Writ purchaſed, abſque hoc that he was dwelling at L. Per Jenney, you do not deny the Deed by which you ſhall be eſtopped to ſay that you was never dwelling at L. for in Debt upon a Leaſe for Years by Indentnre Ne Leſſa Pas is no Plea, but he ſhall anſwer to the Deed. Br. Eſtoppel, pl. 98. cites 9 E. 4. 29. —— A. is bound to B. in an Obligetion; A. is named of Dale without an Addition; B. ſues A. upon this Obligation; A. ſhall not be received to plead, that there is Over-Dale and Nether-Dale, and that there is no Dale without an Addition; for the Obligation is otherwiſe; and he ſhall not be received to contradict his own Deed, but he ſhall be eſtopped by it; By the Juſtices of both Benches. Jenk 163. pl. 12. cites 2 R. 3. Fitzh. Eſtoppel 181. [but is miſprinted, and ſhould be pl. 8.]

10. In Aſſiſe of Tenements in W. the Defendant *pleaded Eſtoppel by Fine* levied *of the ſame Tenements* by the Anceſtor of the Plaintiff in O. *Judgment if the Plaintiff ſhall ſay that they are in W.* and the *Plaintiff ſaid*

ſaid that O. is a Hamlet of W. and a good Plea, by which they plead over. Br. Brief, pl. 292. cites 28 Aſſ. 6.

11. *Præcipe* quod reddat *of Lands in H.* the *Tenant ſaid that they are in B.* and the *Demandant pleaded* Eſtoppel, becauſe *at another Time he brought Aſſiſe againſt R. Couſin of the Demandant, whoſe Heir he is, of Tenements in B. and thoſe ſame Tenements put in View, where he came and accepted the Writ, and pleaded in Bar*; Judgment if he ſhall be received &c. and becauſe it ſtood with [&c.] that the *Vill might be known by both Names*, the Writ was held good. Br. Eſtoppel, pl. 101. cites 39 E. 3. 7.

12. If a Man is bound by *Recognizance to keep the Peace*, and *is attainted in Scire Facias, becauſe he ſtruck J. N. by which he died*, and after is *indicted and arraigned in Appeal of it* he ſhall not be eſtopped by the firſt Record to plead Not Guilty, for the *firſt Conviction was not as of Felony*. Br. Eſtoppel, pl. 56. cites 7 H. 4. 34.

13. *Averment of Primo Deliberatum againſt a Deed inrolled* ought not to be * received; for by the ſame Reaſon it might be averred that Nunquam Deliberatum, and ſo upon the Matter it would be Non eſt Factum; Per Curiam clearly. 3 Le. 175, 176. pl. 227. Mich. 29 Eliz. C. B. Holland v. Bonis. 2 Le. 121, 122. pl. 168. Holland v. Boin, S. C. in totidem Verbis, and that the Word (* received) is there (reverſed) and ſo miſprinted. —— Ow. 138. Holland's Caſe, S. C. & S. P. accordingly. —— Sav. 91. pl. 169. Holland v. Downe, S. C. adjudged.

14. *Againſt a Deed inrolled* a Man may plead *Infancy*, although none can plead Non eſt Factum; Per Manwood. 2 Le. 65. Paſch. 31 Eliz.

15. *Leſſee enters before the Day*; Leſſor afterwards brings Debt for Rent, and recovers, Quære if Leſſor ſhall notwithſtanding his Recovery, in which he has admitted him to be Leſſee for Years, *put him out* as a Diſſeiſor? Or if his *Heir be eſtopped* by it to ſay he is not in by the Leaſe? Or if the Recovery in Debt has *purged* the Wrong? Per Yelverton, by the *bringing Debt for the Rent* the Leſſor is concluded. But Quære if it ſhall bind his Heir. It was conceived it ſhall, becauſe it is by Record, the ſtrongeſt Concluſion that is. Godb. 314. pl. 472. Paſch. 3 Car. B. R. Green v. Moody.

16. Where a Man *confeſſes an Indictment* he may produce *Affidavits to prove Son Aſſault upon the Proſecutor* in Mitigation of the Fine; Otherwiſe where the Defendant is found Guilty; for the Entry upon a Confeſſion is only Non vult contendere cum Domina Regina & ponit ſe in Gratiam Curiæ. 1 Salk. 55. pl. 6. Trin. 1 Ann. B. R. The Queen v. Templeman.

(C) Upon Records.

In what Caſes a Man ſhall be eſtopped.

1. A Man ſhall not be received to aver any Thing againſt the Certificate of a Judge.

2. If a Man acknowledges a Fine in my Name of my Lands, this ſhall bind me perpetually, for I cannot ſay that I was not Party to the Fine. 19 H. 6. 44. 58. b. Br. Eſtoppel, pl. 182. cites S. C. that I have no Remedy but Action on the Caſe or Diſceit. —— Br. Fines de Terres, pl. 54. cites S. C. accordingly. —— Fitzh.

Fitzh. Diſceit, pl. 10. cites S. C. accordingly. —— If one of my Name levies a Fine of my Land, I may well confeſs and avoid this Fine, by ſhewing the ſpecial Matter, for that ſtands well with the Fine. But if a Stranger, who is not of my Name, levies a Fine of my Land in my Name, I ſhall not be received to aver that I did not levy the Fine, but another in my Name, for that is more contrary to the Record; and ſo it is of all Reconuſanees and other Matters of Record. But I conceive when the Fraud appears to the Court as here, they may well enter a Vacat upon the Roll, and ſo make it no Fine, although the Party cannot avoid it by Averment during the Time that it remains as a Record; Per the Lord Keeper in the Star-Chamber, and ſaid that he had always noted this Difference. Cro. E. 531. pl. 63. Mich. 38 & 39 Eliz. in Hubert's Caſe.

Br. Eſtoppel, pl. 182. cites S. C. — Br. Fines de terre, pl. 54. cites S. C. —— Fitzh. Diſceit, pl. 10. cites S. C. but neither of thoſe Books mention a Præcipe quod reddat.

3. So in Præcipe quod reddat againſt A. if B. comes by the Name of A. and acknowledges the Action, this will bind him perpetually, and he has no Remedy, but a Writ of Deceit againſt B. 19 H. 6. 44.

Br. Eſtoppel, pl. 182. cites S C & S P. — Br Fines de terres, pl 54. cites S C. &. S. P. —— Fitzh. Diſceit, pl. 10. cites S. C. & S. P.

4 So if a Man be vouched and a Stranger upon Summons returned comes as Vouchee and acknowledges the Action, this ſhall bind the Vouchee. 19 H. 6. 44.

Br. Eſtoppel, pl. 182. cites S. C & S. P. —— Br. Fines de terres, pl. 54. cites S. C. & S. P. —— If one appears by a Name which is not in Truth his right Name, and thereupon the Plaintiff declares againſt him by that Name, he ſhall be eſtopped afterwards to ſay he is not right named. 20 Oct. 1650. B. S. For he ſhall not be ſuffered to take Advantage of his own Wrong to prejudice another thereby. L. P. R. 85.

5. So a Man ſhall not be received to ſay that he is not the ſame Perſon who acknowledged the Recognizance. 19 H. 6. 44.

Br. Eſtoppel, pl. 182. cites S. C. & S. P. —— Br. Fines de terres, pl. 54. cites S. C. & S. P.

6. So if a Man acknowledges a Statute Merchant, or Statute Staple, in my Name, it ſhall bind me, and I have no other Remedy but Writ of Diſceit againſt him who acknowledged it. 19 H. 6. 44.

7. If A. is bound to B. in 20 l. by Obligation, and B. by other Deed promiſes in Conſideration of 5 l. paid by A. to him that he will not proſecute any Action againſt A. before ſuch a Day, and in Default of this that he will forfeit 10 l. In an Action of Debt by A. againſt B. for the 10 l. upon this laſt Deed, if he avers that B. before the Day proſecuted a Writ original out of the Chancery againſt him, and ſhews the Subſtance of the Writ returnable in Bank at a certain Day, and that at the Day of the Return the ſaid B. by J. S. his Attorney obtulit ſe againſt A. de Placito prædicto, and the ſaid A. non venit, and the Sheriff then returned that the ſaid B. had found Pledges de proſequendo Breve illud prout per Recordum &c. it is not any Plea for B. to ſay that he, after the making of the Deed, and before the ſaid Day, did not Proſecute out of the ſaid Court of Chancery againſt the ſaid A. in Manner and Form prout &c. & de hoc ponit ſe ſuper Patriam; For he is eſtopped to ſay ſo againſt the Record. Trin. 22 Car. B. R. adjudged between *Harriſon and Cheſton*. Intratur P. 21 Car.

8. In Writ againſt two, if they plead ſeveral Tenancy of Parcel to the Writ, the Demandant may aver that they are Tenants in Common &c. notwithſtanding that one of them ſhew'd Fine, by which he purchaſed Parcel to himſelf in ſeveral. Thel. Dig. 226. Lib. 16. cap. 7. S. 17. cites Trin. 7 E. 3. 334.

9. *Teſtament*

9. *Teſtament proved under the Seal of the Ordinary*, is no Eſtoppel for the *Plaintiff to ſay that the Debter died inteſtate*, quod nota; and therefore it ſeems that this is not Matter of Record, as a Record of a judicial Act is at Common Law. Br. Record, pl. 12. cites 44 E. 3. 16. Br. Adminiſtrators, pl. 11. cites S. C.

10. *Teſtament proved Sub ſigillo Ordinarii* is no Eſtoppel for the *Plaintiff to ſay that the Debtor died inteſtate*; quod nota; And therefore it ſeems that this is not Matter of Record, as the Record of a judicial Act is at Common Law. Br. Record, pl. 12. cites 44 E. 3. 16.

11. *And Plea in the Spiritual Court in Prohibition*, if it was of Tithes, or of Lay Chattle, was tryed per Patriam; And ſo note that there Pleas are not of Record. Br. Record, pl. 12. cites 44 E. 3. 17. 32.

12. If *Fine* ſur Conuſance de Droit Come ceo be *levied to Baron and Feme*, this ſhall not eſtop *the Feme to claim other Eſtate*. 2 Roll. 17 Fine (M) pl. 6. but cites Contra 4 H. 6. 42. 8 H. 6. 4. b. See tit. Fines, pl. 6. and the Notes.

13. *Suing of a Superſedeas by J. N. by Name of J. N. of D.* is no Eſtoppel to ſay that *there are two D's. and none without Addition*, for it ſtands with &c. *Contra* to ſay *that Null tiel Vill*, for this is contra; So of Warrant of Attorney, but yet the Attorney has ſuch Liberty upon the Diverſity aforeſaid. Br. Eſtoppel, pl. 82. cites 19 H. 6. 35. 36.

14. *Debt againſt J. N. of B.* who at the Exigent *purchaſed a Superſedeas accordingly*, and came *and ſaid that no ſuch Vill as B.* &c. by Formal Pleading, and was not received by reaſon of the Superſedeas, which eſtopped him, for *he has affirmed it*; And per Paſton he *ought to have put Proteſtation that no ſuch Vill as B.* and therefore he was awarded to Anſwer over; quære &c. Br. Eſtoppel, pl. 84. cites 19 H. 6. 44.

15. Treſpaſs *againſt J. N. of D. in the County of B.* who ſaid that at the Time of the Writ purchaſed he was converſant and *dwelling at S. in the County of Middleſex*; Judgment of the Writ, inaſmuch as the *Defendant had Superſedeas before in the ſame Suit.* Br. Eſtoppel. pl. 85. cites 19 H. 6. 65.

16. A Man *taken by Capias Utlagatum* upon Exigent awarded *after Capias ad Satisfaciend'* where he was *condemned by Plea by Attorney by Name of J. C. of D. Butcher*, ſaid that he was *dwelling always at S. and not at D. and was Husbandman, and not Butcher, and that he never appeared to the Plea in Perſon, nor by Attorney*; Per Paſton, if he Avers ſuch Matter by Form &c. he *ſhall ſhew what Perſon it was that made the Attorney* in the Plea, and give to him a Name, *abſque hoc that he is the ſame Perſon who made the Attorney* &c. But Brooke makes a *Quære*, if he ſhall have the Plea contrary to the Record; For 36 H. 8. ſuch Plea was refuſed in avoidance of a Statute acknowledged in the Name of a Man of Eſſex for great Inconvenience, which might come of it. Br. Miſnomer, pl. 34. cites 22 H. 6. 16.

17. *A. makes a Feoffment by Deed indented to B. of Black-acre, in which he has nothing*, to the Uſe of C. and the Heirs of his Body, Remainder to B. and his Heirs, *and after purchaſes Black-acre.* Per Saunders, C. can take no Advantage of an Eſtoppel in this Caſe, becauſe he *comes in by the Statute of Uſes.* Freem. Rep. 475. pl. 651. Trin. 1679. Anon.

(C. 2) By Records or Recoveries as to Eſtate or Rights accruing afterwards.

1. IN Mortdanceſter, the *Tenant pleaded Feoffment of the Anceſtor of the Demandant, he ought to Traverſe the dying ſeiſed*; *Contra* where he pleads Fine or Recovery by or againſt the Anceſtor, For by this he is concluded if he cannot make Title after the Fine or Recovery. Br. Eſtoppel, pl. 219. cites 6 E. 4. 11.

2. A. *recovers Lands* in Fee-ſimple *againſt B. in a Real Action* tried, where B. had nothing in the Land; *Becauſe B. appeared and pleaded* to this Action, this Recovery ſhall deliver A. and his Heirs by Eſtoppel, although B. ſhould afterwards purcharſe the ſaid Land. Jenk. 113. pl. 20.

(D) What Records ſhall be Eſtoppel.

Br. Eſtoppel, pl. 215. cites S. C. — Fitzh. Eſtoppel, pl. 18. cites S. C. and Trin. 3 H. 6.

1. A Record of a Thing of which the Court where the Record is has no Juriſdiction of the Cauſe, ſhall not be any Eſtoppel in another Action. 10 H. 6. 13. b. For it is coram non Judice.

Br. Eſtoppel, pl. 215. cites S. C. —— Fitzh. Eſtoppel, pl. 18. cites S. C. and Trin. 3 H. 6.

2. As a Record in the Marſhalſea, where no Party is of the Houſhold. 10 H. 6. 13.

3. So a Record in B. R. upon a Formedon ſhall not be any Eſtoppel, for it is coram non Judice. 10 H. 6. 13.

Fol. 834.

4. So a Fine received there ſhall not be any Eſtoppel, but is void. 10 H. 6. 13. b.

Br. Eſtoppel, pl. 134. cites S. C.

5. If a Man purchaſes a Licence of Alienation of the King, yet he may after ſay the Land is not held of the King, and he ſhall not be eſtopped by the Charter. 29 Aſſ. 38. adjudged.

Br. Office devant Eſcheator, pl. 23. cites S. C. but is not fully S. P.

6. If J. S. be ſeiſed of Land of the Feoffment of J. N. and after acknowledges in Chancery that J. N. was aiding to the Enemies of the King, and by Patent accepts a Grant of the Lands from the King, claiming nothing in the Franktenement, he ſhall be after eſtopped to ſay againſt the King, that J. N. infeoffed him of the Land againſt his own Acceptance. 43 Aſſ. 28. adjudged.

Br. Waſte, pl. 46. cites S. C.

7. If a Leſſee abates a Writ of Waſte, becauſe the Writ ſuppoſes him in of the Leaſe of the Plaintiff, where he is in of the Leaſe of the Plaintiff and B. this ſhall eſtop him in a new Action by them two, to ſay that he is in of the Leaſe of one of them only. 46 E. 3. 20. b. Dubitatur.

Br. Diſclaimer, pl. 17. cites S. C.

8. In an Action of Waſte againſt B. ſuppoſing him to be in of his Leaſe, where in Truth B. is ſeiſed in Fee, if B. pleads no Waſte done, and this is found for B. by which Judgment is given that the Plaintiff take nothing by his Writ, yet B. ſhall be eſtopped after to ſay that he is ſeiſed in Fee, and not in of the Leaſe of the Plaintiff. 36 H. 6. 29.

9. If

9. In Ceſſavit if Tenant confeſſes the Tenure, and tenders the Arrears, and is adjudged to find Sureties according to the Statute, in Writ of Cuſtoms and Services brought by the Lord againſt him, he cannot diſclaim againſt the Acceptance aforeſaid. 50 E. 3. 23.

So that where the Ceſſavit was brought by an Abbot, if he holds the Land of a Lord, he has charged himſelf with two Seigniories by Concluſion, and in Ceſſavit he ſhall not diſclaim afterwards. Br. Eſtoppel, pl. 50. cites * 49 E. 3. 14, 15. —— Fitzh. Eſtoppel, pl. 209 cites S. C.

* This is miſplaced in the firſt Edition of Brook, from whence it is taken, but it ſhould be 50 E. 3. 22. 23.

10. If Debt be brought upon Obligation, ſuppoſing it to be made there where they are at Iſſue, whether it were made by Dureſs, pending this, he may bring Action in another County, and ſuppoſe the Obligation to be made there. 7 H. 4. 8.

Br. Eſtoppel, pl 54 cites S. C. —— Br. Brief, pl. 108. cites S. C. ——

Fitzh. Brief, pl. 225. cites S. C.

11. In a ſecond Scire Facias upon a Fine, a Man may vary from the lineal Deſcent which he made in the firſt Writ, for though he made the Deſcent ill before, he ſhall not be eſtopped by this to make the Deſcent in a better Manner. 13 H. 4. 14.

12. In Debt upon Obligation, if Defendant pleads Non eſt factum, yet if he brings Detinue for it againſt another, he ſhall not be eſtopped to demand it by Name De ſcripto Obligatorio. 20 H. 6. 45.

Fitzh Eſtoppel, pl. 37. cites Paſch. 20 H. 6. 24. S. P. ——

[And the ſame is likewiſe at 20 H. 6. 45. a. pl. 3]

13. In Treſpaſs for a Cloſe broken, if they are at Iſſue upon the Franktenement, the Plaintiff is eſtopped to ſay that Defendant is his Leſſee for Years. Dubitatur 3 H. 4. pl. 2. Quære, whether or not the Iſſue has ſet all at large.

(D. 2) Nient Dedire.

14. If a Prior prays in Aid becauſe he is preſentable, and Defendant ſays, that he has Covent and Common Seal, if he does not deny this, but demurs, by which he is ouſted of the Aid, he ſhall after be eſtopped to ſay in the ſame Plea, that he has not Covent nor Common Seal, for this is confeſſed by Nient Dedire. 11 H. 4. 69.

Br. Eſtoppel, pl. 65. cites 11 H. 4. 68. S. C. —— Fitzh. Scire Facias, pl. 71. cites S. C. ——

Br Ayde, pl. 50. cites S. C.

15. If Leſſee prays in Aid, and Demandant ſays that he is ſeized in Fee, and this is not denied him, by which he is ouſted of the Aid, he ſhall not ſay after that he is Tenant for Life, and vouch the Reverſioner. 11 H. 4. 69.

Br. Aid, pl. 50. cites S. C. —— Fitzh. Scire Facias, pl. 71 cites S. C.

16. If a Man *outlawed avers that he was in ſuch a Priſon at the Time of the Outlawry*, and the *other avers that he was at Large at B.* he ſhall not be eſtopp'd by *Record of Execution by Statute-Merchant ſerved againſt the Outlaw*, for it may be that he eſcaped at Large after, and alſo it ſeems good Cauſe inaſmuch as he is a Stranger to the Record. Br. Eſtoppel, pl. 212 cites 18 E. 3. and Fitzh. Utlawry 47.

17. In *Aſſiſe* the *Tenant ſaid that he himſelf brought Aſſiſe againſt the Plaintiff which paſſed with him*, this is no Eſtoppel nor Bar; for it is only a Verdict without Judgment given, and ſo *no perfect Record*. Br. Eſtoppel, pl. 189. cites 21 Aſſ. 9.

18. Office was found that *H. S. was aiding to the Enemies of the King*, and was ſeiſed of ſuch Land &c. by which the *King ſeiſed and granted* it by Patent *to T. N.* and after *H. S. traverſed the Office and Suit in Parliament, and had Reſtitution, and Writ to the Eſcheator to make Livery to him, who returned that T. N. diſturbed him*, upon which *T. N. ſaid that before the Office H. S. himſelf infeoffed him, and* was *eſtopped by the Patent*, becauſe he took it by the Grant of the King, and then claimed nothing in the Franktenement, and therefore the Patent eſtopped him, quod nota, by which T. N. made Fine for the Contempt; and ſee that a Stranger took Advantage of the Eſtoppel; quod mirum! But it ſeems that the King was Party to puniſh the Contempt. Br. Eſtoppel, pl. 144. cites 43 Aſſ. 29.

19. It was ſaid that a Man ſhall not take Advantage at another Time of a *Record in which he was nonſuited before.* Br. Eſtoppel, pl. 37. cites 44 E. 3. 45.

20. *Waſte of Aſſignment of J. by Fine*, and ſhewed the *Fine*, which *willed that J. and C. aſſigned* the Remainder to the Plaintiff by the Fine, by which the *Tenant upon the Monſtrans of the Fine pleaded this to the Writ*, and the *Plaintiff ſaid that C. had nothing in Reverſion, but was Tenant by the Curteſy*, and yet after the *Writ was abated thereby, inaſmuch as* it was by Fine, which is *Matter of Record*; *Contra if it* had been *by Deed* as it is ſaid. Br. Brief, pl 420. cites 11 H. 4. 1.

21. *Certificate of Baſtardy* is Eſtoppel for all the World; *Contra* of *Certificate of Mulier*; Per Priſot; But per Danby it is all one. Br. Eſtoppel, pl. 15. cites 33 H. 6. 7. 19. 50.

22. *And* it is agreed there that *all Records in which Franktenement come in Debate* ſhall be eſtopped with the Land, *and ſhall run with the Land*, ſo that a Man may plead it as Party, or as Heir, as Privy or by Que Eſtate. Ibid.

23. *And* per Laicon, if *two ſue Livery as Heir* it is Eſtoppel between them, ſo that the one ſhall not baſtardize the other after. Ibid.

Dal. 100. pl. 31. S. C. accordingly.

24. R. brought a Writ of *Dower* againſt J. S. who pleaded, and Judgment given for the Defendant, and afterwards the *Judgment was reverſed*; and ſhe brought a *new Writ of Error*, and the *Tenant pleaded, that he always was ready, and yet is* &c. againſt which the *Demandant pleaded the firſt Record* to eſtop the Tenant. To which the *Tenant pleaded Nul tiel Record.* It was the Opinion of the Court, that here the Demandant cannot conclude the Tenant by that Replication to plead Nul tiel Record; for the Judgment is reverſed, and ſo no Record, and *it cannot be certified a Record.* But if the Tenant had taken Iſſue upon the Plea of the Tenant abſque hoc that he was ready; the ſame might well have been given in Evidence againſt the Tenant. 3 Le. 52. pl. 75. Mich. 15 Eliz. C. B. Riche's Caſe.

Ibid. The Reporter adds a Nota, that one cannot demand Oyer of a Deed but during the Time of its being in Court, and that is for all the Term in which it was produc'd in Court, and cites 5 Rep. 74.

25. In *Debt on Bond dated 27 April, 2 Ann.* Defendant prayed Oyer of *the Original*, which *bore Teſte 16 April, 2 Ann.* whereupon Defendant *pleaded, that the Original was ſued out before the Date of the Bond.* The Plaintiff *replied, that the Writ upon which he declared was another Writ, and then ſets it forth*; the Defendant rejoined by Way of Eſtoppel, becauſe of the Oyer aforeſaid; The Plaintiff demurred, and concluded in Bar, and Defendant joined in Demurrer. Trevor Ch. J. and Nevil, and Blencow J. held the Replication good; for the Writ being filed, the reading of it is the Act and Office of the Court, and ſhall not conclude the Plaintiff from ſhewing the true Writ, and that this is *not like to Oyer of a Deed, the reading of which is the Act of the Plaintiff himſelf*, and therefore ſhall not be admitted to ſay that the Deed ſo read to the Defendant is not the Deed upon which he counted; but Tracey J. held, that when the Defendant prayed Oyer of the Writ, and it was read to him, this was the Act of the Court, and when

when it is entered upon the Record, the Plaintiff ſhall not be admitted to ſay, that this is not the true Writ, and ſo falſify the Act of the Court; But had the Writ been miſtaken, the Plaintiff's Attorney, upon Delivery of the Paper-Book, ought to have rectified it, or have applied to the Court to rectify it; but after it is recorded, he is eſtopped to ſay that it is not the true Writ; But Judgment was given for the Plaintiff. 2 Lutw. 1641. 1644. Trin. 2 Ann. Simpſon v. Garſide.

Wymark's Caſe, ſo that it is as much in the Power of the Court to give Over of a Deed as of a Writ, and ſays Quære therefore of the Difference between Oyer of the Writ and Oyer of the Deed.

26. The *putting in Bail* by a wrong Name is the Act of the Court and not of the Party, and therefore cannot eſtop the Defendant; *but* the *Defendant appearing by that Name may eſtop himſelf*; and Bail is an Appearance as well as Bail. But then it *ought to be pleaded as an Appearance* if the Plaintiff will make uſe of that as an Eſtoppel. 1 Salk. 8. pl. 19. Mich. 6 Ann. B. R. Stroud v. Lady Gerrard.

(E) By Record by Conuſans.

What Perſon ſhall be eſtopped by Conuſance.

1. IN Aſſiſe againſt Baron and Feme, if they plead the Feoffment by Deed of J S. after * the Death of M. by which he was Tenant after Poſſibility, and the Plaintiff ſaith that the Feoffment was in the Life of M. ſo that he was Tenant in Tail at the Feoffment. In other Action the Feme after the Death of the Baron ſhall not be eſtopped to ſay that Nothing paſſed by the ſaid Deed of Feoffment, though it was acknowledged e contra before, becauſe ſhe was then a Feme Covert. 32 Aſſ. 9. adjudged.

*Fol. 865. Br. Eſtoppel, pl. 140. cites S. C.

2. If A. demands Land as Heir to B. againſt Baron and Feme, and they traverſe the Action, and this is found againſt them, yet after the Death of the Baron the Feme may ſay in another Action that the Demandant is a Baſtard; for the Admittance during the Coverture ſhall not bind her. 32 Aſſ. 9. Quære.

Br. Eſtoppel, pl. 140. cites S. C.

3. If A. ſeiſed in Fee of Land is diſſeiſed of it by B. and during the Diſſeiſin a Præcipe is brought of it by D. againſt A. who ſuffers a Common Recovery of it to the Uſe of D. the Recoveror; though this is in Truth a void Recovery for want of a Tenant to the Præcipe, yet this ſhall be a good Recovery by Eſtoppel to bind A. his Heirs and Aſſigns. Mich. 10 Car. B. R. between *Bull and Wyott*. Intratur Trin. 9 Car. Rot. 514. adjudged upon a Special Verdict.

Cro. C. 388, 389. pl. 21. S. C. and Judgment Niſi.

4. If *Fine upon Grant and Render* be *to A. for Years, Remainder to B. in Fee, where A.* who now by the Fine is to have for Years *was before ſeiſed of the Fee*, now A. is only Tenant for Years; Per Anderſon Ch. J. 2. And. 79. cites 2 E. 3. tit. Replevin.

5. If I bring *Aſſiſe of Common* and make *Plaint for a certain Number* I cannot have another Aſſiſe there and make *Plaint for Beaſts without Number*; For I ſhall not be receiv'd to this; For it is contrary to my firſt Plaint. Br. Eſtoppel, pl. 116. cites 8 Aſſ 9.

6. *Attainder by Inqueſt is not as ſtrong as Confeſſion of the Party*, for Confeſſion cannot be ſet aſide, but Verdict may be ſet aſide by Attaint. Per Shard. Br. Eſtoppel, pl. 132. cites 27 Aſſ. 57.

7. In

7. In Treſpaſs the *Defendant juſtified by a Leaſe for Years made to him by the Plaintiff*, the *Plaintiff ſaid*, that he *Ne leſſa pas*, the *Defendant pleaded Bar by Acquittance* which the Plaintiff had made to him of the Rent of the ſame Leaſe, and the Plaintiff was compell'd to anſwer to the Deed, quod nota. Br. Eſtoppel, pl. 100 cites 39 E. 3. 3.

8. In *Præcipe* quod reddat *againſt two, the one has nothing*, and the *other is Tenant*, if *he who has nothing takes the entire Tenancy, and the other diſclaims*, there *he who takes the Tenancy may ouſt the other of the entirety*. Br. Eſtoppel, pl. 60. cites 8 H. 4. 7. Per Frisby.

9. If a *Fine is levied to A. and B. where A. is ſeiſed in Fee*, both A. and B. ſhall be concluded to ſpeak againſt the Fine; Per Anderſon Ch. J. 2 And. 79 cites 9 H. 4. 8.

Br. Nontenure, pl. 2. cites S. C.

10. Note for Law, that where Tenant in Præcipe quod reddat pleads *Jointenancy with a Stranger*, he ſhall not plead *Nontenure* in another Writ. Br. Eſtoppel, pl. 13 cites 33 H. 6. 2.

Br Nontenure, pl. 2. cites S. C.

11. *And* where the Tenant *wages his Law of Nonſummons* there in another Writ he ſhall not plead *Nontenure*. Br. Ibid.

Br. Nontenure, pl. 2. cites S. C.

12. Formedon *againſt Baron and Feme*, they *pleaded Nontenure*, to which the Demandant ſaid to this he ſhall not be received; For *at another Time he brought Formedon againſt the ſame Baron only* of the ſame Land *who pleaded Jointenancy with J. B.* upon which he prayed Leave to enquire a better Writ, and had it and immediately, the ſaid *J. B. died, by which he took a new Writ by Journeys Accounts againſt the Baron and Feme and R. H.* and had Day &c. at which Day the *Parties appear'd except R. H. and the others pleaded the Death of R. H. after the laſt Continuance*, and the Demandant prayed Leave to enquire a better Writ, *and took this Writ againſt the Baron and Feme*, and ſo the Day of the firſt Writ purchas'd the Baron was Tenant, Judgment &c. Priſot ask'd them what they ſaid as to the *Feme* who was not Party to the firſt Writ; For ſhe *is at Large to plead Nontenure*, and cannot be eſtopp'd &c. quod Littleton conceſſit by which Billinge maintain'd his Writ, that at the Day of the ſecond Writ purchas'd againſt the ſaid Baron and Feme, and the ſaid R. H. the Baron and Feme were Tenants, and the others e contra. Br. Eſtoppel, pl. 14 cites 33 H. 6. 3.

And the like Caſe the ſame Year, fol. 38. where it is ſaid, that nothing of this Matter is material

13. *Debt* upon a Bond *againſt J. B. late of D.* he *ſaid that he was never dwelling at D.* to which the Plaintiff ſaid, that to this he ſhall not be received; For he is *bound by Name of J. B. of D.* and the beſt Opinion was, that the Obligee is not eſtopp'd in this Point, for nothing is effectual in this to this Purpoſe but the Name and the Surname. Br. Eſtoppel, pl. 16. cites 33 H. 6. 10.

in the Bond but the Name, Surname, and the Sum, and ſaid there that Anno 31. it was adjudg'd no Eſtoppel. Ibid.

14. Where *Baron and Feme bring quod ei deforceat which they claim to hold for Term of the Feme's Life*, the Parties appear, and the *Baron dies*, the *Feme may have another quod ei Deforceat, which ſhe claims to hold to her and the Heirs of her Body*, and the firſt Action ſhall not be Eſtoppel, becauſe it was the Act of the Baron, and ſhe was Covert. Br. Eſtoppel, pl. 92. cites 15 E. 4. 28. Per Littleton.

S. C. cited Raym. 457. per Curiam. Mich. 33 Car. 2. B. R.

15. The *Lord diſtrains for Services the Cattle of the Tenant's Leſſee for 60 Years, who pleads that the Tenant made him a Leaſe for 10 Years, and prays in Aid of the Tenant his Leſſor, ſuppoſing by his Aid Prayer that he holds of him by a Leaſe of 10 Years*; afterwards a *Bargainee of the Tenant after the 10 Years were expir'd enters, and the Leſſee pleads his Leaſe of 60 Years*. It was reſolv'd by all the Juſtices that this was no Eſtoppel, becauſe it was the Leaſe and not the Number of Years which was Material, and the Land is not in Queſtion, but the Services &c. And the Eſtop-

pel

pel not being for the Land, neither the Vendor nor the Vendee can have any Advantage of it. D. 289. b. pl. 59. Paſch. 12 Eliz. Anon.

16. If a *Writ of Covenant* be brought *of a Rent where there is not any ſuch*, and he *acknowledges it by Fine*, it ſeems it will be Eſtoppel againſt him, and all claiming under him. 2 Roll Abr. 16. pl. 17.

17. *The King* ſhall not be bound by Eſtoppel; Per Doderidge J. 2 Roll Rep. 304. Paſch. 21 Jac. in the Court of Wards in Sir Edw. Cook's Caſe.

18. The *Diſſeiſee levies a Fine*, Reeve and Crawley Juſtices held that it ſhall not give Right to the Diſſeiſor, becauſe that this Fine ſhall enure only by Way of Eſtoppel, and *Eſtoppel bind only Privies* to them and not a Stranger, *and therefore the Diſſeiſor here ſhall not take Benefit of it*, and therefore they did conceive the 2 Rep. 56. a. to be no Law. Mar. 105. pl. 180. Trin. 7 Car. Anon.

19. If a *Feme Covert be arrected by a wrong Name*, and *gives Bail-Bond*, yet *ſhe may plead Miſnomer*; For her Bond being that of Feme Covert, ſhe may plead Non eſt factum to it; Ideo it will not Eſtop her. Per Cur. 6 Mod. 311. Mich. 3 Ann. B. R. in Caſe of Linch v. Hooke.

(F.) Eſtoppel by Confeſſion.

In what Caſes a Man ſhall be eſtopp'd by Verdict, Confeſſion, or &c.

Not where it ſtands with the Verdict.

1. THE Iſſue is as high in **a Writ of** Treſpaſs i**f it be** taken in the Realty as in an Aſſiſe. 7 H. 6. 9. Fitzh. Eſtoppel, pl. 20. cites Mich. 7 H. 6. 8. S. C.—— Iſſue tried in an Action of Treſpaſs, and Judgment given upon it, is a good Eſtoppel in an Action Real Br. Eſtoppel, pl. 77. —— As in Aſſiſe, the Tenant ſaid that his Father was ſeiſed and died ſeiſed, and he entered as Heir, and gave Colour to the Plaintiff; The Plaintiff ſaid that the Father of the Tenant had nothing but by Diſſeiſin done to the Plaintiff, and he made continual Claim, and dared not enter for Fear of Death &c. To which the Tenant ſaid, that at another Time he brought Treſpaſs againſt the Plaintiff, in which he juſtified becauſe the Father of the Tenant leaſed to him for Life, and the Tenant ſaid that his Father died ſeiſed, and this found for the Tenant, and he recovered Damages; Judgment if he ſhall be received to defeat this Iſſue once found; And by the beſt Opinion it is a good Eſtoppel; For he cannot avoid the Thing which is found againſt him before. Ibid. cites 7 H. 6. 8. 9.

2. **In an Action, if the** Iſſue be whether the Anceſtors of the Defendant died ſeiſed, and it is found that he did, in other Action the Plaintiff himſelf may ſay that he himſelf made Continual Claim before the Death of the Anceſtor **&c. For this is not contrary to the Verdict, for the Jury could not inquire of the Continual Claim, but of the Dying ſeiſed. Dubitatur, 7 H. 6. 8. b. 20.** Fitzh. Eſtopple, pl. 20. cites S. C.— Br Eſtoppel, pl. 77. cites S. C.

3. So **in an Action if** Tenant ſays that his Anceſtor died ſeiſed, and he is his Heir within Age, by which he has his Age, **he may after** ſay **that** his Anceſtor had nothing but by Diſſeiſin; **For this ſtands with the firſt Plea. Dubitatur** 7 H. 6. 9.

4. **If a** Releaſe be pleaded **in Bar, and** Plaintiff denies it, **and it is** found againſt him, **he ſhall be after eſtopped to** ſay **that** it was made by Dureſs. 7 H. 6. 9.

5. So **he cannot** ſay **after that** nothing paſſed by the Deed. 7 H. 6. 9.

Br. Eſtoppel, pl. 77. cites S. C.

6. If a Man would avoid a Deed becauſe it was made when he was within Age, and it is found againſt him, he cannot after ſay that he made it by Dureſs; For by the firſt Plea he acknowledged the Deed to be good in all Points but for the Infancy. 7 H. 6. 9.

Br. Eſtoppel, pl. 77. cites S. C.

7. In Dower the Tenant may ſay Ne unque Seiſie &c. and after Ne unque Accouple. 7 H. 6. 8. b.

Br. Eſtoppel, pl. 77 cites S. C.

8. In Aſſiſe of Mortdanceſter, Tenant may ſay that he is not Tenant, and at another time may ſay that the Demandant is a Baſtard. 7 H. 6. 8. b.

Br. Eſtoppel, pl. 140. cites S. C.

9. In Mortdanceſter, if the Tenant traverſes the Action, and it is found againſt him, the Tenant in other Action cannot ſay that the Demandant is a Baſtard; For it was acknowledged before, e contra when he pleaded to the Action. 32 Aſſ. 9. admitted if the Tenant had not been Covert.

* Fol 866.

Br. Eſtoppel, pl. 138 cites 30 Aſſ. 46. & 51.

10. In a Writ of Aiel, ſuppoſing his Grandfather to be named J. and Defendant ſays that he was named W. and it is found that he was named J. according to the Writ * and he recovers, and after he brings other Writ for other Land of the ſame Anceſtor againſt the ſame Tenant, he may ſay that the Father of the Plaintiff was a Baſtard, though in the other Action it was not denied that he was Mulier. 30 Aſſ. 51.

Br. Eſtoppel, pl. 138. cites 30 Aſſ. 46. 51.—Br. Mortdanceſter, pl. 56. cites S. C.

11. If a Man brings Writ of Ward againſt the Mulier, ſuppoſing the Baſtard to be Heir to his Tenant and in Ward, if the Defendant does not deny that he is Heir, but takes Traverſe upon any Point, which is found againſt him, he ſhall by this be diſinherited perpetually. 30 Aſſ. 51.

12. In Mortdanceſtor brought by the Baſtard againſt the Mulier, if the Mulier ſays that he is Eldeſt, not ſaying that the Plaintiff is a Baſtard, and it is found that the Baſtard is Eldeſt, the Mulier ſhall never be received after to ſay that he is a Baſtard. 30 Aſſ. 51. per Finchden.

13. In Aſſiſe, if the Tenant ſays that A. died ſeiſed, and he as Mulier entered, and Plaintiff being a Baſtard ouſted him, to which Plaintiff ſaith, that J. S. enfeoffed him, by which he was ſeiſed till by the Tenant diſſeiſed, by this Plea he has acknowledged himſelf to be a Baſtard, and therefore in another Action ſhall not ſay that he is a Mulier. 42 Aſſ. 20.

It was accepted in pleading that it paſſed by the Deed. Br. Eſtoppel, pl 140. cites S. C.

14. In an Ad terminum qui præteriit, if the Tenant ſets forth the Deed of the Anceſtor of the Plaintiff, by which he aliened to him in Fee, upon which Plaintiff maintains his Writ, if this be found againſt the Plaintiff, he ſhall not after be received to ſay that nothing paſſed by the Deed. 32 Aſſ. 9. per Thorpe.

Br. Eſtoppel, pl. 140. cites S. C.

15. In Aſſiſe, if the Tenant pleads that J. S. made Feoffment by this Deed after the Death of M. by which he was Tenant after Poſſibility, and Plaintiff ſays that he infeoffed him by the Deed in the Life of M. ſo that he was Tenant in Tail at the Time of the Feoffment, upon which they are at Iſſue, and it is found for the Plaintiff; In another Action, if this Deed of Feoffment be pleaded, the Tenant in the firſt Action cannot ſay that nothing paſſed by the Deed of Feoffment, becauſe that it was acknowledged in the other Action. Vide Dubitatur, 32 Aſſ. 9.

Br. Fauxifier de Recovery, pl. 39. cites S. C.

16. In Aſſiſe, if a Recovery is pleaded, and the other might have falſified it, but does not, but takes Iſſue upon another Matter, which is

is found againſt him, **he ſhall be eſtopped by this Admittance, ſo that he ſhall not be received to falſify this Recovery in any other Action.** 40 Aſſ. 40. **Curia.**

17. If a Man be *reſceived for Default of Tenant for Life*, and *pleads to Iſſue*, and *at the Niſi Prius makes Default*, by which the *Demandant recovers*, it is Eſtoppel to the Tenant by Reſceipt to ſay in another Action, *that A. againſt whom the Judgment was given, had nothing in the Franktenement at the Time of the firſt Action.* Br. Eſtoppel, pl. 190. cites Mich. 17 E. 2.

18. In Aſſiſe, if *A. alleges E. to be Mulier in an Action between him and M.* there *in Aſſiſe brought againſt M.* if *M. pleads in Bar* by E. there *A. cannot ſay that E. was a Baſtard.* Br. Eſtoppel, pl. 124. cites 14 Aſſ. 10.

19. *Aſſiſe at Common Law of Treſpaſs in Ancient Demeſne againſt the Lord and others*, there if the *Tenant does not take the Tenancy upon him, but pleads another Plea*, he ſhall be eſtopped at another Time by it to *ſay that the Land is Ancient Demeſne.* Br. Eſtoppel, pl. 204. cites 21 E. 3. 25.

20. Aſſiſe *againſt A. and B.* Both *pleaded in Bar ſeverally.* The *Plaintiff took A. for his Tenant*, and *B. would have eſtopped him, becauſe* before the Aſſiſe brought *the Plaintiff brought Writ of Ad Terminum qui præteriit againſt the ſaid B. and affirmed him Tenant*, and no Eſtoppel by Award; for it may be that the Demandant entred after the bringing of the Writ of Entry, and the Defendant ouſted him, and that of this he brought Aſſiſe. Br. Eſtoppel, pl. 191. cites 23 Aſſ. 14.

21. In Aſſiſe the *Tenant anſwered by Guardian*; It is no Eſtoppel to the Plaintiff to ſay *that the Tenant, at the Time of the Alienation of the Land made to the Plaintiff, was of full Age*, for he had not Time to ſay it till now; Quod Nota. Br. Eſtoppel, pl. 130. cites 25 Aſſ. 2.

22. Scire Facias, *ſuppoſing Land to be given to W. in Tail*, Remainder to *J. Son of the ſaid W. in Tail*, Remainder to the *right Heirs of the ſaid W.* and the *Warranty of J. was pleaded in Bar*, and the *Plaintiff ſaid that he was a Baſtard*, and was pleaded for Eſtoppel, becauſe he is *named J. Son of W.* & non allocatur; but he was compelled to anſwer to the Baſtardy; Per Kirton. Br. Eſtoppel, pl. 103. cites 39 E. 3. 24, 25.

23. *But* if a Man *names himſelf Heir in the Writ, where he needs not* to name himſelf Heir, and recovers, yet after he may ſay *that he is not Heir*; Per Clame. Ibid.

24. *Contra where* the Writ of Neceſſity *ought to be brought againſt the Heir.* Ibid.

25. *As* where a Man by *Warranty of J. brings* a Writ of Warrantia Chartæ *againſt W. Heir of J.* and recovers, he ſhall not be reſceived after to ſay that he is not Heir. Ibid.

26. *So where* the Writ *cannot be brought but againſt the Party himſelf or his Heir*; Per Clame, quod non negatur. Ibid.

27. In Aſſiſe, the *Tenant made Bar*, and the Plaintiff *made Title by Leaſe to the Tenant for Life, and for Entry by Alienation made by the Tenant to his Diſinheritance*, and the Tenant pleaded *Eſtoppel by Mortdanceſtor brought by the Plaintiff* at another Time againſt the Tenant, in which it was found that he had Fee, and therefore the Plaintiff was barred of the Aſſiſe. Br. Eſtoppel, pl. 148. cites 45 Aſſ. 15.

28. In Treſpaſs the Defendant pleaded *Not Guilty*, and the Plaintiff eſtopped him, *becauſe he was indicted thereof at another Time, and traverſed it, and ſaid that it was of the Aſſault of the Plaintiff*, and ſo to Iſſue, and after waived it and confeſſed the Traverſe, and held that this Confeſſion is good Eſtoppel to plead Not Guilty, and alſo to juſtify De ſon Aſſault Demeſne, ſo that he ſhall not plead the one nor the other

other contrary to his Confeſſion. Br. Eſtoppel, pl. 64. cites 11 H. H. 4. 65.

S. P. Br. Error, pl. 75. cites S. C.

29. If there are a *Son and a Daughter by one Venter, and a Daughter by another*, and the *eldeſt Brother enters and dies ſeiſed*, and *his Siſter enters as Heir*, if the *other Siſter of the half Blood brings a Writ of Nuper Obiit, and recovers by falſe Verdict, or erroneous Judgment*, it is Eſtoppel to the eldeſt Daughter to *ſay but that the other is Co-heir with her, the Judgment being in its Force*, and if ſhe brings Writ of Partition, ſhe ſhall compel her elder Siſter to make Partition; But yet, by a Writ of Error or Attaint, ſhe ſhall defeat it, and ſhall be reſtored to her firſt Right; Quod Nota; and ſo ſee that *Eſtoppel extends to a Thing done before during its Force.* Br. Eſtoppel, pl. 81. cites 19 H. 6. 26.

30 In Debt at the Capias the Defendant named *J. S. of B. appeared* and demanded Judgment of the Writ, for he *ſaid that there is B. upon M. and B. upon P. abſque hoc that there is any B. without Addition*; Port. to this he ſhall not be received, for he has *purchaſed Superſedeas by the ſame Name*, and becauſe this Allegation ſtands with, and was not contra, therefore no Eſtoppel; the ſame Law of Attorney who has Warrant, he ſhall not plead N. ſuch Vill as B nor here, for it is contra &c. Contra of that which may ſtand with &c. Br. Additions, pl. 30. cites 19 H. 6. 35. 36.

31. If *two ſue Livery as Heir* it is Eſtoppel between them, ſo that one ſhall not baſtardize the other after. Br. Eſtoppel, pl 15. cites 33 H. 6. 7. 19. 50. per Laicon.

32. If a Man *confeſſes the Deed of his Anceſtor pleaded againſt him*, it is Eſtoppel for all the World to plead it. Ibid. per Litt. and Needh.

33. Note per Fort. Arguendo in an Attaint, that in *Præcipe* quod reddat the *Tenant pleaded Jointenancy by Deed*, the *Demandant maintained his Writ*, and it is *found for the Tenant, and affirmed by Attaint* that they are Jointenants &c. Then *if he brings other Præcipe againſt both*, and *they plead the ſame Deed in Bar*, the Demandant ſhall not be eſtopped to plead *Not his Deed*, or *Riens Paſſa* &c. for the Effect of the Iſſue, which was found and affirmed, was the Jointenancy, and not upon the Deed. Br. Eſtoppel, pl. 19. cites 35 H. 6. 20.

34 In Debt *a Releaſe was pleaded* in Bar, and they are *at Iſſue if it be his Deed or not, and* the ſame Releaſe *is alſo in Iſſue in another Action between the ſame Parties*, there if the one Iſſue be found that it is not his Deed, this does not make an End of the other Iſſue; but it was agreed that it may be pleaded for Eſtoppel upon the other Action; quod nota. Br. Eſtoppel, pl. 159. cites 1 E. 4. 12.

S. P. Br. Eſtoppel, pl. 132 cites 27 Aſſ. 57.

35. If a Man *indicted of Extortion or Treſpaſs puts himſelf into the Grace of the King, and makes Fine*, and *after the Party ſues* againſt him thereof *by Bill or Writ*, and he pleads Not Guilty, he ſhall have the Plea, and the making of Fine to the King ſhall not eſtop him. Br. N. C. Temp. H. 8. pl. 367. (bis).

36. *For* the *Entry* is *Quod Petit ſe admitti per Finem*, and *does not confeſs it preciſely*, and therefore it is no Eſtoppel. But Brook ſeems to make the Fine by Proteſtation that he is not Guilty, and then this is all clear. Ibid.

37. A Man *pleaded a Pardon of the King* in the Exchequer, *for Alienation without Licence, where the Land is not held of the King* in Capite, this was Eſtoppel to him to ſay after that he did not hold in Capite. Br. Eſtoppel, pl. 222. cites P. 7 E. 6.

(G) Eſtoppel

(G) Eſtoppel by Verdict.

In what Caſes a Man ſhall be eſtopped.

By Thing not material.

1. IN Mortdanceſtor as Heir to B. if the Tenant ſays that A. was ſeiſed, and infeoffed the ſaid B. and him and his Heirs, and Demandant ſays that the Tenant had not any Thing therein but as Feme; upon which the Aſſiſe finds the Purchaſe as the Tenant hath alleged, by which the Demandant is barred. In a new Aſſiſe by the Demandant he ſhall be eſtopped by the ſaid Verdict to ſay that the Purchaſe was by B. and the Tenant, and to the Heirs of B. though the Effect of the Plea before was not whether the Tenant had Fee, or only for Life, for the Demandant was to be barred though he had but for Life. 45 Aſſ. 15. adjudged. It ſeems becauſe it was in a Manner put in Iſſue. Br. Eſtoppel, pl. 148. cites S. C.

2. *Coſinage of the Seiſin of W.* the *Tenant ſaid that I was ſeiſed till by A. Grandfather of the Demandant, and Brother to this W. diſſeiſſed, upon which J. brought Aſſiſe againſt A. and made Title that the ſame W. enfeoffed him in his Life, by which he was ſeiſed tilll by A. Brother of W. diſſeiſed, and the ſame A. ſaid that W. his Brother died ſeiſed, and he enter'd as Heir* to him; upon which the Aſſiſe was taken, and *found that W. did not die ſeiſed*; Judgment if &c. Quære if the Demandant ſhall be bound here as Heir to his Grandfather, where he *claims by his Coſin, and not by his Grandfather, but he convey'd by him*, nevertheleſs it ſeems that he ſhall not be bound; But Brook makes a Quære, for the Releaſe of the Grandfather after the Death of the Couſin ſhall be a Bar, therefore quære of the Eſtoppel. But per Finch and Cand. the *Effect of the Iſſue in the Aſſiſe was but upon the Seiſin and Diſſeiſin of the Plaintiff, and* therefore the *finding that W. did not die ſeis'd was Surpluſage*, which ſhall not be Eſtoppel by them. But note, that the Writ of Coſinage is if he was ſeiſed the Day that he died, therefore it may be that he did not die ſeiſed, and yet was ſeiſed the Day that he died, and ſo is the Opinion of Fitzh. in his new Nat. Br. tit. Mortd. Br. Eſtoppel, pl. 27. cites 40 E. 3. 38.

3. The Plaintiff *declares that B. held of him a Houſe and an Acre of Land by* 10 *Marks, and that the Plaintiff diſtrained, and the Defendant made Reſcous.* The Defendant *pleads that the Plaintiff at another Time brought an Aſſiſe againſt the ſaid B. of the ſaid* 10 *Marks, who pleaded Hors de Son Fee, and the Plaintiff made Title that the Defendant held the Houſe, and five Acres of Land, and a Mill, by the Services of* 10 *Marks, and ſo within his Fee, and that the Plaintiff was Nonſuit*, and after B. leaſed to the Defendant for Years, and demands Judgment if the Plaintiff ſhall be received to ſay that the 10 Marks are iſſuing out of the Houſe and Acre only; and reſolved that the Plea is not good, becauſe *the Quantity of the Services is not material in an Action of Reſcous, but the Tenure only.* Raym. 457. per Cur. cites Mich. 7 E. 4. 18. Fitzh. Eſtoppel 69.

4. *Aſſiſe by J. late Wife of R.* the Defendant *pleads Feoffment by Deed of the Plaintiff's Father with Warranty*; the Plaintiff *replies Riens Paſſa* per le fait; the Defendant *rejoins, that the Defendant* before that Time had *brought an Aſſiſe againſt the Plaintiff and her late Husband, who* to it *pleaded that the Lands were given to one W. and M. his Wife, and the*

Heirs of their Bodies; the *Remainder to J. the now Plaintiff, and her Heirs; that M. died without Iſſue by W. and that W. after the Death of M. aliened in Fee to the now Defendant, for which J. entered and demanded Judgment Si &c.* the *Plaintiff there; and now the Defendant replied, that the Feoffment was during the Life of M. by the Deed*; and the Jury found accordingly; Judgment if the Plaintiff ſhall now be admitted to plead that Nothing paſſed by that Deed; and reſolved that the Plaintiff here was not eſtopped, becauſe *in the firſt Action the Deed was not in Queſtion, but the Time of the Feoffment*, viz. whether before or after the Death of M. Raym. 457. per Cur. cites Fitzh. Eſtopple 247.

5. *Jury are bound to find an Eſtoppel*; Per Mead J. ſaid it was ſo ruled in **Bright's Caſe.** Cro. E. 36. pl. 1. Hill. 27 Eliz. C. B. in the Caſe of James v. Landon.

6. In *Debt* upon Bond *againſt Edmund W. alias Edward W. condition'd for Payment by R. W.* the *Defendant pleaded Payment by R. W. and found againſt him*; and upon *Error brought for that Edward W. was obliged and Edmund W. was ſued*, who cannot be intended one and the ſame Perſon, it was the Opinion of all the Juſtices and Barons, that there could not be any Eſtoppel in this Caſe; But *if the Condition had been for Payment by Edward W. and Iſſue had been that the ſaid Edward paid, and it had been found for the Plaintiff*, there the *Verdict would have made it an Eſtoppel*, and the Court ſhould be aſcertained that they were one and the ſame Perſon; and ſo Judgment in B. R. was reverſed in Cam. Scacc. Cro. J. 558. Hill. 17 Jac. Watkins v. Oliver.

Skinn. 10. pl. 10 S. C. held accordingly per tot. Cur. and Judgment reverſed Niſi. —— 2 Jo. 170. S. C. adjudged. —— 2 Show. 168. pl. 162 S. C. and the Ld. Ch. Juſtice ſaid, As to the Viz. if that be of a Thing which is impoſſible it is no Concluſion or Eſtoppel, and it would be hard to make it ſo in this Caſe; and it was ruled to revarſe the firſt Judgment in C. B. Niſi &c.

7. 20 Car. 2. Vaughan brought a Writ of *Dower* unde Nihil habet in the Great Seſſions at Brecknock againſt Morgan, and had Judgment. And Morgan the *Tenant brings a Writ of Error, and aſſigns* for Error *that he was an Infant at the Time of the Judgment given*, viz. of the Age of 14 and no more, *and that he appeared by Attorney*, whereas he ought to have appeared by Guardian; And upon this Infancy Iſſue was taken, and laid to be at Abergavenny in Com' Monmouth, and tried at Monmouth, and found for the Plaintiff in the Writ of Error. And now Pollexſen moved in arreſt of Judgment this *Exception*, viz. *The Writ of Error was brought 26 Car. 2. and the Tenant had alleged in 20 Car. 2. that he was Infra Ætatem, viz. 14 and no more; and this Writ of Error is brought 26 Car. 2 and Error aſſigned by Attorney, and then of his own ſhewing, he was alſo under Age when he brought the Writ of Error, and aſſign'd the Error*, and he is now eſtopped to ſay the contrary; but Judgment was reverſed by the whole Court. Here is no Eſtoppel, becauſe the alleging the preciſe Age in the Viz. is idle and not traverſable, and he might have alleged any other Age, and the Defendant in the Writ of Error could not have taken the Iſſue upon it. Raym. 456. Mich. 33 Car. 2. B. R. Morgan v. Vaughan.

See tit. Former Action (A) pl. 6. S. C. and the Notes there.

8. An Eſtoppel *upon a Verdict* goes a great Way; Iſſue in Tail ſhall never falſify it. But *if A. is eſtopped, and he joins B.* with him, whether this ſhall avoid the Eſtoppel is a Quære. Show. 28. Trin. 1 W. & M. Incledon v. Burgeſs.

9. *Jury is bound* by Eſtoppel, unleſs the Party leaves the Fact at large by Pleading. 1 Salk. 276. pl. 3. Mich. 3 Ann. B. R. Trevivan v. Lawrence.

(H) Eſtoppel upon Records after Nonſuit.

Fol. 867.

In what Caſes a Man ſhall be eſtopped after Nonſuit.

1. IF the Plaintiff denies a Deed by Traverſe, if he be after Nonſuited he cannot affirm the Deed. Contra 11 H. 4. 30. Br. Eſtoppel, pl. 62. cites S. C. —— Fitzh. Eſtoppel, pl. 99. cites S. C.

2. If a Deed be pleaded in Bar, and Plaintiff ſays that he made it by Dureſs of Impriſonment, and after the Plaintiff is nonſuited, in a new Action he cannot ſay that he was within Age at the making, for he admitted the Deed good before in every Point but for the Dureſs. * 45 E. 3. 2. b. †7 H. 6. 20. 14 H. 6. 9. b. * Br. Eſtoppel, pl. 39. cites S. C. but not S. P. —— Fizh. Eſtoppel, pl. 199. cites S C. but I do not obſerve S. P. there. † Br. Eſtoppel, pl. 77. cites 7 H. 6. 8. 9. S. P. —— Fitzh. Eſtoppel, pl. 20. cites Mich. 7 H. 6. 8. but S.P. does not appear.

3. So in ſuch Caſe he cannot ſay that not his Deed. 6 H. 4. 4. b. Fitzh. Eſtoppel, pl. 96. cites 9 H 4. and 6 H. 4. 4. S. P. by Hank.

4. In Aſſiſe, if the Plaintiff acknowledges a Matter againſt himſelf, and after is nonſuited, yet in a new Action he ſhall be eſtopped by it. 18 E. 3. 35.

5. In Aſſiſe, if it be found by Verdict that he was not ſeiſed nor diſſeiſed, and after, before Judgment, is nonſuited, in a new Aſſiſe he ſhall not be eſtopped by this Verdict, becauſe now he cannot have Attaint upon the Verdict. 18 E. 3. 35. Cur. 17 Aſſ. 27. adjudged. Br. Eſtoppel, pl. 126. cites S. C. but S P. does not clearly appear.

6. In Aſſiſe, if upon Pleading the Releaſe of the Plaintiff it be denied, and it is found by Verdict that it is a good Deed, and after Plaintiff is nonſuited upon Adjournment he ſhall not be eſtopped by this Verdict to deny the Deed in a new Action. 18 E. 3. 35. 17 Aſſ. 28. adjudged.

7. In Debt upon an Obligation, if the Plaintiff counts of the making in one Place, after Nonſuit he cannot allege it in other Place. Dubitatur 14 H. 6. 9. b. He is not eſtopped to allege it in another Place, Per June Ch. J. for when he is nonſuited the Record is as null; Quod Nota. Br. Eſtoppel, pl. 108. cites 14 H. 6. 9.

8. If a Deed be pleaded in Bar, the which is pleaded to be made by Dureſs of Impriſonment at D. and after the Plaintiff is nonſuited, in a new Action he cannot vary from the Place. 45 E. 3. 2. Br. Eſtoppel, pl. 39 cites S. C. —— Br. Lieu &c. pl. 14. cites S.C. —— Fitzh. Eſtoppel, pl. 197. cites S. C. & S. P. —— Ibid. pl. 198. cites S. C. but S.P. does not appear there.

9. In falſe Impriſonment, if the Plaintiff counts of an Impriſonment in one Place, after Nonſuit he may allege it in another Place, for the Place is not material. Contra 14 H. 6. 9. b.

10. In

Br. Brief, pl. 301. (305.) cites S. C. —— Br. Eſtoppel, pl. 192. cites 31 Aſſ. 14.

10. In Aſſiſe by A. B. and C. againſt D. if they make their Plaint, and after the Writ abates by Nonſuit A. and B. only may bring a new Writ, though C. be in full Life, for if they miſtook their Writ before, they ſhall not be ouſted of a good Writ for ever. 31 Aſſ. 15. adjudged.

S. P. —— Fitzh. Eſtoppel, pl. 140. cites S. C. & S. P. [and Roll ſeems to be miſprinted].

S. P. Br. Eſtoppel, pl. 208 cites S. C. and Fitzh. Scire Facias 129.

XI. If in an Action the *Defendant pleads a Releaſe*, and the *Plaintiff denies it*, and after is nonſuited, and *brings another Action*, and the *Defendant pleads the ſame Releaſe*, the Plaintiff was not eſtopped thereto *avoid it by Raſure* in (Scire Facias). Br. Eſtoppel, pl. 186. cites 24 E. 3. 35.

XII. In Aſſiſe, the *Tenant pleaded Matter in another Aſſiſe, in which he himſelf was nonſuited*, and becauſe he was nonſuited he was not ſuffered to plead it as Eſtoppel, but was ouſted thereof by Award. Br. Eſtoppel, pl. 194. cites 44 Aſſ. 19.

XIII. Where a Man brings an Action and is nonſuited, he ſhall not be eſtopped by this Record after, for *by the Nonſuit it is no Record*; Per Wankf. and Litt. But Brooke ſays, Quære. Br. Eſtoppel, pl. 15. cites 33 H. 6. 7. 19. 50.

XIV. Where a *Man in Aſſiſe makes Title that A. was ſeiſed and enfeoffed B. who enfeoffed C. who enfeoffed the Plaintiff*, and after is nonſuited, the Plaintiff ſhall be *eſtopped to deny the Seiſin of any of them*, For each of their Seiſin is material and traverſable. Br. Eſtoppel, pl. 162. cites 5 E. 4. 7. 8 7 E. 4. 19. 20.

XV. A *Record in which the Party was Nonſuit*, ſhall be Eſtoppel to him to ſay contrary to that which he ſaid in the Record of Nonſuit; Per Chock. Br Eſtoppel, pl. 98. cites 9 E. 4. 29.

XVI. *But* per Needham, he *may convey by other Anceſtor in the new Suit*, notwithſtanding the Nonſuit. Ibid.

(H. 2) Suppoſal.

Fitzh. Eſtoppel, pl. 96. cites S. C. and 9 H. 4. ——

11. A Suppoſal in a Writ ſhall not eſtop a Man, if he be nonſuited, in bringing of a new Writ. 6 H. 4. 4. b.

Debt upon a Leaſe made to M. for Arrears of Rent for the Years 20 and 21, and becauſe it appears that the Leaſe was expired before theſe Years he was Nonſuited, and brought other Writ of Debt upon the ſame Leaſe, and declared for Arrears for the Years 18 and 19, and counted of a Leaſe made to A. where the firſt was to M. and the firſt Action ſuppoſing the Leaſe made to M. was pleaded for Eſtoppel to ſay now that the Leaſe was made to A. and per Brudnel and Kingſmill it is no Eſtoppel; For the Writ and Declaration is not but Suppoſal which ſhall not be Eſtoppel. Br. Eſtoppel, pl. 110. cites 21 H. 7. 24. ——As in Formedon the Demandant conveys by one Deſcent and is Nonſuited, and brings other Formedon and conveys by another Deſcent, and well. Ibid. —— And in Mortdanceſtor as Son and Heir to one, he may be Nonſuited and bring another Writ as Son and Heir to another. Ibid. ——And in Action of Waſte upon a Leaſe for Years he is Nonſuited and brings another Action of Waſte upon a Leaſe for 10 Years; For the firſt Writ may be falſe, which is the Cauſe of the Nonſuit peradventure, and then it is no Reaſon that it ſhould be Eſtoppel. Ibid. —— And per Kingſmill, if the Defendant had pleaded, and the Plaintiff had replied of Record and had been Nonſuited, there the firſt Record ſhall be Eſtoppel, for the Replication is Matter in Fact though the Writ and Count are only Suppoſal; But per Rede the Writ is Suppoſal and the Count is Matter in Fact, and it is Eſtoppel by him, and the ſame Law of part Confeſſed to be paid by the Count, but no Matter here was mentioned that the Eſtoppel ſhould be inſufficient by reaſon of the Nonſuit, and therefore it ſeems that the Record in which the Plaintiff was Nonſuited may well remain as Eſtoppel if there was no other Matter but this, quod nota. Ibid.

Br. Eſtoppel, pl. 44. cites S. C. & S. P. per Wich.

12. In Mortdanceſtor, if Plaintiff ſuppoſes his Anceſtor of the Name of W. if he be nonſuited he may ſuppoſe his Name in another Writ to be L. 46 E. 3. 18.

13. So

13. So it is in a Formedon. 6 H. 4. 4. b.

Fitzh. Eſtoppel, pl. 96. cites S. C.

14. If a Man in Mortdanceſtor ſuppoſes that his Father died ſeiſed of Fee after Nonſuit, he may bring a Formedon ſuppoſing him to have Eſtate Tail. 6 H. 4. 5.

15. In Writ of Coſinage, if Plaintiff makes himſelf Heir to an Anceſtor, after Nonſuit, he may bring Formedon or other Writ of the ſame Land, becauſe that the firſt Writ was but a Suppoſal. 3 H. 6. 15. b.

Br. Eſtoppel, pl. 1. cites S. C. and 39. per Martin. —— Br. Eſtoppel, pl. 1. cites 3 H. 6. 15. and 39. S. P. by Martyn and Babington —— Fitzh. Eſtoppel, pl. 15. cites S. C. & S. P. per Martyn and Babington.

16. In Debt upon Obligation, if Plaintiff alleges the making in L. after Nonſuit, in a new Action he may allege the making in another County without any Eſtoppel. 6 H. 4. 4. b. adjudged.

Fitz. Eſtoppel, pl. 96. cites S. C.

17. In Aſſiſe, if the Tenant pleads a *Recovery* in Mortdanceſter againſt the Anceſtor of the Demandant, which Demandant would void for falſe Latin, and after the Demandant is nonſuited, in another Aſſiſe he may avoid the ſaid Recovery, by ſaying that his Anceſtor was not Tenant of the Frankteneiment at the Time of the Recovery, and ſhall not be eſtopped by his admittance in the firſt Aſſiſe, becauſe he is at large by the Nonſuit. 19 Aſſ. 4. adjudged.

Fol. 868.

S. P. Br. Eſtoppel, pl. 128. cites S. C. and the other demurred, and by Advice Brook ſays have diverſe

of all the Juſtices the Aſſiſe was awarded at large, becauſe Nihil dicit; quod nota. Quære, whether becauſe the Record of Nonſult is no Eſtoppel, or becauſe a Man may Pleas to avoid a Recovery.

18. Recordare *between A. B. Executors of the Teſtament of C. and R. M. of an Ox of the ſaid A. taken*, and ſo ſuppoſes Property *in himſelf* and good, and the Writ awarded good. Br. Brief, pl. 445. cites 24 E. 5. 35.

19. Scire Facias upon a Fine, the *Tenant pleaded Feoffment with Warranty of one R. M. in Remainder in the Fine, to whom the Plaintiff is Heir*; The *Plaintiff ſaid that R. is a Baſtard*, and the *Tenant eſtopped him, for that the Writ of the Plaintiff called him R. Son of R.* and if it be his Son he is no Baſtard; and per Finch it is a good Eſtoppel; Quære, for it was not adjudged. Br. Eſtoppel, pl. 102. cites 39 E. 3. 10. 11.

20. Where a *Feme Plaintiff in Aſſiſe* pleads againſt the *Defendant*, who *pleads as Son and Heir to the Father of the Feme* Plaintiff, *that R. their Father firſt eſpouſed M. and had Iſſue the Defendant, and* that *living M.—R. took to Feme S. and had Iſſue the* Feme *Plaintiff*, which *Eſpouſals continued all their Lives*, Judgment &c. and pleaded ſuch Matter for Eſtoppel by pleading in other Aſſiſe, For *it ſhall not be intended* upon this Matter *that the Baron and firſt Feme were divorced*, For this *ought to be alleged* by Matter in Fact, and otherwiſe ill; quod nota. Br. Eſtoppel, pl. 33. cites 42 E. 3. 11.

21. There is a *Diverſity*, as it ſeems, *between a Writ or Count, and Plea* pleaded, for the *one is only Suppoſal*, which is no Eſtoppel, and *the other is Matter in Fact, and* concord' the beſt Opinion is ſo 21 H. 7. 24. 25 that a *Man who brought a Writ and declared upon a Leaſe to B. was Nonſuited*, and *in another Writ declared upon the ſame Leaſe to P.* and good, for a Writ and Declaration is only Suppoſal; *But* it is ſaid there, that *if the Defendant had pleaded a Bar, and the Plaintiff had maintained the Place by Replication*, this *is Matter in Fact*, and by this he ſhall be eſtopped; Nota Diverſity. Br. Eſtoppel, pl. 39. cites 45 E. 3. 2.

Where a Man avoids a Deed made by Dureſs at B in one Action, and the Plaintiff is nonſuited, there the * Plaintiff in new Action ſhall not avoid it by

Dureſs at another Place. Br Dureſs, pl. 5. cites 45 E. 3. 1, 2. —— * Orig is (ple)

22. *Debt upon Obligation made in L.* Paſton demanded Judgment of the Writ; For he has Plaint of *Debt yet pending upon the ſame Obligation in N. ſuppoſing the Obligation to be made at N.* Judgment of the Writ; & non allocatur, becauſe his ſaying *is not but Suppoſal.* Br. Eſtoppel, pl. 1. cites 3 H. 6. 15. 39.

Br. Dette, pl. 3. cites 3 H. 6. 14.

23. And ſee the ſame Year 14. that in *Debt againſt J. as Adminiſtrator* it is no Plea that at another Time the *Plaintiff brought Action againſt one W. as Executor to the ſame Perſon*, Judgment if he ſhall ſay now that he died Inteſtate, & non allocatur; For he was a *Stranger to this Record*, and alſo it *is not but Suppoſal*, and therefore he was awarded to anſwer; and it is ſaid for Law in both Caſes that Suppoſal is no Eſtoppel. Ibid.

24. It was ſaid in a Writ of Entry that Mich. 18 E. 3. *Formedon in Remainder* was brought, and it was *abated by Ley Gager of Nonſummons*, and after *the ſame Demandant brought Formedon in Deſcender of a Gift made to himſelf, to whom he ſuppoſed the Leaſe to be made in the Formedon in Remainder*, and the Writ awarded good; the Reaſon ſeems to be, that the *firſt Writ was Suppoſal*, which is not Eſtoppel. Br. Eſtoppel, pl. 180. cites 9 H. 6. 51, 52.

25. *Superſedeas* of Chancery *becauſe J. is Servant of the Chancellor*, it is no Eſtoppel to the Party to *ſay that he is not Servant to the Chancellor*, for the Writ is *Ut Accipimus*, and alſo the Party is a Stranger to the Writ. Br. Eſtoppel, pl. 184. cites 21 H. 6. 20.

* S. P. Br. Count, pl. 19. cites 34 H. 6. 48. —— S. P. Br. Eſtoppel, pl. 162. cites 7 E. 6.

26 It was ſaid that * *Writ nor Count is only Suppoſal*, ſo that if Tenant in Tail appears and loſes, the Iſſue may ſay that his Father was not Tenant at the Time of the Recovery. Br. Brief, pl. 374. cites 12 E. 4. 14, 15.

contra of Bar, or Title, or other Pleading, for this is Matter in Fact and Eſtoppel. —— S. P. Br. Traverſe per &c. pl. 185. cites 5 H. 7. 11, 12 —— S. P. And therefore Bar which is Matter in Fact is good without Traverſe. Br. Traverſe per &c. pl. 186. cites 5 H. 7. 26.

27. Treſpaſs &c. the *Defendant ſaid that the Plaintiff required the Defendant to have the Governance of his Goods in his Abſence, by which he took them* &c. and *did not ſay that the Plaintiff was poſſeſſed tempore* &c. and yet a good Plea, for the *Suppoſal of the Writ gives Property* to the Plaintiff. Br. Treſpaſs, pl. 437. cites 16 H. 7. 5.

(I) In what Caſes a Man ſhall be eſtopped.

After Diſcontinuance.

Becauſe by the Demiſe of the King the Plea was Sine Die, and ſo he took no Fine; for no Judgment, and therefore no Eſtoppel. Br. Eſtoppel, pl. 53. cites S. C. —— Fitzh. Eſtoppel, pl. 95. cites S. C.

1. IN Debt upon Obligation if the Defendant pleads Payment according to the Condition in one Place, if it be diſcontinued by Demiſe of the King, in new Original he may alledge Payment in another Place. 3 H. 4. 9.

Fitzh. Eſtoppel, pl. 95. cites S. C. & S. P. per Marcam. —— Br. Eſtoppel, pl. 53. cites S. C. but S. P. does not appear.

2. But otherwiſe it is if he ſues a Reſummons upon the firſt Original. 3 H. 4. 9.

3. *Record diſcontinued* was adjudged no Eſtoppel. Br. Eſtoppel, pl. 215. cites 10 H. 6. 13.

(K) Eſtoppel by Record.

Who ſhall be eſtopp'd.

A Stranger.

1. A Man ſhall not be eſtopped by a Verdict between Strangers to which he was not Party, where he is to loſe any Inheritance by it; But he may aver the Contrary thereof. 11 H. 6. 46.

2. But a Man ſhall be eſtopped by a Verdict between Strangers to plead a Matter contrary to it in Abatement of a Writ, becauſe he is not to receive any Diſinheritance by it for to avoid contrary Verdicts. 11 H. 6. 46 b.

3. If A. diſſeiſes B. of Land, and after B. ſuffers a common Recovery of the Land in which the Præcipe is brought againſt B. and the Record is, that the Sheriff put the Recoveror in Poſſeſſion of the Land upon a Writ of Habere Facias Seiſinam. And after C. a Stranger enters upon A. and diſſeiſes him, upon which the Recoveror enters, his Entry is lawful, for though B. was not Tenant to the Præcipe, yet this was a good Recovery by Eſtoppel againſt B. and his Heirs and Aſſigns, it being Fee-Simple Land, and binds all but A. who was ſeiſed of the Land at the Time of the Recovery, and ſo by Conſequence ſhall eſtop C. who does not claim under A. but comes in after the Recovery by Diſſeiſin. Mich. 10 Car. B. R. between *Bull and Wiott*, and per Cur. adjudged upon a Special Verdict, none attending for the other Part. Intratur Trin. Car. Rot. 514. Cro. C. 388, 389. pl 21. S. C. and Judgment Niſi.

4. He who *claims by the Heir of A. which A. had releaſed before in Fee with Warranty* ſhall be bound by the Deed as his Feoffor ſhall be, and therefore was compelled to anſwer to the Deed though he was a Stranger to the Deed; quod nota. Br. Eſtoppel, pl. 142. cites 37 Aſſ. 16. S. P. Br. Eſtranger al fait, pl. 14. cites S. C.

5. In Quare Impedit, if *Matter of Eſtoppel* be *pleaded againſt the Patron which is ſufficient, and the ſame Matter is pleaded againſt the Incumbent he* ſhall be eſtopped alſo, becauſe the Patron alſo is eſtopped, and the Incumbent cannot claim but by his Preſentment. Br. Eſtoppel, pl. 103. cites 39 E. 3. 24, 25.

6. It ſeems that *Letters Patents of the King* are not Eſtoppel to a Stranger nor Bar. Br. Eſtoppel, pl. 52. cites 3 H. 4. 8.

7. A Stranger ſhall not take Advantage of an Eſtoppel, and therefore ſhall not be bound by it; As if *one takes a Leaſe for Years by Indenture of his own Lands*, the ſame ſhall bind him, but if he dies without Heir it *ſhall not bind the Lord in point of Eſcheat*; per Cur. Le. 178. pl. 124. cites 18 H. 6. 22.

8. In *Dower* if *Tenant in Fee Simple ſays that he holds for Term of Life*, the *Reverſion to J. S.* and *prays Aid of him*, this is Eſtoppel between the Tenant for Life and him in whom he affirmed the Reverſion; but the *Demandant in Præcipe* quod reddat *may ſay that he was Tenant in Fee-Simple the Day of the Writ purchaſed*; for a Stranger ſhall not be concluded where he affirms the Reverſion ut ſupra *in a Common Perſon*, but if he affirms it *in the King* ut ſupra, there it is a Concluſion to all Perſons. Br. Eſtoppel, pl. 88. cites 22 H. 6. 2.

9. *Teſtament naming A. and B. Executors*, it is no Eſtoppel for them to *ſay that they were not made Executors*, and a good Reaſon, for *they*

are

are not Parties to it, but are named by the Teſtator. Br. Eſtoppel, pl. 185 cites 22 H. 6. 52.

10. If I bring an *Action by the Name of W. D. where* my *Name is J. D. and recover*, the *Party ſhall eſtop me* in another Action to *ſay that my Name is J. D.* but a *Stranger cannot* ſo eſtop me. Br. Eſtoppel, pl. 216. cites 30 H. 6. 2.

11. *But every Stranger* ſhall take Advantage *of Baſtardy certified*. Ibid.

12. *And* ſo it was agreed 36 H. 8. that a *Stranger to the Fine or Recovery* ſhall not plead it for Eſtoppel. Ibid.

Br. N. C. 36 H. 8. pl. 281.

13. *Contra if he claims the ſame Land under the Fine*, or recovers *by them who were Parties*, or claims *the ſame Eſtate or Part of it, and that this Eſtate continues*, for then he is privy in the Per. Ibid.

14. *Treſpaſs againſt J. N. of D.* who *ſaid that there are two D's* &c. *and no D without Addition*; Per Chocke, to this you ſhall not be received, for *at another Time you yourſelf brought a Writ againſt him, and your Writ ſuppos'd you to be of D. & Obtulit ſe, and took Proceſs*, which is in Effect Appearance in Law; Judgment if he ſhall be receiv'd &c. Per Litl. the Plaintiff is a Stranger to this Record, and cannot be eſtopp'd by it, therefore he by this ſhall not eſtop the other; and by the beſt Opinion it is no Eſtoppel. Br. Eſtoppel, pl. 105. cites 37 H 6. 22. 23.

15. *And alſo* when the *Defendant in Action Perſonal makes Default at the Original, by which it is enter'd Quod querens Obtulit ſe* 4 *Die*, againſt the Defendant, *and had Capias, and ſo at the ſecond Appearance*, that *this is not properly Appearance of the Plaintiff to the Suit*, and then *without Appearance it cannot be ſaid his Suit*. Ibid.

16. A Man *has Chattels of Outlaws*, and another is outlawed, and he *ſeiſes*, and after the *Party is acquitted of the Outlawry upon Iſſue between the King and him of the Outlawry*, and *brought Treſpaſs againſt him who ſeis'd*; It ſeems that he ſhall not be concluded by the firſt Iſſue, becauſe he is a Stranger to it, and *cannot have Error nor Attaint* thereof. Br. Eſtoppel, pl. 163. cites 7 E. 4. 1.

17. *And* if *A.* be *bound in a Recognizance that B. ſhall obſerve the Peace*, and *in Scire Facias againſt B. it is found between the King and him that he broke the Peace*, there *in another Scire Facias againſt A.* he ſhall not be eſtopped by the firſt Trial. Ibid.

18. *So* of *two Actions by Villein againſt Maſter and Servant*, the Iſſue tried againſt him is no Eſtoppel to the other, for Stranger &c. Ibid.

19. *But* it was ſaid if a Man *commits Felony, and enfeoffs A. of his Land*, and after is attainted of Felony by Verdict, the *Feoffee* ſhall be eſtopped to ſay he is Not Guilty. The Reaſon ſeems to be inaſmuch as none may have Attaint of this Verdict, for the Party was indicted by 12, and attainted by other 12, which is 24. Ibid.

20. *But* it was ſaid that *if* in this Caſe the *Party had been attainted by his own Confeſſion*, there the Feoffee might have averr'd that he is Not Guilty; and contra where he is attainted by Verdict. Note a Diverſity. Ibid.

Br. Dette, pl. 163. cites S. C.

12. *Debt againſt Executor*, who *ſaid that* at another Time the *Plaintiff brought Action againſt the Ordinary, ſuppoſing that the Teſtator died Inteſtate, and recover'd* Judgment of the Writ brought againſt him as againſt Executor; and per Cur this is no Eſtoppel, becauſe the Defendant is a Stranger to the firſt Record, of which none ſhall have Advantage but Privies, and alſo *it may be that a Teſtament was proved after*, and therefore no Plea. Br. Eſtoppel, pl. 169. cites 18 E. 4. 1.

22. A Stranger ſhall not be eſtopped *by the Inrolment of a Deed*, as the Parties ſhall be, as it ſeem'd to the Court; for though the Inrolment is reputed to be of Record, yet *it is not a Record created by any Judicial*

Judicial Act; for it is *not like to a Recognizanee*, and in all Recognizances Nul tiel Record is a Plea. The Sealing and Delivery is the Force of ſuch Deeds, and not the Inrolment. But in Caſes of Recognizances they take their Force and Effect by the Inrolment only, and not by the Delivery; and therefore here a Stranger may well enough be receiv'd to deny the Time of the Delivery, which is only Matter of Fact; But the Cognizance before the Judge is Matter of Record, and by this the Debt is created; But Obligations, and Indentures, and Deeds of Feoffment take their Force by the Delivery, and ſo is a perfect Act before the Cognizance is taken, and before any Inrolment. Sav. 91, 92. pl. 169. Paſch. 28 Eliz. in Caſe of Holland v. Downe.

23. *Privies in Blood*, As the *Heir*; Privies *in Eſtate*, As the *Feoffee*, Leſſee &c. Privies *in Law*, As the Lords by *Eſcheat*, Tenant by the *Curteſy in Dower*, the *Incumbent* of a Benefice, and others that come *under by Act in Law, or in the Poſt*, ſhall be bound and take Advantage by Eſtopples. Co. Litt. 352. a.

(K. 2) By Certificate of Biſhop &c. Who. Strangers and others.

1. CErtificate of the Biſhop *that J. S. who was outlawed, was in his Priſon at the Time of the Outlawry*, is Eſtoppel to all to ſay that he was at large at the Time. Br. Eſtoppel, pl. 211. cites 15 E. 3.

2. In Aſſiſe by A. againſt J. who intitled himſelf as Heir to his Father by Deſcent, and gave *Colour*; The *Plaintiff ſaid that J. is a Baſtard. J. pleaded Eſtoppel, becauſe at another Time in Formedon between him and H. he was certified Mulier*; Judgment &c. And by the Opinion of the Court he ſhall not have the Plea, wherefore he pleaded that he is Mulier, and not Baſtard, and it was tried by the Aſſiſe; Quod Nota. Br. Eſtoppel, pl. 131. cites 29 Aſſ. 64.

3. If the *Biſhop certifies Baſtardy*, it is Eſtoppel to all to allege that he is Heir. Br. Eſtoppel, pl. 179. cites 11 H. 4. 84.

4. *Contra* of Certificate *of Mulier*, for he may be Mulier by the Law of the Church, and Baſtard by our Law, and therefore it is no Eſtoppel to a Stranger to this Record. Ibid.

5. In Aſſiſe, the *Tenant pleaded Baſtardy in the Plaintiff*, and *he eſtopped him, by reaſon that he was at another Time certified Mulier by the Biſhop, in a Replevin between a Stranger and the Bailiff of the Plaintiff, who acknowledged the Taking in Right of the Plaintiff, in which the Bailiff had Aid of the now Plaintiff*, and there was certified Mulier; Judgment &c. and a good Eſtoppel as was adjudged there; Quod Nota. Br. Eſtoppel, pl. 78. cites 7 H. 6. 37.

6. Where *Baſtardy in an Action is certified* by the Biſhop, *and after the Plaintiff is nonſuited*, the Certificate ſhall not be Eſtoppel no more than after Diſcontinuance, and the Reaſon ſeems to be, inaſmuch as there *Judgment cannot be given upon the Certificate*. Br. Eſtoppel, pl. 161. cites 3 E. 4. 11. per Moile J.

(K. 3) By Appearance, Imparlance, Defence &c.

1. IN Dower, the *Tenant alleged Detainer of Charters* by the Demandant, concerning his Land deſcended by his Father, *and in Caſe he will deliver them he is, and always was, ready* to render Dower if &c. Per Candiſhe, to this you ſhall not be received to ſay that you was at all Times ready, For you was *eſſoigned in this Plea*; Per Martin J. this is no Eſtoppel, for the Eſſoign *may be Caſt by a Stranger*, which ſhall not hurt the Party, quod Cur. conceſſit. Br. Eſtoppel, pl. 106. cites 14 H. 6. 3. 4.

2. *Treſpaſs againſt J. W. of F.* who *made Defence, and imparled till another Term by the ſame Name*, and after came and *ſaid that he was of B.* the Day of the Writ, and *not of F.* Judgment of the Writ; and was eſtopped by the Defence and Imparlance per tot. Cur. Br. Eſtoppel, pl. 79. cites 19 H. 6. 1.

3. And if a *Man makes an Attorney by ſuch a Name, he ſhall not come* in Perſon *after and ſay that he was of another Vill*, for he ſhall not plead it but in proper Perſon before Attorney made, and before Defence and Imparlance, and no Diverſity between the Day of the Date and the Imparlance. Ibid.

4. *And if* a Man ſo miſnamed *purchaſes Superſedeas by ſuch Name*, he ſhall be concluded to plead Miſnoſmer contrary to it. Ibid.

5. *So where a Man is impleaded by Name of J. N. where his Name is W. N.* Ibid.

6. *But* in ſuch Caſes, in his Defence, Imparlance and Superſedeas, *it ſhall be* ſo, *You have here W. N. who is named J. N. who defends* &c. and ſo upon the Superſedeas, *and then he ſhall ſave the Exception after*; Quod nota per tot. Cur. by Award. Ibid.

7. He who *renders himſelf at the Exigent*, or Gratis at the Capias, or Pone, may plead Miſnoſmer, and this Matter of Appearance ſhall not eſtop him. Br. Eſtoppel, pl. 83. cites 19 H. 6. 43.

8. In Dower, the *Tenant ſaid that he is, and at all Times has been, ready* to render Dower &c. there it is no Eſtoppel to ſay that the Tenant has been eſſoigned, for it may be caſt by a Stranger; Per Huſſey. Br. Eſtoppel, pl. 154. cites 7 H. 7. 6. 7. 16.

(L.) Who ſhall take Advantage of an Eſtoppel. Who Claims under it.

Br. Eſtoppel, pl. 51. cites S. C. ——Fitzh. Eſtoppel, pl. 93. cites S. C.——Co. Litt. 252. a. S. P. at the bottom.

1. A Feme who claims Dower **ſhall have Advantage to an Eſtoppel** by Deed between her Baron and the Tenant. 3 H. 4. 6. **Dubitatur.**

Br. Eſtoppel, pl. 51. cites S. C. & S. P. per Rede.

2. **If a Man** leaſe for Life by Indenture, and **after** levies a Fine of the Reverſion, **the** Conuſee **ſhall ſtop the Leſſee in a** Quid Juris clamat, **to** ſay that Conuſor had not any Thing in the Land. 3 H. 4. 6.

3. If

3. If a Man recovers a Rent-Charge without Title, in an Aſſiſe, againſt the Tenant of the Land, and after the Tenant aliens the Land, the Alienee ſhall be eſtopped by this * Recovery as well as the Alienor, becauſe he comes under the Charge. 30 E. 3. 21. b. * Fol. 869.

4. If J. S. be eſtopped to claim any Eſtate in certain Land, and J. D. has gained the Eſtate by Eſtoppel, and J. D. enters upon the Land and a Stranger comes in Aid of him, if Treſpaſs be brought againſt the Stranger he may well juſtify and take Advantage of the Eſtoppel, for he claims in right of him who is Privy. Contra. 14 H. 6. 23. b. Curia. Br. Eſtoppel, pl. 96. and 109. cites S. C. ——Fitzh. Eſtoppel, pl. 32. cites S. C.

(L. 2) Stranger.

5. A Stranger to a Record ſhall not have Advantage of the Record to eſtopp the Party. 46 E. 3. 18. Br. Eſtoppel, pl. 44. cites S. C.

——Eſtoppels ought to be reciprocal, and to bind both Parties and that is the Reaſon that regularly a Stranger ſhall neither take Advantage of, nor be bound by the Eſtoppel. Co. Litt. 352. a. ——Le. 158. cites 18 H. 6. 22. S. P.

6. If an Infant makes a Deed, he ſhall not be eſtopped to avoid it, becauſe he being in Ward to the King before the making in Chancery proved himſelf of full Age, and ſued Livery, (Becauſe the other is a Stranger to this, as it ſeems) 46. E. 3. 33. And the Proof of his Age and Livery is no Eſtoppel, but that he may plead Infancy at the Time of making the Deed and yet it was the Deed of the Defendant himſelf; Nota. Per Brooke. Br. Eſtoppel, pl. 46. cites 46 E. 3. 34. ——Fitzh. Eſtoppel. pl. 206 cites S. C.

7. In Debt againſt one as Adminiſtrator, he cannot plead that Plaintiff had other Writ againſt J. S. as Executor, becauſe he is a Stranger to it. 3 H. 6. 14. Br. Dette, pl. 3. cites S. C. —— Fitzh. Eſtoppel, pl. 14. cites S. C.

8. So in Writ of Eſcheat upon the Death of J. S. without Heir Defendant cannot ſay that in other Action by a Stranger againſt this Plaintiff, the Plaintiff had vouched as Heir to the ſaid J. For he is a Stranger to this Record. 3 H. 6. 14. Fitzh. Eſtoppel, pl. 14. cites S. C. & S. P. by Martin.

9 In Real Action, if the Tenant vouches J. S. to Warranty, and after J. S. brings Real Action againſt the Tenant for the ſame Land, he ſhall eſtop the Tenant to plead Non tenure pending the Summons ad Warrantiam againſt him, For he is not a Stranger to the firſt Record. Dubitatur 17 E. 3. 43. b.

10. In Right of Ward for A. the Daughter, and Heir of J. S. if Defendant claims to be Brother and Heir to J. S without that A. is the Daughter of J. S. upon which they are at Iſſue, and this is found againſt the Defendant, and upon this Judgment given; If the Brother after brings Aſſiſe againſt A. the Daughter for the Land, ſhe ſhall eſtop him to claim as Heir to J. S. though the firſt Writ was but for the Body, and though ſhe is not Party, nor privy to the Record; For the Plaintiff is enough and privy to have Attaint or Error, and the ſame Matter is to be put in Iſſue which was before, and ſo may be contrary Verdicts, which tha Law abhors. Contra 30 Aſſ. 46. 51. adjudg'd. Curia. Br. Eſtoppel, pl. 138. cites S. C. and ſays that ſo it ſeems that none ſhall take Advantage or Diſadvantage by a Record try'd by Verdict, unleſs he be Party or Privy. —— Br. Mordanceſtor, pl. 56. cites 30 Aſſ. 46.

11. In Writ of Dower againſt a Guardian, if the Iſſue be whether ſhe was the Feme of the Father of the Heir, and it is found by Verdict Br. Eſtoppel, pl. 138. cites S. C.

but I do not obſerve the particular Point of Dower there.

dict, that ſhe was Not, the Heir ſhall eſtop her by this Verdict to claim her Dower, though he is not wholly privy to it, but he is in a Manner Party becauſe he ſhould be bound by it, if this had been found againſt the Guardian. 30 Aſſ. 51.

Roll Rep. 450. pl. 12. S. C adjudged —— Cro. J. 482. pl. 15 Forteſcue v Markham S. C. and Judgment affirmed by ſeven Juſtices.

12. If an Action be brought againſt J. S. Knight and Baronet where he is not any Baronet, but only a Knight, and the Defendant appears and pleads, and after Judgment is given againſt him; If he be taken in Execution upon this Judgment by the Sheriff, upon a Writ of Execution directed to him to take J. S. Knight and Baronet, he ſhall be eſtopped by this Judgment to maintain an Action againſt the Sheriff. By Reports, 14 Ja. B. R. Reſolved per Cur. between *Markham and Sir Fracis Forteſcue.*

—— 2 Roll Rep 88. Paſch 17 Jac. B. R. Forteſcue's Caſe reſolved that the Sheriff might ſafely execute the Writ, the Defendant having appeared and pleaded to the ſame Name, and therefore has loſt the Advantage of the Miſnoſmer; but by Doderidge and Haughton if the Judgment had been by Default it would be otherwiſe.

Cro. J. 323. pl. 1 Doily v. White, S. C. in B R reſolved that the Action was not maintainable. —— * Fol. 8 o. 2 Bulſt. 80. Doily v. White, B. R. the S. C adjudged that the Action did not lie againſt the Sheriff. —— † Lane 48. in Cam. Scacc. S. C. adjornatur.

13. If A. brings Action in Bank againſt Julian Goddard a Feme ſole, where the Parties are at Iſſue, and a Venire Facies is awarded, and before the Return of it the Feme takes to Baron one Doiley, and after upon ſpecial Verdict found in the ſaid Suit Judgment was given in Bank pro prædicta Juliana againſt the ſaid A. upon which Judgment A. brought Writ of Error in Banco Regis, and a Scire Facias is awarded againſt Julian Goddard as a Feme ſole, and ſhe appears by Attorney as a Feme ſole, by the Aſſent of the Baron, and after the Judgment * is reverſed, and the Judgment was entred quod prædictus A. recuperet &c. verſus prædictam Julianam &c. and Coſts and Damages taxed &c. upon which Judgment the ſaid A ſues a Capias ad Satisfaciendum againſt Julian Goddard by Force of which Writ of the Sheriff took the ſaid Julian, who is called Doiley, being the Wife of Doiley, yet it is lawful; For the Feme ſo long as the Judgment is of Effect, is eſtopped to ſay that her Name is other than Julian Goddard, and the Sheriff being the Miniſter to execute the Judgment may take Advantage of this Eſtoppel.

B. R. in the ſaid Caſe per Cur. againſt the Judgment in the Exchequer. Contra. H. 7. Ja. in the Exchequer between † Doiley and Jolliffe held. But adjudged P. 9 Ja. there.

—— Ibid. 52, 53. S. C. and at the End of the Caſe is a Note, viz. That Doilie [the Husband who had brought Action alone without his Wife's joining] perceiving the Law againſt him for this laſt Point or Matter, becauſe his Wife did not join, commenced his Action de Novo in this Court, and this was in Treſpaſs for the Beating and Impriſoning his Wife, and in this Caſe the Husband and Wife joined, and declared to the Damage of the Husband and Wife, and the like Plea was pleaded in Bar, as was in the other Action, and the Record thereof was read in Court Paſch. 9 Jac. and then adjourned, and after it was adjudged for the Plaintiff.

See tit. Error (K) pl. 18. and the Notes there.

14. In Aſſiſe, the *Tenant pleaded a Deed of Feoffment of the Grandfather of the Plaintiff with Warranty as Aſſignee*, and ſhewed both Deeds, and the *Plaintiff ſaid that his Grandfather was ſeiſed in Fee and of Right, and died ſeiſed, and he entred as Couſin and Heir*, and the *Defendant ſhewed a Deed by which the Grandfather took Eſtate for Term of Life of the Feoffor, to toll the Plaintiff of the Averment that he died ſeiſed of Fee*; & non Allocatur; For the Tenant is a Stranger to the Deed, and therefore cannot plead it; But it was ſaid, that ſuch Plea was awarded good, for the Aſſignee of the Plea in Mortdanceſtor before Wilby. Br. Eſtoppel, pl. 117. cites 9 Aſſ. 11.

15. *Præcipe*

15. *Præcipe* quod reddat *againſt A. of three Acres of Land.* A. *ſaid that B. is Tenant of one Acre*; The *Demandant pleaded* Eſtoppel, for *that B. brought Præcipe* quod reddat *of the ſame Land againſt A. to which he anſwered as Tenant of the whole*; Judgment &c. & non Allocatur; For he was a Stranger to the Record. Br. Eſtoppel, pl. 220. cites 14 E. 3. and Fitzh. Eſtoppel. pl. 172.

16. The *King eſtopped another to ſay that M. never had any Thing in the Land, by Reaſon that M. held of the King, and levied a Fine thereof* Sur Conuſance de Droit *come ceo* &c. *to a Stranger*, and *the King has the Advantage to plead the Fine* for Eſtoppel, to which he was a Stranger, by the Opinion there. Br. Eſtoppel, pl. 209. cites 20 E. 3. and Fitzh. Eſtoppel, 187.

17. In Aſſiſe the *Tenant intitled himſelf by dying ſeiſed of one W. to whom he is Heir* &c. the *Plaintiff intitled himſelf that the ſaid W. in his Life enfeoffed the Plaintiff, who was ſeiſed and diſſeiſed, and travers'd that W. did not die ſeiſed*, and to this the *Defendant pleaded* in Manner of Eſtoppel, that *the Queen before certain Commiſſioners of Oyer and Terminer ſued in Nature of a Writ of Ward againſt the Plaintiff, inaſmuch as the Feoffment made by W. to the Plaintiff was forged to toll him of the Ward of the ſaid W. and* there *it was found for the Queen*, and ſo of the Feoffment of W. you cannot have Advantage; For it was found againſt yourſelf, and yet the Opinion of Thorp Ch. J and of all the others, was, That the Plaintiff ſhall have the Aſſiſe; For *he who pleaded the Record was a Stranger*, and alſo the Commiſſion ſpeaks of Treſpaſs, Conſpiracies and Falſities touching the Queen, and not of Ward, *and this Recovery is of Damages, and of no Franktenement*, and the Opinion of the Court was, that the Aſſiſe lies and ſhall be awarded; Quod nota. Br. Eſtoppel, pl. 133. cites 29 Aſſ. 26.

18. Aſſiſe by Baron and Feme, the *Tenant ſaid, That the Father of himſelf and of the Feme was ſeiſed, and died ſeiſed, and the Feme entred and he ouſted her.* The *Plaintiff ſaid, That the Land was given to the Father and his firſt Feme in Special Tail, and the Son Defendant is by another Feme*, the *Defendant ſaid, That the Father* by the Deed which he ſhewed *leaſed the Ward of the ſaid Land for Term of Years*, and demanded Judgment if ſhe ſhall be received to ſay that ſhe is Heir &c. and becauſe he did *not ſuppoſe the Leaſe to be made after the Coverture*, and alſo the Plaintiff is a Stranger to the Deed, therefore the Aſſiſe was awarded. Brook ſays, it ſeems to him that the Eſtoppel (if he ſhall be eſtopped) *ſhall deſcend upon the Heir at Common Law*, which is he who pleaded it, and therefore no Plea, and alſo that it ſeem'd to him to be *a Departure from his Bar*; Quære thereof, For the Eſtoppel *is to eſtop the other Party to ſay that which he pleaded laſt*, and therefore peradventure no Eſtoppel. Br. Eſtoppel, pl. 136. cites 30 Aſſ. 29.

19. Aſſiſe by *a Feme*, the *Tenant ſaid that ſhe at another Time brought Cui in Vita againſt A. of the ſame Land, and appear'd to it*, Judgment if ſhe ſhall be received to a Writ of a more baſe Nature, *which Eſtate of A. the Tenant has*, and a good Plea though he be a Stranger *to the Record*, becauſe thereby the Land was diſcharged of Action of Aſſiſe, and ſo it *goes with the Land*, by which the Plaintiff made Title, quod nota. Br. Eſtoppel, pl. 141. cites 33 Aſſ. 5.

20. *Aſſiſe by two againſt two who was outlawed upon Capias pro Fine*, and Exigent upon it *where the Diſſeiſin was found with Force*, and *one Defendant brought Error, becauſe Diſſeiſin with Force was pardoned by Parliament, and it was not inquired whether the Diſſeiſin was after the Pardon or not*, therefore Error, and the *Party Plaintiff warned*, and *nihil dicit*, and therefore *the Outlawry was reverſed*; and after the *other Defendant brought other Writ of Error, upon the ſame Error*, and the *Outlawry reverſed without warning the Plaintiff*; For *he is eſtopped by the*

Nihil Dicit againſt the Firſt, becauſe it is of one and the ſame Diſſeiſin, and alſo the Outlawry is only the Suit of the King; quod nota. Br. Eſtoppel, pl. 57. cites 7 H. 4. 40.

21. A Stranger may have Advantage *of a Confeſſion*, for it *cannot be reverſed*; But *Record upon Verdict may be reverſed* by Error or Attaint; Note the Diverſity. Br. Eſtoppel, pl. 64. cites 11 H. 4. 65.

22. In *Debt againſt J. as Adminiſtrator* it is no Plea that at another Time the *Plaintiff brought Action againſt one W. as Executor to the ſame Perſon*, Judgment if he ſhall ſay now that he died Inteſtate, & non allocatur; For he was a Stranger *to this Record*, and alſo it is *not but Suppoſal*, and therefore he was awarded to anſwer, and it was ſaid for Law that Suppoſal is no Eſtoppel. Br. Eſtoppel, pl. 1. cites 3 H. 6. 14.

S. P. by which ſhe *ſaid as above, that A. B. leaſed to him for Life, Judgment if againſt the Warranty* &c. and the

23. *Waſte* againſt J. ſuppoſing that he did Waſte *in Tenements which he held in Dower of his Inheritance*, and the *Defendant ſaid, that W. Father of the Plaintiff whoſe Heir he is, was ſeiſed in Fee, and enfeoffed A. B. with Warranty*, Judgment if againſt the Deed which counts of his Warranty, he ſhall be received to ſay, that ſhe held in Dower of his Heritage, & non allocatur; For the Tenant did not make Privity to himſelf to plead the Warranty. Br. Eſtoppel, pl. 9. cites 20 H. 6. 19.

beſt Opinion was, That it is no Eſtoppel; For it may ſtand with the Warranty, and that the Father came to it after, and died ſeiſed &c. by which Gratis they took Fine upon the Plea above, abſque hoc that ſhe held in Dower of his Heritage, and the others e contra; For otherwiſe he cannot anſwer the Point of the Writ, Nota. Br. Waſte, pl. 13. cites S. C.

24. *Præcipe* quod reddat *of Rent of Diſſeiſin done to his Father*, the Tenant demanded Judgment of the Writ, for the *Demandant himſelf was ſeiſed of the Rent in Fee, ſo he ought to have Action of his own Poſſeſſion*, to which the *Demandant ſaid that he was not ſeiſed*, Priſt, to which the *Tenant ſaid, that* to this the Demandant ſhall not be received; For *at another Time J. H. brought Writ of Treſpaſs* in B. R. *againſt the Demandant of his Cloſe broken Vi & Armis*, and his Goods carried away, *to which the Demandant ſaid, that his Father was ſeiſed of a Rent-Charge out of the Premiſſes, and that he and his Anceſtors Time out of Mind were ſeiſed of the ſame Rent, and that his Father died ſeiſed, and after he himſelf was ſeiſed, and for ſo much* Rent *arrear he entred and diſtrain'd the ſame Goods for the ſame Rent, and alleged further how they pleaded to Iſſue, which Plea is yet pending*, and demanded Judgment if he ſhall be received to ſay that he was never ſeiſed &c. upon which the *Demandant demurr'd*, and upon long Argument it was awarded no Eſtoppel, becauſe the *Tenant who pleaded it was a Stranger to the Record* which he pleaded, *and did not make himſelf Privy to the Land, nor Rent by Que Eſtate nor otherwiſe*, and alſo the Plea is yet pending, ſo that there is no perfect Record ended by Judgment nor otherwiſe, and Priſot held ſtrongly that none ſhall plead a Record for Eſtoppel, unleſs that he himſelf may be eſtopped by it, and after it was adjudged no Eſtoppel. Br. Eſtoppel, pl. 15. cites 33 H. 6. 7. 19. 50.

25. *And* if *I bring an Action by Name of R. P.* where my *Name is J. P.* I ſhall be eſtopp'd againſt him to ſay that my Name is other; But e contra againſt a Stranger, quod nota. Per Priſot, (and in a Manner agreed by All). Ibid.

26. If I bring a *Writ of Ward, and count that the Heir held of me by certain Services, and recover* &c. the *Heir in Avowry upon him for greater Services ſhall eſtopp me*, and yet he is a Stranger to the Record. Agreed per Priſot and others, Quære. But per Priſot the *Heir and all others who come to the Land ſhall have Advantage of this Record*, quære inde, and every

every one ſhall have Advantage of Outlawry in Action Perſonal to Perſons outlawed of Felony in Bar, but thoſe are not Eſtoppel. Ibid.

27. In Treſpaſs the *Defendant ſaid that it is his Franktenement*, the *Plaintiff ſaid S recovered it by Formedon againſt the Defendant, and had Execution before the Treſpaſs, and leaſed to him at Will*, Judgment if the Defendant ſhall ſay that it is his Franktenement, and a good Eſtoppel prima facie, Per Cur. Moyle asked, If a *Tenant at Will* may plead this Eſtoppel here? to which none anſwered; and therefore it ſeems that he well may, and is a good Eſtoppel as well againſt the Maſter, againſt whom it was recovered, as againſt the Servant who juſtified by the ſame Maſter, and the Tenant at Will now Plaintiff confeſſed the Reverſion in S. who recovered, and therefore well. Br. Eſtoppel, pl. 158. cites 2 E. 4. 21.

28. *Debt againſt two by ſeveral Præcipes naming them of D.* and they *were outlawed*, and *one* was taken and *pleaded that No ſuch Vill*, and had Scire Facias againſt the *Plaintiff*, who *ſaid that there is ſuch Vill*, and *found againſt the Plaintiff*, and *he went quit*, and after *the other Defendant* was taken and *pleaded the ſame Plea*, and had Scire Facias againſt the *Plaintiff* who *made Default*, by which the Defendant would have had Advantage of the firſt Record; Per Priſot the *King ſhall not be concluded by the firſt Verdict, for* the King *was not Party* to it, neither ſhall this Defendant have Advantage of it, for he is a Stranger; and Laicon agreed, for by them the *Plaintiff may reverſe the firſt Record by Attaint*, and therefore there is no Reaſon that the other Defendant who was not Party ſhall have Advantage of this Record. Br. Eſtoppel, pl. 223. cites 33 H. 6. 51, 52.

29. Reſcous againſt R. for that he *held a Houſe and* 10 *Acres of Land by* 10 *d.* and that the *Plaintiff diſtrained*, and the *Defendant made Reſcous*; Brian ſaid, That *at another Time the Plaintiff brought Aſſiſe againſt A. of the* 10 *d. who pleaded Hors de ſon Fee, the Plaintiff made Title that he held the Houſe, the* 10 *Acres, and a Mill of him by the* 10 *d. and ſo within his Fee, and after the Plaintiff was Nonſuited, and then A. leaſed to him for Term of* 10 *Years*; Judgment if he ſhall be received to ſay that the 10 d. is iſſuing out of the Houſe and 10 Acres only; Per Pigot, this is no Eſtoppel by Reaſon of the Nonſuit, and it was moved that the Defendant ſhould not plead it, for he was not Privy to the firſt Record, and by ſeveral Juſtices it is no Eſtoppel, becauſe the *Matter is not Material*, for in Aſſiſe he need not ſhew Tenure, but might have ſaid that Deins ſon Fee, Priſt, for he concluded, and ſo Deins ſon Fee, and ſo no Anſwer might have been given to the firſt Matter, and then there is no Reaſon that it ſhould be Eſtoppel, by ſeveral Juſtices; Per Moyle this Termor is privy enough; Per Chocke *the Quantity of the Services is not material in Reſcous*, for if he holds of him by any Services, he cannot make Reſcous, therefore he ought to anſwer only to the Reſcous, which Needham and Danby agreed. Br. Eſtoppel, pl. 162. cites 5 E. 4. 7, 8. and 7 E. 4. 19, 20.

30. If there be *Lord, Meſne and Tenant*, and the *Tenant brings Replevin*, and the *Lord avows upon the Meſne who joins in Aid to the Tenant Gratis*, and they are at *Iſſue upon the Services*, and it is *found for the Plaintiff*; if after, *in another Replevin, the Lord avows for more Services*, the Tenant ſhall plead the firſt Record for Eſtoppel, and yet he is a *Stranger to the Avowry, unleſs for the Privity* which was between them by the firſt Record and Joinder. Ibid. Per Moyle.

31. *Aſſignee* ſhall take Advantage of the *Eſtoppel againſt a Leſſee by Indenture*. Per Ld. Ch. J. Raymond Mich. 2 Geo. 2. 2 Ld. Raym. Rep. 1551. cites Co. Litt. 352. and 4 Rep. 53. And *Privies in Eſtate, as the Feoffee, Leſſee* &c. ſhall take Advantage of Eſtoppels, Ibid. Per Eundem in delivering the Opinion of the Court cites 1 Salk. 276. Trevivan v. Lawrence.

(L. 2) Advantage.

How to be taken of it.

1. IN Formedon if the *Tenant pleaded Warranty with Aſſets*, and it is *found for the Demandant that he has not Aſſets*, there *the Deed ſhall not be taken to be confeſs'd*, becauſe the Iſſue paſs'd for the Demandant; *Contra if it be further found againſt him*, then he cannot deny the Deed after, contra now per Huſſey Ch. J. But others were againſt him, and that *by the Iſſue of the Aſſets the Deed is confeſs'd.* Brook makes a Quære if he may not *take the Deed by Proteſtation, and join Iſſue upon the Aſſets.* Br. Eſtoppel, pl. 151. cites 5 H. 7. 23.

2. *And* per Brian, J. If a Man *pleads Riens paſſa by the Deed*, he ſhall not ſay in Evidence that it is not his Deed; For by the Plea the Deed is confeſs'd by *Implication.* Quære. Br. Eſtoppel, pl. 151. cites 5 H. 7. 23.

Eſtoppels which bind the Intereſt of the Land, as the taking of a Leaſe of a Man's own Land by Deed indented, and the like, being ſpecially found by the Jury, the Court ought to judge according to the ſpecial Matter; For although Eſtoppels regularly muſt be pleaded and relied upon by an apt Concluſion, and the Jury is ſworn ad veritatem dicendam, yet when they find veritatem facti they purſue well their Oath, and the Court ought to adjudge according to Law. Co. Litt. 227. a.

3. The Jurors are not, upon Pain of Attaint, to take Notice of Matters of Eſtoppel which are given in Evidence between the Parties, for they are Strangers to the Concluſion between the Parties, and are no more eſtopped than the Judges are; Per Wray and Southcot. Mo. 96. pl. 238. Hill. 14 Eliz. Pleadall v. Pleadall.

2 Brownl. 150. Paſch. 10 Jac. C. B. in Caſe of Eggens v. Biddle, all the Juſtices agreed that the Jury ſhall not be concluded by the Pleading of the Parties, inſomuch as they are ſworn to ſpeak the Truth. —— The Court took this Difference, that where the Plaintiff's Title is by Eſtoppel, and the Defendant pleads the general Iſſue, the Jury are bound by the Eſtoppel; for here is a Title in the Plaintiff that is a good Title in Law, and a good Title, if the Matter had been diſcloſed and relied on, in Pleading; but if the Defendant pleads the ſpecial Matter, and the Plaintiff will not rely on the Eſtoppel when he may, but take Iſſue on the Fact, the Jury ſhall not be bound by the Eſtoppel, for then they are to find the Truth of the Fact which is againſt him. Thus in Debt for Rent on an Indentnre of Leaſe, if the Defendant pleads Nil debet, he cannot give in Evidence, that the Plaintiff had nothing in the Tenements, becauſe, if he had pleaded that ſpecially, the Plaintiff might have replied the Indenture, and eſtopped him; but if the Defendant pleads Nil habuit &c. and the Plaintiff will not rely on the Eſtoppel, but reply Habuit &c. he waives the Eſtoppel, and leaves it at large, and the Jury ſhall find the Truth notwithſtanding his Indenture. 1 Salk 276, 277. Mich 3 Ann. B. R. in Caſe of Trevivan v. Lawrence.

4. Though the *Party is eſtopped to take Averment againſt any thing expreſſed in the Deed*, yet the Jurors who are ſworn ad veritatem dicendam ſhall not; For an Eſtoppel is to conclude to ſay the Truth, and therefore Jurors cannot be eſtopped, becauſe they are ſworn to ſay it; *But if the Eſtoppel or Admittance is within the ſame Record in which the Iſſue is joined*, whereupon the Jurors ſhall give their Verdict, there they cannot find any thing contra to what the Parties have affirmed and admitted of Record, though the Truth be to the contrary; For the Court may give Judgment upon a Thing confeſſed by the Parties, and the Jurors are not to be charged with any ſuch Thing, but only with Things wherein the Party vary; Per Curiam. 2 Rep. 4. b. Hill. 26 Eliz. C. B. in Goddard's Caſe.

Le. 206. pl. 287. Sutton v. Holloway,

5. Ejectione Firmæ. The Plaintiff declared upon a Leaſe for Years. The Jury finds that the Leſſor had nothing in the Land when he made

made the Leaſe to the Plaintiff, and that he afterwards entred on the Plaintiff. Anderſon and Periam were of Opinion, that the Jury had found for the Plaintiff, for the *Jury are bound to find Matter of Eſtoppel* as well as other Matter, and that they are bound to do it upon Penalty of Attaint; But Walmſley and Windham contra. Cro. E. 140. pl. 2. Trin. 31 Eliz. B. R. Sutton's Caſe.

S. C. the Court divided. — Ow. 96. S. C. the Court was divided.— Sav. 98. pl. 179. Sutton v. Dicon, S. C. and the Court divided. —— S. C. cited Arg. Pollexf. 68.

6. An Eſtoppel muſt *be relied upon*, but if Iſſue be taken, it can then give no Advantage. Hob. 207. pl. 260. Trin. 15 Jac. in Caſe of Speake v. Richards.

1 Salk. 277. pl. 5. Paſch. 4 Ann. B. R. cites S. C.

7. An Action was brought in the Name of C. againſt L. and Verdict and Judgment for the Plaintiff. L. brings a *Writ of Error* coram vobis, and aſſigns Error in Fact, *that C. died before the Trial of that Iſſue*, viz. *tali Die* &c. The Defendant in Error per A. B. Attornat' ſuum *ſays that he was alive*, & adtunc in plena Vita exiſtit, & hoc petit quod inquiratur per Patriam; And *now the Plaintiff in Error gives in Evidence, that the Defendant, being a Seaman, died ſevearl Years ago before the Action brought.* Holt Ch. J. ſaid, You are eſtopped to give in Evidence the Plaintiff's Death before the principal Action brought, for then by your Plea you admitted him to be alive. Sir Barth. Show. pro Quer', We are indeed eſtopped to plead that he died before the Action brought, but ſure we may give it in Evidence to the Jury, for if he were dead before the Action, he muſt needs be dead before the Trial. Holt Ch. J. contra. You are eſtopped in Evidence. The Defendant in Error ſaying, & adhuc in plena Vita exiſtit & hoc &c. ſeems to have let the Plaintiff looſe from the Eſtoppel, whereas if he had ſaid, abſque hoc that he died between the Action brought and the Trial, he had hampered him. So the Evidence was admitted and left to the Jury. Comb. 446. at Niſi Prius, before Holt Ch. J. 22 Junii 1697. Lambert v. Cameret.

8. Tenant in Tail had acknowledged a Judgment or Recognizance, and died. Upon a *Scire Facias againſt his Heir* and Tertenant, the *Sheriff returned a Scire Feci*, and there was *Judgment by Default*; And in Ejectment it was ruled, that the *Iſſue in Tail could not give in Evidence that the Conuſor was only Tenant in Tail*, becauſe he might have pleaded it to the Scire Facias. A Caſe cited by Holt Ch. J. Comb. 446. in the Caſe of Lambert v. Cameret.

2 Ld. Raym. Rep. 1551. S. C. cited by Ld. Ch. J. Raymond in delivering the Opinion of the Court, Mich. 2 Geo. 2. but that if the Plaintiff pleads Nil habuit in Tenementis, and the Plaintiff replies, Habuit &c. the Jury may find the Truth notwithſtanding the Indenture.

9. *Where the Eſtoppel appears on the Record the other Side may demur*, As *in Debt for Rent upon an Indenture*, if the *Defendant pleads Nihil habuit in Tenementis*, the Plaintiff need not reply that Eſtoppel, but may demur, becauſe the Declaration is on the Indenture, and the Eſtoppel appears on the Record; otherwiſe if he had declared quod cum dimiſiſſet. 1 Salk. 277. pl. 5. Paſch. 4 Ann. B. R. Kemp v. Goodal.

(L. 3) What Thing is Eſtoppel.

1. NOTE, that where a Writ of the Chancery *recites a Man to be an Infant, and to admit him by Guardian*, yet the other Party *may aver that he of full Age, and pray that he be viewed* upon a Plea pleaded,

pleaded, for the Writ of the Chancery ſhall not be Eſtoppel to any to *allege the Truth.* Br. Eſtoppel, pl. 226. cites 12 Aſſ. 37.

2. Where a Man is outlawed in Treſpaſs, and has a Pardon of the King, he *ſhall not plead Not Guilty after*, and therefore it ſeems that the *Outlawry* is Eſtoppel, being in Force; But Quære, if the *Pardon* be not Eſtoppel; For, for this Cauſe, it is uſual to make Fine by Proteſtation upon Indictment. Br. Eſtoppel, pl. 129. cites 22 Aſſ. 47. per Thorp.

3. In Mortdanceſtor, the *Tenant made Bar by H. Uncle of the Plaintiff*, of Land deviſable, *who deviſed to the Tenant*; The *Plaintiff ſhall not ſay that the Deviſor was ſeiſed in Fee, abſque hoc that he had any Thing by the Deviſe.* Birton ſaid, that the Teſtament of your Anceſtor, whoſe Heir you &c. is Eſtoppel, As a Deed indented; But after Iſſue was taken that he was ſeiſed by the Deviſe. Br. Eſtoppel, pl. 193. cites 35 Aſſ. 1.

4. Note, that the *Deliverance of a Writ of Contempt of Record* is no Eſtoppel to the Party to ſay *that no Writ of Contempt came to him.* Br. Eſtoppel, pl. 205. cites 2 E. 4. 1.

5. A *Rebutter* is a kind of Eſtoppel. Co. Litt. 352. a.

L. 4) By what. Not by the Thing which is to be defeated.

1. *WHere a Man is to defeat a Suit or Record by his Action*, he ſhall not be eſtopped by this Record. Br. Eſtoppel, pl. 34. cites 42 E. 3. 14.

2. *As* where an *Abbot by Conſpiracy impriſons W. till he would make J. S. his Attorney to plead at the Will of the Abbot*, by which J. brought Action in the Name of W. in the County of E. againſt the Abbot, and the *Abbot pleads Villeinage in W. and J. pleads that Frank, and found for the Abbot by Maintenance* &c. In Conſpiracy of this Falſity brought by W. againſt the Abbot and J. *he ſhall not be eſtopped by the firſt Record to ſay that he is Frank*, for that is to defeat the firſt Suit; By the beſt Opin. But quære, becauſe it is not adjudged. Ibid.

(M) What ſhall be Eſtoppel.

Recital.

S. P. and therefore where a Man holds 12 Acres by 12 d. and one Acre by 1 d. of one and the ſame Lord, by ſeveral Tenures, and the Lord recites by his Deed, that where the Tenant held the 13 Acres by 13 d. he confirmed his Eſtate to hold by 1 d. this does not make one intire Tenure, nor does it make any Eſtoppel; Per Cur. Quod Nota. Br. Eſtoppel, pl. 5. cites S. C.

1. A Rehearſal of a Deed ſhall never be any Eſtoppel. 9 H. 6. 9. Curia. 60.

Br. Eſtoppel, pl. 43. cites S. C. ac-

2. If a Man by Indenture recites that he had before leaſed for Years to B. he now releaſes to him in Fee, this Deed ſhall eſtop him after to

to ſay that he had not any Thing at the making of the Deed; **yet it is but Recital.** 46 E. 3. 13. (Quære ceo).

but makes a Quære, if he had taken the Deed by Proteſtation and pleaded as above. — Eſtoppel, pl. 102. cites S. C.

cordingly, and adds, Quod Nota, Fitzh. Eſtop-

3. **If** Leſſee **by Indenture recites** that whereas J the Heir of B. had granted the Reverſion to C. he attorns to C. **this ſhall eſtop him** to ſay **after** that J is not Heir of B. 49 E. 3. 14. b.

Fitzh. Eſtoppel, pl. 207. cites S. C.

4. **In a Deed indented** between two Siſters, **if the** one recites that they are ſeiſed **of certain Land** by Force of the firſt Entail, and leaſes her Part for Life, **this ſhall not eſtop her to** ſay that ſhe is in by Force of the ſecond Entail. 19 H. 6. 79. **Dubitatur.**

5. **If a Man recites by Indenture** that whereas B. holds **certain Land** of the Leaſe of his Father, he releaſes to him in Fee, **yet he may after** ſay that the Leſſee had not any Eſtate upon which the Releaſe might enure, **for that it is but Recital.** 18 E. 3. 40. 8 Aſſ. 56

Br. Eſtoppel, pl. 127. cites 18 Aſſ. 3. [and Roll is miſprinted, there being not ſo many Pleas there, but it ſeems to refer to Page 56.]

6. **If a Man by Deed recites** that whereas J. S. holds of him **certain Lands** in D. he acknowledges himſelf to have received 40 s. *from the Term of Chriſtmas laſt paſt, **yet he who made the Acquittance ſhall be eſtopped to** ſay that J. S. did not hold the ſaid Land of him at the Time of the Acquittance made, **becauſe this is affirmed in the Deed but by Way of Suppoſal.** 45 Aſſ. 5. per Cur.

* Br. Eſtoppel, pl. 146. S. C. and the Words there are (Rent due at Chriſtmas &c.)

7. **If A. releaſes to B. and the Deed is** that he releaſes to B. in his full Seiſin, **yet A. ſhall not be eſtopped by this to** ſay that B. had Nothing in the Land at the Time of the Releaſe. **45 Aſſ. 5. per Perſey.**

Br. Eſtoppel, pl. 146. cites S. C. — So where a Man releaſes, and

ſays in his full and peacable Poſſeſſion being; Per Hill J. But per Thorpe contra; quod nota; for it is not but a Rehearſal, and Rehearſal is not Eſtopſtel. Br. Eſtoppel, pl. 127. cites 18 Aſſ. 3.

8. **If a Man rehearſes in a Deed** that he has leaſed to A. and B. his Feme for Years, he now releaſes to them in Fee, **this ſhall not eſtop him after to ſay** that the Baron and Feme had Nothing **in the Land** at the Time of the Releaſe **made, becauſe this was but a Rehearſal of the Leaſe for Years. Dubitatur** 46 Aſſ. 6.

I. If J. S. *reciting* by his Deed *that his Name is J. S.* by the ſame Deed *grants* an Annuity *by the Name of W. S.* this is a good Grant, for the Writ ſhall be brought upon the whole Deed. Perk. S. 40. cites 3 E. 3. Itin. Not. Eſto. 132.

II. If A. S. *reciting* by her Deed *that ſhe is Feme-Covert* (and in Truth ſhe is a *Feme-Sole*) grants an Annuity &c. it is a good Grant, for that is but a *void Recital*, and the Grantee need not put that in his Writ, and that cannot be a Concluſion to him when he ſhews the Deed. Perk S. 40. cites 3 E. 3. Itin. Not. Eſto. 132.

But if a Feme Covert reciting by her Deed that ſhe is a Feme-Sole, grants an Annuity, this is a void Grant, for ſhe ſhall not be concluded by this Recital &c. Perk. S. 41.

III. *And ſo* ſhall it be if *J. S. Knight*, *reciting* by his Deed *that he is Yeoman*, grants an Annuity &c. Perk. S. 40.

IV. Where a *Deed rehearſes that the Plaintiff leaſed to the Defendant for Years, and thereupon releaſes* and confirms *to him*, the Plaintiff was not received to avoid the Deed, inaſmuch as the Defendant had nothing at the Time of the making of the Deed, becauſe he confeſſes the Deed. Br. Confeſs and Avoid, pl. 8. cites 46 E. 3. 12.

Br. Eſtoppel, pl. 43. cites S. C.

V. Waſte

V. Waſte againſt B. and *counts that ſhe held for Life of his Heritage of the Aſſignment of W. of the Aſſignment of H. Brother and Heir of J. of whom the Defendant held for Life by Feoffment made to her and her Baron, and to the Heirs of the Baron*, and the *Defendant ſaid that J. had an elder Brother than H.* Judgment ſi Actio; the *Plaintiff pleaded Eſtoppel, becauſe the Defendant by Deed indented reciting that H. Brother and Heir of J. who granted the Reverſion had attorned*; Judgment if againſt the Deed ſhe ſhall ſay that H. is not Brother and Heir; and per Perſay and Belk. ſhe ſhall have the Averment, for Recital is no Eſtoppel; For if a *Man releaſes to J. N. all his Right in his Poſſeſſion and Seiſin being*, yet he ſhall ſay that he *had nothing at the Time of the Releaſe*; But a Man *ſhall not deny the Effect of the Deed*, as *that nothing paſſed, or that he did not releaſe*; But the Recital may be Denied. Br. Eſtoppel, pl. 49. cites 50 E. 3. 22. 23.

VI. *So* it ſeems where a Man *recites by Deed that he is of full Age*, or *Sole*, or, *of Sanæ Memoriæ, or at large*, and releaſes &c. yet it ſeems that he *may plead Nonage*, Coverture, Non ſanæ Memoriæ, or Dureſs, which is only Recital. Ibid.

VII. *Debt upon Obligation* with *Condition*, that if the Defendant *performs the Covenant* contained *in certain Indentures*, that then &c. Defendant *ſaid that there were never ſuch Indentures*, and the Plaintiff demurred, by which the Defendant paſſed over and made other Anſwer, and the Reaſon ſeems to be, inaſmuch as he ſhall be eſtopped by the Obligation. Br. Eſtoppel, pl. 12. cites 28 H. 6. 7.

VIII. *Debt upon Obligation* againſt a Prior, he *ſaid that his Predeceſſor menaced five Canons, which made the Covent, to make the ſame Obligation*, wherefore they made it by Menace, and the *Plaintiff ſaid* to this he ſhall not be received, for *after this by the Deed indented* which here is of which the one Part is Sealed by the ſaid Prior and Covent, *which recites the ſame Obligation, the Plaintiff granted to him that if he enjoyed ſuch Land &c. that then the Obligation ſhould be void* &c. and averr'd that this was the ſame Obligation; Judgment if he ſhall be reſceived to ſay that it was made by Menace; and per Chocke *it is Eſtoppel to deny the Deed*, as to ſay Non eſt factum; *but* yet *he may confeſs and avoid the Deed by Menace, Infancy* &c. Contra per Moyle and Priſot, and that it is Eſtoppel; but per Aſhton, contra. Quære, For it is not adjudged. Br. Eſtoppel, pl. 21. cites 35 H. 6. 17. and 14 H. 8. 26. and 45 E. 3. 2.

IX. The *ſhewing a Writ rehearſing a Record ſhall ſerve to make the Juſtices or Miniſters obey it*, as well as if the Record itſelf was brought to them; Quod nota. Br. Eſtoppel, pl. 157. cites 5 E. 4. 30.

X. A Man ſhall not be eſtopped by the Rehearſal *of a Condition*, and *contra of an Indenture*, As where I rehearſe in an Indenture that I have an Action of Debt againſt J. C. and I covenant to be Nonſuited in it be before ſuch a Day, I ſhall be eſtopped to ſay that I have no ſuch Action; Per Brian Ch. J. of C. B. Br. Eſtoppel, pl. 173. cites 21 E. 4. 52, 53.

XI. Where it is recited *by Parliament that J. S. is ſeiſed for Life, and the King by Parliament ratifies* and confirms it, this concludes all Perſons to ſay that he had nothing at the Time of the ratifying and confirming. Br. Eſtoppel, pl. 155. cites 9 H. 7. 2.

4 Le. 43. pl. 116. Duffam's Caſe S. C. in totidem Verbis, only that it adds the Word (Not) before

XII. A. made a *Leaſe* by Indenture to C. *to begin after the Expiration of a Leaſe* thereof made to one B. And in an Action of *Covenant* brought by C. againſt A. *A. ſaid*, that *there was no ſuch B. in Rerum Natura at the the Time of the ſuppoſed Leaſe* made to B. It was aargued, that this Plea doth lie for A. for he is eſtopped to ſay againſt the Indenture, that there is no ſuch B. &c. And alſo if no ſuch Perſon was, then the firſt Leaſe was void, and then the ſecond Leaſe ſhall begin preſently, which

which Manwood and Mounſon granted; and by Manwood, the Deſendant ſhall be eſtopped by the Recital of the firſt Leaſe, to ſay that there was no ſuch B. and although the common Ground is, that a Recital is not an Eſtoppel, yet where the Recital is * material; as it is here, it is otherwiſe; For here the ſecond Leaſe is to begin upon the Expiration of the recited Leaſe and therefore in this Caſe it ſhall be an Eſtoppel. 2 Le. 11. pl. 17. Hill. 20 Eliz. C. B. Anon.

* the Word (Material.) ——A Demiſe by Indenture for a Term, Habendum from the Expiration of another recited or mentioned Term therein, which is not, (or not found to be, which is the ſame Thing) is no Eſtoppel or Concluſion to the Leſſor or Leſſee, but that the Leſſee may enter immediately, and the Leſſor demiſe or grant in Reverſion after ſuch immediate Leaſe; Per Ld. Ch. J. Vaughan. Vaugh. 82. Hill. 21 & 22 Car. 2.

XIII. *Bond* by B. to A. recites, that whereas J. S. *claimed to have a Leaſe for Years* &c per Cur. it is a good Eſtoppel. 3 Le. 118. pl. 168. Mich. 27 Eliz. B. R. Branthwait's Caſe.

XIV. A. by his *Deed Poll recited that whereas he was poſſeſſed of certain Lands for Years of a certain Term by good and lawful Conveyance, he aſſigned the ſame to J. S. with divers Covenants, Articles and Agreements* in the ſaid Deed contained, which are or ought to be performed on his Part. Gawdy conceived that it was an Agreement. Clench ſaid the Recital of itſelf is nothing, but being joined and conſidered with the reſt of the Deed it is material as here, for againſt this Recital *he cannot ſay that he has not any Thing in the Term.* And at length it was clearly reſolved, that if the Party had not that Intereſt by a good and lawful Conveyance the Obligation was forfeited. Le. 122. pl. 164. Trin. 30 Eliz. B. R. Severn v. Clark.

XV. A. *covenants* with B. that he would *procure a Deputation &c. in the like Manner as J. S. had it.* A. is eſtopped to ſay that there was *no Deputation* to J. S. Cro J. 297. pl. 4. Hill. 9 Jac. B. R. Barwick v. Gibſon.

XVI. By *Indenture* between A. and B. *reciting, that A. was ſeiſed in in Fee of certain Lands, A. in Conſideration of a Marriage to be had between her Son and B. grants a Rent-charge out of theſe Lands to B. to begin after the Death of her Son, and covenants to pay it.* In an Action againſt A. upon this Covenant, ſhe *cannot plead ſhe had nothing in the Land at the Time* of the Covenant, but that a Stranger was ſeiſed thereof. Adjudged upon Demurrer for the Plaintiff, both becauſe the Defendant is eſtopped by the Deed, and the Covenant extends to it as an Annuity. All. 79. Hill. 23 Car. B. R. Newton v. Weeks.

XVII. Debt upon *Bond conditioned to appear* before the Houſe of Commons they having voted the Obligor into Cuſtody, being Guilty of High Treaſon. This being a void Bond it was urged that this Condition which recites this Bond for appearance only, is an Eſtoppel to the Parties to ſay, it was for any other Cauſe, but the Court ſaid that *when the Bond is a good Bond the Recital is a Eſtoppel, but when the Bond is void the Eſtoppel is void too,* and does not bind the Parties as if upon the Statute of 23 H. 6. cap. 10. or of Uſury, the Condition ſhould recite ſome Matter which ſhould make the Bond good, yet if in Truth the Contract was Uſurious or the Condition not within the 23 H. 6. and that be pleaded, it will avoid the Bond and the Eſtoppel too. Hard. 464, 465. Trin. 19 Car. 2. in Scacc. Norfolk's Caſe.

XVIII. A *general Recital* is not an Eſtoppel, but a Recital of a particular Fact is ſo; Per Holt Ch. J. Show. 59. Mich. 1 W. & M. in Caſe of Salter v. Kidley.

(M. 2) Surplus ſhall not eſtop.

9 **If the** Jury upon an Iſſue find a Matter which is but Surplus of which they did not inquire, **this ſhall not eſtop the Party.** 11 H. 6. 46.

Br. Eſtoppel, pl. 44. cites S. C.

10. **If the** King ſues Scire Facias againſt B. as the Heir of A. for the Debt of A. **if the** Defendant ſaith that A. was Tenant by the Curteſy **of the Land which was** the * Inheritance of C. his Mother, whoſe Heir he is, **and this** is found by the Iſſue accordingly; **in another Action** B. **may well** ſay that he is the Son of D. **and he ſhall not be eſtopped; for the Effect of the Iſſue was whether A. was Tenant by the Curteſy or in Fee, and the Addition that he is the Son of C. was Surplus.** 46 E. 3. 18.

* Fol. 871.

11 **In** Aſſiſe of Common **if** Defendant ſays that the Land where &c. is out of his Fee &c. **though here this is no Plea to force the Demandant to make Title in the Aſſiſe, yet** if he makes Title upon a Grant after Time of Memory, **he ſhall be eſtopped after in another Action** to claim the Common by Preſcription. 11 H. 6. 27. b.

(M. 3) A Thing not material.

Co. Litt. 352. b. S. P.

12. **A Thing** alleged of Record **not material ſhall not be any Eſtoppel.** 13 H. 4. 14.

Raym. 457. S. C. cited per Cur. that the Leaſe and not the Number of Years was material.

13. **If** Leſſee for 20 Years prays in Aid of the Leſſor as Leſſee for 10 Years, who joins and pleads &c. **this ſhall not eſtop the Leſſee to claim for more than 10 Years, becauſe the Number of Years was not material nor traverſable.** D. 12 Eliz. 289. 59.

Br. Eſtoppel, pl. 60. cites 8 H. 4. 7. S. C. [but I do not obſerve S. P. in Brooke.]

14. But otherwiſe **it is** if Tenant in Tail prays in Aid as Tenant for Life, **for this ſhall eſtop him, (for here he differs in the Subſtance of Eſtate).** 8 H. 4. 8. b.

I. Where *a Man ſays, in Avoidance of Outlawry, that he is of W. abſque hoc that he was dwelling at D.* he ſhall not be by this eſtopped to ſay *no ſuch Vill as D. in the ſame County*, for the Confeſſion of a Thing which is not material ſhall not be Eſtoppel. Br. Eſtoppel, pl. 178. cites 22 E. 4. 38.

2. *As* a Man vouched J. as Son and Heir of W. and when he came he bound him by his own Deed, he ſhall not be eſtopped to *ſay in Mortdanceſtor that the ſame J. is a Baſtard*; for Son and Heir, ut ſupra, is not material. Ibid.

3. *So in an Action brought by Name of Executor of Goods taken out of his own Poſſeſſion.* Ibid.

4. *Or in Debt by Name of Executor*, and *counted of Debt due to himſelf*, there the Word *Executor* is not material, and therefore ſhall not be Eſtoppel, but may *ſay after, Ne unques Executor* &c. Ibid.

(M. 4)

(M. 4) A Thing not traverſable.

15. **A Man ſhall not be eſtopped** by Nient Dedire of a Thing, unleſs he might have a Traverſe to it. 19 H. 1. 79. This ſhould be 19 H. 6. 79.

16. Detinue *againſt J. C. Son and Heir of J. C. of Bailment of Charters* by the Plaintiff to the Defendant, who *ſaid that he is Son and Heir of W. and not Son and Heir of J. C.* Per Moile this is no Plea; Per Jenney, if he ſhall not have the Plea, he ſhall be at another Time eſtopped to ſay that he is not Son and Heir of J. C. Per Chocke it is not traverſable, as here, and a Man ſhall not be eſtopped of that which he cannot have Traverſe. Br. Eſtoppel, pl. 165. cites 10 E. 4. 12.

17. *As* if it is found by Office that my Father died ſeiſed in Fee and held in Capite, and I ſue Livery, I ſhall not be eſtopped to *ſay that the Land is Tail*, for the *Fee was not traverſable at the Time of the Livery*; Per Chocke. Ibid.

18. *So* where *Jointenancy is pleaded againſt me by the Deed of my Father with Warranty*, I ſhall not have Anſwer to the Deed, but maintain that Sole Tenant; Per Chocke. Ibid.

19. And therefore in another Action, where *the Warranty is pleaded*, *I may ſay Non eſt Factum*, but where he is ſo named *in Action of Debt againſt me as Heir*, *or where he is vouched as Heir*, there he ſhall have Plea to it, contra here; Per Chocke and Danby Ch. J. accordingly; But Needham and Littleton contra. Ibid.

(M. 5) By Diſclaimer.

1. FOrmedon againſt two; The one *diſclaimed*; The other pleaded Nontenure; and there it is agreed, that *upon Diſclaimer no Judgment is given for the Demandant*, *but againſt him*, *that his Writ ſhall abate*, and yet it is Eſtoppel between the Parties, and the Demandant may enter; But per Moile, if the Tenant be Tenant for Life, this ſhall not bind him in Reverſion, but that after the Death of Tenant for Life, he in Reverſion may re-enter. Br. Eſtoppel, pl. 111. cites 36 H. 6. 28, 29. 34.

2. If a Man avows, and the *Plaintiff confeſſes the Avowry*, yet *in another Avowry he may diſclaim*, Per Aſhton and Needham; But per Moile contra. Br. Eſtoppel, pl. 158. cites 2 E. 4. 21.

(M. 6) By Plea of Attorney.

1. IN an *Action by an Abbot*, the Defendant pleaded by Attorney, *that the Abbot is depoſed*, and well, for his *Warrant was once true*. Br. Eſtoppel, pl. 99. cites 9 E. 4. 31.

2. *But* in Dower againſt a Guardian, if he makes *Attorney* accordingly, and imparls, there in another Term he *cannot ſay that he is not Guardian*. Ibid.

3. *But*

3. *But* in Debt againſt Executor who makes Attorney, *the Attorney may plrad Ne unques Executor*, Ne unques *adminiſtred as Executor*, for *the Effect is the Non-Adminiſtration*, and not the being Executor, and it does not ſtand with &c. Ibid.

4. And in an *Action againſt J. B. Son and Heir of W. B.* and he makes Attorney by this Name, the *Attorney ſhall not plead after that he has an elder Brother, nor that he is a Baſtard.* Ibid.

5. *Nor in Debt againſt Adminiſtrator* who makes Attorney, he ſhall not plead after that *the Adminiſtration was not committed to him*; Quod Nota. Ibid.

6. If an *Infant* be *impleaded*, and *imparles by Guardian* till another Term, yet he ſhall have his Age; *Contra* it ſeems of Imparlance by Attorney. Br. Eſtoppel, pl. 176. cites 21 E. 4 78.

7. Attorney in Writ of Reſcous *ſaid that his Maſter was a Viſcount*, which is a Name of Dignity, *not named Viſcount*; Judgment of the Writ, and well; for *it is contrary to the Warrant* of Attorney. Br. Eſtoppel, pl. 153. cites 6 H. 7. 14.

(M. 7) By former Actions where a Wrong Title was ſet forth.

1. IF a Man *claims an Advowſon, or Common appendant, where* the one and the other *were in Groſs, and it paſſes againſt him*, yet *he may after this claim as in Groſs.* Br. Eſtoppel, pl. 168. cites 13 E. 4. 2. 3.

(M. 8) By Acts done by Compulſion of Law.

1. DEBT *againſt J. B. of C. Yeoman*, he may come *at the Capias* gratis, and *ſay that he is the ſame Perſon, and is Gentleman, and Yeoman; and the ſame* per Brian *at the Exigent*, which Chocke agreed, and the *putting in of* Bill of *Mainpriſe by the ſame Name* is no Eſtoppel; for this is by Coertion of the Court; Per Brian; quod non negatur. Br. Eſtoppel, pl. 175. cites 21 E. 4. 78.

(N) What Act or Acceptance ſhall be an Eſtoppel.

1. IF a Tenant in Fee accepts a Leaſe for Years of the Land by Deed indented, this ſhall eſtop him during the Term to claim other Eſtate. * 4 Rep. 54. *Lond.* † 14 H. 6. 22. b. Trin. 3 Jac. B. R. per Cur. between *Stile and Herring.* Co. Litt. 47. b. 3 E. 4. 14. ‡ 8 E. 4. 7.

* 4 Rep. 54. a. cites Paſch. 33 Eliz. London's Caſe. —— 1 And. 128. Paſch. 26 Eliz. London v. James. —— Cro. E. 26. Hill. 27 Eliz. James v. Landen. pl. 96. 109. 221. S. C. —— Fitzh. Eſtoppel, pl. 32. cites S. C.

† Br. Eſtoppel, ‡ Br. Eſtoppel, pl. 60. S. P. cites 8 H. 4. 7.

2. So

2. So if Leſſee for Years accepts a Leaſe for Years from a Stranger by Indenture who has Nothing in the Reverſion, this ſhall be between them a Leaſe by Eſtoppel, and not a Confirmation only of the firſt Eſtate. Trin. 3 Jac. B. R. between *Stile and Herring*, per Cur. except Fenner, who thought it ſhould be a Confirmation.

3. If a Man takes a Leaſe for Years of his own Land by the Patent of the King, rendering Rent, this ſhall not eſtop him as an Indenture between common Perſons, becauſe the King cannot be eſtopped by his Patent, and an Eſtoppel ought to be of both Parties. Trin. 8 Jac. *Sir Michael Stanhope's Caſe*, Dubitatur.

4. If a Man takes a Leaſe for Years of the Herbage of his own Land by Deed indented, this is not any Eſtopple to ſay that the Leſſor had Nothing in the Land, becauſe this is not made of the Land itſelf. Co. Litt. 47. b. It is no Eſtoppel to him to claim the Soil or the Freehold. 2 Le. 159. Pleadall's Caſe.

5. If A. leaſes Land to B. for Years by Indenture, this ſhall eſtop both Parties to ſay that the Leſſor had Nothing in the Land at the Time of the Leaſe made. Co. Litt 47. b.

6. But if A. leaſes Land for Years to B. by Deed Poll, B. is not eſtopped to ſay that A. had Nothing in the Land at the Time of the Leaſe made, becauſe it is not mutual. Co. Litt. 47. b. Br. Eſtoppel, pl. 8. cites 38 H. 8.

7. If a Copyholder in Fee comes into the Court of the Lord, and accepts of the Lord a Copy, by which the Lord grants it to him for Life, * the Remainder to his Wife for Life, the Remainder to his Son for Life, this ſhall not eſtop him to claim the Inheritance, for at moſt this ſhall enure but as a Surrender to the Uſes aforeſaid, and then the Reverſion in Fee will continue in his own Perſon. 37 Eliz. between *Southcot and Adams* adjudged, the which Intratur H. 36 Eliz. Rot. 2640. M. 13 Ja. B. R. held in the ſame Caſe upon Evidence at the Bar. Roll Rep. 256. pl. 24. S. C. —— * Fol. 872. 3 Bulſt. 80. Belfield v. Adams, S. C. —— See tit. Copyhold (Z) pl. 1. S. C. and the Notes there.

8. In Aſſiſe the *Baron alien'd in Fee, and retook Eſtate to him and his Feme in Tail, and died*, the *Lord ſeiſed the Ward of his Heir, and leaſed it to W. N. who aſſign'd the third Part to the Feme in Dower, and gave her* 100 *s. to hold herſelf Content*, and *after ſhe brought Aſſiſe of the other two Parts*, and *all this Matter found*, and that *ſhe did not accept it by Deed indented, nor releas'd her Right in the two Parts*, and by Judgment of all the Counſel upon Adjournment ſhe recovered Seiſin of the Land, and yet before the Alienation ſhe was dowable, and it was ſaid that ſhe was *remitted in reſpect of the third Part*. Br. Eſtoppel, pl. 125. cites 17 Aſſ. 3.

9. *And* it is ſaid there that if the *Diſſeiſee takes Homage of the Diſſeiſor* it is a Bar of Aſſiſe during his Life, but his Heir ſhall have Writ of Entry ſur Diſſeiſin upon the ſame Diſſeiſin. Ibid.

10. *Aſſiſe* by a Feme againſt J. S. *of a Rent, the Tenant pleaded Jointenancy by Deed of the Land with his Feme not named* &c. the *Plaintiff ſaid that her Father, whoſe Heir ſhe is, was ſeiſed, and leas'd to the Tenant alone by Deed indented, which ſhe ſhew'd, for Life, rendering the Rent*; the *Father died, and ſhe was ſeiſed of the Rent, and diſſeiſed*; Judgment if againſt his proper Deed he ſhall be received to plead Jointenancy, and a good Plea by Award, and ſo ſee that a Deed indented is the Deed of both Parties, and yet the Leſſor, as here, parted with the Land reſerving the Rent, and there is no Word of the Leſſee, and yet it is his Deed, for he hath ſealed. Br. Eſtoppel, pl. 147. cites 45 Aſſ. 14.

11. *Acceptance of a Surrender* made *by a Termor who has broken Covenants* for not repairing of the Tenements, is no Bar nor Concluſion, for

the Leſſor who accepted the Surrender *to bring Writ of Covenant* of the Non-Reparation before; quod nota. Br. Eſtoppel, pl. 201. cites 50 E. 3. 27.

12. In Error it was ſaid by Clom. for Law, that where *Tenant of Fee is impleaded, and ſays that W. S. leaſed to him for Life, and prays Aid* of him, immediately by this Conuſance the Right is veſted in W. S. quod Conceditur. Br. Eſtoppel, pl. 149. cites 50 Aſſ. 3.

13. If the Tenant *prays Aid of the King affirming the Reverſion in him where has no Reverſion* of it in Fact, there the *King has gain'd the Reverſion* thereof by Concluſion, though the Tenant had Fee-Simple before, quod nota. Br. Eſtoppel, pl. 203. cites 8 H. 4. 14.

Br. N. C. 37 H. 8. pl. 306.

14. If there are *two Jointenants* who *hold of the King in Chief*, and *one releaſes to the other in Fee*, and after *both reſpite Homage in the Exchequer*, by this *he who releaſed has gained the Moiety by Concluſion.* Br. Eſtoppel, pl. 218. cites 37 H. 8.

Br. N. C. 37 H. 8. pl. 306.

15. *As* it ſhall be where *two join in Suit of Livery out of the Hands of the King, where the one has nothing*, by the Opinion of ſeveral, and the ſame of *Partition* by two where the one has nothing. Ibid.

16. A. is attainted of Treaſon, an *Office is found that A. was ſeiſed of the Manor of Dale* on the Day of the Treaſon committed; the *King grants this* Land *to B. in Fee.* (In Truth, *D. was in Poſſeſſion* of this Land *and it was his Inheritance.) B. reconveys* this Land *to the King*; An Act of Parliament is made, by which it is ordained, that the ſaid Attainder of A. ſhall be Null, the *King* afterward by Patent *reciting the Right of D. grants* this Land *to D. and his Heirs.* D. in this Caſe is remitted to his ancient Right in this Manor, by all the Judges of England. D. had not been remitted, without this Recital, but eſtopped by the Acceptance of the ſaid Patent, from claiming any other Right than by the Patent. Jenk. 196. pl. 4. cites 33 H. 8. Br. Caſes. 206.

Cro E. 36. S. C. cited, and that the Eſtoppel continued after the 15 Years expired.

17. *A Man ſeiſed in Fee took a Leaſe by Indenture of the Herbage and Pawnage of the ſame Land*; It was the Opinion of the whole Court, that the ſame was no Eſtoppel to him to claim the Soil or the Freehold; And it was ſaid by Plowden, and agreed by the Court, that if the *Father and Son* be *Jointenants for an Hundred Years*, and the *Son takes a Leaſe of his Father of the Lands for 15 Years to begin* &c. the ſame ſhall conclude the Son to claim the whole Term or Parcel of it by Survivor. 2 Le. 159. pl. 192. 21 Eliz. B. R. Pleadal's Caſe.

18 If a Man *takes a Leaſe of his own Land by Deed indented* this is an Eſtoppel. But per Windham and Periam J. if the Leaſe be *be made for Life by Indenture*, this ſhall be no Eſtoppel, becauſe the Leaſe takes Effect by the Livery and not by the Deed. But Rhodes J. did not fully aſſent to this laſt Point, and Anderſon was abſent. Goldsb. 53. pl. 5. Trin. 29 Eliz. Anon.

19. *But* if a Man takes a Leaſe *of the Herbage of his own Land* for Years by *Indenture* it is no Concluſion to ſay, that the Leſſor had nothing in the Land, becauſe it was not made of the Land itſelf. Co. Litt. 47. b.

20. *C.* made a Leaſe to *W.* for *ſix Years*, by Indenture of a *Houſe in which he had nothing*, and *afterwards he purchaſeth of R. a Leaſe of the ſaid Houſe for 21 Years upon Condition; then C. re-demiſed to R. for ten Years*; adjudged, 1ſt. That the Leaſe to *W.* for ſix Years was good againſt C. by Concluſion, but nothing in Intereſt. 2dly, That as ſoon as *C.* had purchaſed his Leaſe for 21 Years, *W's.* Leaſe for ſix Years became a Leaſe in Intereſt, the Reverſion in *C.* 3dly, When *C.* demiſed to *R.* for ten Years, *R.* was bound by the Eſtoppel, and took only a future Intereſt, there being no Attornment. 4thly, That when the Jury hath found this Matter at large, the Court ſhall adjudge according to the Law, and *W.* had a good Eſtate for ſix Years, and *R.* only

only an Intereſt in futuro. Pollexf. 68. cites 4 Rep. 53. Mich. 29 & 30 Eliz. B. R. Rawlin's Caſe.

21. A. leaſes to B. for Years on *Condition to be performed by A.* Afterwards A. grants a *ſecond Leaſe* by Indenture, and then performs the Condition. This ſecond Leaſe is only an Eſtoppel between ſecond Leſſee and Leſſor, ſo as the Entry on the firſt Leſſee is lawful. But if A. had *enfeoff'd* B. and then levied a *Fine to C.* the Condition was gone. Cro. E. 665. pl. 16. Paſch. 41 Eliz. C. B. Ferrers v. Borough.

22. *No Record* eſtopps *if the Court has not Juriſdiction*, and every Eſtoppel is *reciprocal*. 1 Inſt. 352.

23. Eſtoppel was againſt Deviſee by *miſtake of Title, and paying Rent* for the very Land deviſed to him *upwards of* 20 *Years*. Nelſ. Chan. Rep. 76. Mich. 13 Car. 2. Daire v. Beverſham. 3 Ch. Rep. 4 S. C.

24. If *I have future Intereſt to begin* 10 *Years hence*, and I *make a Leaſe for five* Years, preſently againſt me this is good by Eſtoppel; Per Bridgman Ch. J. Cart. 159. Mich. 18 Car. 2. C. B.

25. An Eſtoppel *cannot be* made *but upon a Concluſion upon a particular Thing*. If I grant all my Lands which I had by my Father, this is no Eſtoppel, but if I grant *Blackacre* it is; Per Bridgman Ch. J. Cart. 159. Mich. 18 Car. 2. C. B.

26. Eſtoppels *muſt either bind both or neither*. 12 Mod. 361. Paſch. 12 W. 3. In Caſe of Pullen v. Purbeck.

27. Where one comes to *diſapprove an Extent* upon a Statute Merchant he muſt ſay that he has not accepted. Per Holt Ch. J. 12 Mod. 361. Paſch. 12 W. 3. In Caſe of Pullen v. Purbeck.

(O) In what Caſes a Man ſhall be eſtopp'd in his Name.

1. IF A. Balman binds himſelf in an Obligation by the Name of A. Bawman **he ſhall be eſtopp'd to ſay that his Name is otherwiſe, and the Action may be brought againſt him by his true Name,** viz. Balman, alias dictus Bawman, **to agree with the Obligation. Mich. 9 Car. B. R. adjudged between** *Buxſtone and Balman.*

2. **If a Man** oblige himſelf by a falſe Sur-name **he ſhall be eſtopp'd to avoid, becauſe he** may have divers Sur-names. 3 H. 6. 25. b. Br. Eſtoppel, pl. 3. cites S. C.

3. So **a Man binds himſelf** by a falſe Chriſtian Name **he ſhall be eſtopped to avoid it.** * 3 H. 6. 25. b. † D. 11 El. 279. 9. [*Shotbolt's Caſe*]. * Br. Eſtoppel, pl. 3. cites S C. Contra; For a Man cannot be known by two Names of Baptiſm. † S. C. cited Le. 322. in pl. 453.

4. In *Right of Advowſon* againſt the Prior of W. who *ſaid that he had to name the Prior of S. the other ſhall have his Writ*, and the Defendant *ſhewe'd a Fine of the Anceſtor of the Demandant, naming him Prior of S.* and the other was Nonſuited. Br. Eſtoppel, pl. 114. cites 11 E. 2. and Mich. 1 E. 3. and ſo ſee Suppoſal of Anceſtor, and after the Writ was awarded good.

5. In *Mortdanceſtor* the *Tenant pray'd Aid of J. Son and Heir of T. and for his Nonage pray'd that the Parol might demur*, the *Demandant ſaid, that he was a Baſtard, and becauſe in the Writ J. was named Son of T. in Latin*, therefore the *Plaintiff was Nonſuited*, for the Writ was brought againſt

againſt A. late Wife of T. and againſt the ſaid J. who made Default, and A. appear'd and pleaded Ut ſupra. Br. Eſtoppel, pl. 119. cites 11 Aſſ. 4

6. In *Waſte* which was *brought by J. Son of R.* &c. which E. his Father demiſed, and for the Contrariety of the Writ abated. Br. Eſtoppel, pl. 119. cites 11 Aſſ. 10.

7. *And* in the *Note of a Fine* which *was, That W. Son of S. granted the Reverſion*, and it was pleaded that his *Father had to name R. and not S.* and the Tenant went quit; And Brook ſays ſo it ſeems that where it is *Filius in Latin* it *is material, but* where it is *Steven's Son, John's Son* &c. *in Engliſh*, it ſeems no Plea to ſay that the Name of his Father was R. For there *it ſhall be taken for one and the ſame Word, and for his Name*, but where it is Filius in Latin, there it is contra; Note the Diverſity. Br. Eſtoppel, pl. 119. cites Paſch. 11 E. 3.

8. Where a Man *is named J. or Heir of R. in Latin*, and by this Name the Judgment is given, he ſhall be eſtopped to ſay to the Contrary, be he Demandant or Tenant. Br. Eſtoppel, pl. 103. cites 39 E. 3. 24, 25. Per Belk.

9. Audita Querela, it is ſaid that 18 R. 2. in Treſpaſs the *Defendant was miſnamed and outlawed*, and *ſued Charter of Pardon by the ſame Name*, and yet *pleaded Miſnoſmer*, and had the Plea by Award, and the Purchaſe of the Charter no Eſtoppel; For he cannot otherwiſe purchaſe but by the ſame Name, quod nota. Br. Eſtoppel, pl. 86. cites 21 H. 6. 7, 8.

10. If *J. P. brings an Action* againſt me *and after Declaration made he brings another Action* againſt me *by Name of T. P.* the bringing of the firſt Action may be pleaded by way of Eſtoppel. Per Pole. Br. Eſtoppel, pl. 90. cites 22 H. 6. 53.

11. *And* if a Man brings *Action Anceſtrel* againſt me, *and conveys by W. P. his Father, and* brings *other Action againſt the ſame Perſon, and conveys by T. P. his Father*, the bringing of the firſt Action ſhall be Eſtoppel. Per Portington. Ibid.

12. If I bring a Writ againſt one *by Name of W. H.* where his *Name is R. H.* and I *recover by Default*; *and after bring a Writ againſt him by Name of R H.* he ſhall not plead the firſt Record for Eſtoppel; For W. ſhall not be grieved for R. and it ſeems there that it *cannot be intended one and the ſame Perſon.* Br. Eſtoppel, pl. 15. cites 33 H. 6. 7. 19. 50. Per Priſot.

13. *So* if I *miſname myſelf, and recover by Default* againſt one, he cannot eſtop me. Ibid.

14. If *my Father brings Writ of Treſpaſs againſt John, and names him Robert, and* my Father *recovers againſt him*, and *after he brings a Writ againſt me by Name of John*, I ſhall not eſtop him; *But if Frank-tenement had been in Debate*, there I ſhould have Advantage as Heir, and ſo ſhould every one who ſhall have the Land after by my Father. Ibid. Per Moyle.

15. If *J. S.* be *bound by Name of T. S.* and is ſued according to the Obligation, he ſhall not plead Miſnoſmer of it, but ſhall be eſtopped, but it may be that the Obligee did not know him nor his Name but by his own ſhewing, and he is the ſame Perſon who made the Obligation, and therefore he ſhall be eſtopped. Br. Eſtoppel, pl. 156. cites 5 E. 4. 4. 6.

16. If a Man be *bound by Name of W. N.* he ſhall not ſay that his *Name is J. N.* for the Name and Surname are material in the Obligation. Br. Eſtoppel, pl. 98. cites 9 E. 4. 29. per Needham.

17. If a *Yeoman becomes Mainpernor* in B. R. *by Name of Gentleman*, he ſhall be eſtopped after to ſay that he is Yeoman, and not Gentleman, by

by reaſon of his Appearance in Court of Record. Br. Eſtoppel, pl. 166. cites 16 E. 4. 16.

18. *But* where a Man is *outlawed upon Original by Name of Gentleman, where he is Yeoman*, he ſhall not be eſtopped, for there was no Appearance nor Acceptance as above. Ibid.

19. An *Obligation was by Name of J. J. de B.* where he is impleaded upon it and imparles, it is an Eſtoppel to him to ſay that there is Over-B. and Nether-B. &c. Br. Eſtoppel, pl. 171. cites 18 E 4. 9. Contra 21 E. 4. 51.

20. If the *Obligor ſubſcribes his Chriſtian and Surname* to the Obligation, *though there is a Blank or Blot for his Chriſtian Name in the Bond*, yet it is ſufficient. Cro. J. 261. pl. 22. Mich. 8 Jac. B. R. Dobſon v. Keys.

21. *Debt upon Bond againſt F.* The Defendant *pleaded his Name is W.* The *Plaintiff demurrd*, ſuppoſing that the Defendant was eſtopped by the Record to ſay that his Name was W. but Judgment was given, quod Billa caſſetur, for the *Plaintiff ſhould have pleaded it.* 3 Salk. 152. pl. 2. Paſch. 8 W. 3. Pleddall v. Freak.

22. F. arreſted the Defendant in Aſſiſe and Trover, who now moved that he might anſwer without putting in Bail, becauſe he was a *Peer*, viz. Earl of Buckingham, Viſcount Purbeck, and Baron of Stoke, and ſo was free from Arreſt, that if he ſhould *put in Bail*, it muſt be *by the Name whereby he is arreſted, which would eſtop him from claiming his Peerage.* Sed per Cur. in all Civil Caſes the Bail only enters into the Recognizance, and not the Party himſelf, and therefore it would be no Eſtoppel to him; they could not take Notice of his Peerage otherwiſe than by Plea, which could not be till he was in the Cuſtody of the Marſhal, and therefore being *by Coertion*, it would not prejudice him; So the Court would order nothing, ſed currat Lex; But Holt ſaid, if this had been a *criminal Caſe*, they would *diſpenſe with his joining in the Recognizance to ſave the Eſtoppel*, and that in this they would make the Plaintiff declare ſpeedily, and not be allowed the uſual Time. 12 Mod. 217. Mich. 10 W. 3. Roberts v. Villars, alias, Danvers.

7 Mod. 38. Trin. 1 Ann. B R. Smith v. Villars, S. P. and the Court held accordingly, and ſaid, that in the Caſe of the Earl of Banbury, who was indicted by the Name of George Knowles, Eſq; becauſe by the Courſe of the Court K. it would be an Eſtoppel upon him, therefore the Court indulged him to bring others, who gave Bail for him by the Name of G. K. Eſq; for their Act could not conclude him.

(P) A Man ſhall not be eſtopped by a Generalty; Otherwiſe by a Particularity.

1. IF a Condition of an Obligation **contains a Generalty, a Man ſhall not be concluded to** ſay that is not any ſuch Thing. 2 Rep. 33. b. *Doddington's Caſe.*

So where he is bound to one Generally, as to infeoff him of all his Lands in D. he may ſay that he has no Lands in D. Br. Eſtoppel, pl. 170. cites Paſch. 21 E. 4. 54.

Contra upon Certainty, As where de is bound to infeoff him of his Manor of D. or of Bl. Acre in D. Ibid.

So Condition, that if the Defendant ſtands to the Sentence of the Biſhop of L. for Cauſe of Tithes moved before him, that then &c. and ſays that there was no Cauſe of Tithes moved before him; and per Chocke and Bridges, he ſhall not have the Plea where the Condition is ſpecial, as here. Br. Eſtoppel, pl. 174. cites 21 E. 4. 54.

Roll Rep. 430. pl. 23. S. C. but no Judgment, but it was ordered that he ſhould plead ſo as he would ſtand to it.

2. In Debt upon an Obligation, the Condition whereof is to perform all Agreements now ſet down by J. S. the Defendant may ſay that no Agreement was then ſet down by J. S. becauſe this comprehends a Generalty. Mich. 14 Jac. B. R. *King and Perſevall*, per Cur. By Reports, Paſch. 13 Jac. in the ſame Caſe affirmed again per Curiam.

Roll Rep. 408. pl. 47. S. C. accordingly. —— Brownl. 57.

3. If the Condition of an Obligation be to perform all Covenants in ſuch an Indenture, in Debt upon the Obligation the Defendant cannot ſay that there is not any ſuch Indenture, becauſe he is eſtopped. By Reports, Trin. 14 Jac. adjudged, *Juell's Caſe*.

Mich. 3 Jac. Fitche v. Biſſe, S. P. the Plaintiff demurred. —— Saund. 316. 317. pl. 50. Mich. 21 Car. 2. Smith v. Yeomans, S. P. adjudged. ——— Lev. 3. Mich. 12 Car. 2. B. R. Hudland v. Povey, S. P. adjudged niſi; becauſe if there are not any Covenants the Obligation is ſingle. —— Mod. 15. pl. 44 Mich. 21 Car. 2. B. R. Holloway's Caſe, S. P. it eſtops to ſay that there is no ſuch Indenture, but not to ſay that there are no Covenants.

S. P. and ſeems to be S. C. D. 196. Marg. pl. 41. Wren v. Cittel. —— But otherwiſe if the Condition had been ſpecial, as in the principal Caſe there of Rainsford v. Smith.

4. If the Condition of an Obligation be to ſuffer the Obligee to carry away all ſuch Marle as he of his Right ought to have in ſuch Cloſe, the Obligor ſhall not be eſtopped by this to ſay that the Obligee has no Right to any Marle in the ſaid Cloſe, becauſe the Condition refers to a Generalty. Hill. 4 Jac. B. R. per Cur.

See infra, pl. 9. the other Part of the Diſtinction.

5. So if the Condition be to releaſe all the Right which he has in Bl. Acre, he may ſay that he has no Right in Bl. Acre, and ſhall not be eſtopped. Held in the ſaid Caſe by Tanfield.

See (B. a) pl. 2. infra, Brierton v. Evans, that it ſhall not enure by way of Eſtoppel; and ſo is Cro. E. 700. pl. 16. Brereton v. Evans, S. C. that it cannot be an Eſtoppel, becauſe it ought to be mutual, and a Deed of a Feme Covert cannot eſtop her.

6. If Baron and Feme makes Leaſe for Years by Indenture, rendring Rent, and it is covenanted between the Parties, and the ſaid Leſſee covenants that he will pay a couple of Capons at Chriſtmas to the Baron and Feme, and to the Heirs of the Baron, and alſo will labour with them by two Days every Harveſt, and the Baron dies, and the Feme brings Action of Covenant, the Defendant cannot plead that the Feme at the Time of the Leaſe had nothing, but ſhall be eſtopped by the Indenture. Mich. 40 & 41 Eliz. B. R. adjudged between *Boverton and Evans*.

7. If the Condition of an Obligation has Reference to a Particular to be done, or in which a Generalty is to be done, the Obligor ſhall be eſtopped by it to ſay that there is not any ſuch particular Thing.

Mo. 23. pl. 79. Anon, * Fol. 873. S. P. and ſeems to be S. C. —— Dal. 28 pl. 2. Anon. S. C. in totidem Verbis. ——— So if A. be bound to B. to deliver to B. all the Charters and Evidences which J. S. has bailed to him, he cannot ſay that J. S. has not bailed to him any Charter. Mo. 23. in pl. 79. and Dal. 28. in pl. 2.

8. If the Condition of an Obligation be to pay all ſuch Sums of Money in which T. S. ſtands bound by his Deed obligatory to T. H. of and for the Behoof of the Children of W. S. according to the Will of &c. he ſhall be eſtopped to ſay that T. S. never ſtood bound by any Deed * obligatory to T. H. for the Uſe of the Children of W. S. &c. D. 3 Eliz. 196. 41. adjudged.

9. If

9. **If the Condition of an Obligation be** to releaſe all the Right which he has for Life in Bl. Acre, **he ſhall be eſtopped to** ſay that he has not any Right for Life in Bl. Acre, **becauſe this contains a Particular. Hill. 4 Jac. B. R. per Tanfield.**

D. 196. Marg. pl. 41. S. P. — See ſupra, pl. 5. for the other Part of the Diverſity.

10. **If a Condition of an Obligation be** to perform certain Things, for which he is bound in a certain Recognizance **ſhewing the Certainty of it, the Obligor ſhall be eſtopped to** plead that he was not bound in any Recognizarce, **inaſmuch as the Condition has Reference to a Particular. M. 12 Ja. B. R. adjudged between** *Fletcher and Farrer.*

11. So **the Obligor** in the Caſe aforeſaid **ſhall be eſtopped to** plead a ſpecial Plea, by which he owns that he acknowledged a Thing in the Nature of a Recognizance, but upon the ſpecial Matter it appears to the Court that it was not any Recognizance in Law, **for this amounts but to this, that he was not bound in any Recognizance. M. 12 Ja. B. R. adjudged between** *Fletcher and Farrer.*

12. **If the Condition of an Obligation be** to give three Parts of the Goods which his Father deviſed to him **he cannot** plead that his Father deviſed no Goods to him, **becauſe it is a Particular. P. 8 Ja. B. per Cur.** *Malarie's Caſe*

13. **If A. be bound in an** Obligation **to B. whereof the Condition is, that if the ſaid A. and his Feme** do perſonally appear before the Judge or Judges **of the Court of the King's Palace at Weſtminſter** at the next Court, **to anſwer to J. S. in a Plea of Treſpaſs, then the Obligation ſhall be void. It is not any Plea for him to** ſay that he himſelf appeared at the next Court &c. but that at the Time of ſealing the Obligation, and from that Time to this, he was and yet is unmarried, nor was he ever, or is he coupled in Matrimony to any Woman; **for he is eſtopped to ſay that he had not any Wife, inaſmuch as this is a Particular, though ſhe be not named nor was it recited that he was married. Trin. 23 Car. B. R. adjudged per Cur. upon a Demurrer between** *Payne and Shelton.* **Intratur Hill. 22 Car. Rot** 740.

Sty. 17. S. C. order'd to ſhew Cauſe the next Day why Judgment ſhould not be given for the Plaintiff. — All. 13. Paine v. Sheltroppe S. C. adjudged.

14. In Replevin the *Defendant avowed for Rent and Suit of Court*, becauſe the Plaintiff held of him the Manor of More, of which the Place &c. by Homage, Fealty, and Eſcuage, Suit of Court, and 40s. Rent, *and alleg'd Seiſin by the Hands of the Plaentiff*; to which the *Plaintiff proteſtando that the Manor was not held by ſuch Services, pro Placito that never ſeiſed of the Manor*; the *Defendant pleaded Eſtoppel*, becauſe *the Manor was granted to him by T. by Fine, and the ſame Plaintiff by Deed attorn'd to him of the Fealty and other Services due*, and demanded Judgment if againſt the Deed &c. and per Cur. it is no Eſtoppel, for he attorned of the Fealty and other Services due, and did *not expreſs the Services certain*; and ſo it ſeems that if he had expreſſed the Services certain in the Deed of Attornment it had been a good Eſtoppel. Br. Eſtoppel, pl. 94. cites 24 E. 3. 50.

15. Where a Man is *bound to be nonſuited in Formedon, or to enfeoff him of the Manor of D. in D. by ſuch a Day*, he ſhall not be received to ſay that there is *no Formedon*, or that he *has no ſuch Manor*. Br. Eſtoppel, pl. 174. cites 21 E. 4. 54.

16. But *contra* where the *Condition is general*, as *to be nonſuited in all Suits which he has againſt W. B.* he may ſay that he has no Suit againſt him, for in the Generality is not compriſed any Action ſpecial, and where the Condition is to enfeoff him of all his Lands in D. he may ſay that he has not any Land in D. Ibid.

17. If

17. If a Man be bound *to perform all Covenants in a Deed*, it is no Plea to ſay there are no Covenants therein on his Part to be performed. Cro. E. 757. cites D. 196. and 279.

18. In Debt the *Condition* of the Obligation was, if the Defendant *ſuffer the Plaintiff to enjoy his Right in ſuch Land.* The Defendant pleaded that the Plaintiff had no Right. The Plaintiff demurred, and the Court thought the Plea good. *But* if it had been *whereas the Obligee had Right*, it would be otherwiſe. D. 196. pl. 41. Marg. cites Mich. 18 Eliz. B. R. Corrant's Caſe.

19. Againſt a *Leaſe by Indenture* Leſſee ſhall not ſay that the Leſſor had Nothing to let. Cro. E. 362. pl. 24. Mich. 36 & 37 Eliz. Stroud v. Willis.

Poph. 115. S. P. by Popham in S. C.

20. *So* againſt a *Bond for Payment of the Rent* reſerved on a Demiſe by Indenture. Ibid.

21. A *Diverſity* was taken by the Court where one is bound in an Obligation with ſpecial *Condition to enfeoff* another in general Words *of all the Land that deſcended* to him *of the Part of his Father*, there he may ſay that *no ſuch Land deſcended*; *But* if it be to enfeoff him *of Bl. Acre, which deſcended*, he ſhall not ſay that *Bl. Acre did not deſcend.* Mo. 406. pl. 544. Trin. 37 Eliz. B. R. in Caſe of Stroud v. Willis, cites 2 E. 4. fol. Ultimo. 18 E. 4 Broughton's Caſe. 3 Eliz. D. fo. 126. [196.] 21 E. 4. fol. 54. 28 H. 6. fol. 7. 19 H. 6. fol. accordingly.

22. *And* Popham ſaid, if one be bound *to releaſe all his Right in all the Lands which deſcended of the Part of his Father*, he ſhall not ſay that none deſcended, but generally ſhall make the Releaſe; *otherwiſe* if he be *bound to make Feoffment*; Quære cauſam diverſitat', it ſeems, becauſe he *cannot make Feoffment to give Poſſeſſion of that which is not*; & adjornatur. Mo. 406. pl. 54. Trin. 37 Eliz. B. R. in Caſe of Stroud v. Willis.

Condition was to give to J S. all the Goods which were deviſed to him by his Father.

23. Condition of a Bond was *to pay all Legacies which J. S. had deviſed by his Will*, he ſhall not ſay that J. S. did not make a Will, but may ſay that J. S. gave no Legacy by his Will. Mo. 420. pl. 578. Mich. 37 & 38 Eliz. Paramour v. During.

The Defendant cannot plead that he had not any Goods deviſed to him; for the Bond ſhall conclude him to ſay the contrary. Godb. 177. pl. 245. Paſch. 8 Jac. C. B. Cullingworth's Caſe.

24. A. entered into an Obligation to J. S. *to proſecute an Information* in B R. againſt one B. A. The Defendant ſaid, there was *no ſuch Information*, and the Plaintiff had Judgment. D. 196. pl. 41. Marg. cites Mich. 38 Eliz. B. R. Williams's Caſe.

25. So where a Man is *bound to appear and anſwer all Actions in B. R.* &c. it is no Plea to ſay that there were *no Actions* there depending. Cro. E. 756. pl. 23. Paſch. 42 Eliz. C. B. Willoughby v. Brooke.

Lat. 125. Jermin v. Randall, S. C. adjudged accordingly; but it would have been otherwiſe if it had been according to an Order to be made &c.

26. An *Obligation* was *to pay* 10 d. *Weekly for the keeping of a Baſtard, according to the Order* made by the Juſtices &c. The *Defendant pleads null' talem fec' ordinem*, and the Plaintiff had Judgment, for that is an Eſtoppel to the Defendant. Noy 79. Hill. 1 Jac. Germin v. Randall.

Brownl. 117 S. C. held accordingly.——

27. In an Action of Debt, upon a *Bond conditioned for the ſaving of the Plaintiff harmleſs from the Payment of all Legacies*, Croke J. ſaid the *Plaintiff here ought to have* reduced his general Allegation, in a more ſpecial

ſpecial and particular Manner, and to have *ſet forth in Facto, that ſuch a particular Legacy was given*, and deviſed. 2 Bulſt. 29. Mich. 10 Jac. Doughty v. Fawne. Yelv. 226. S. C. held accordingly.

28. An *Obligation* was *condition'd, that whereas J. S. held ſuch Copyhold Land for Life of Sir J. K. Lord of the Manor, that if after the Death of the ſaid J. S. the ſaid Sir J. K. ſhould grant the ſame Copy to the ſaid W. R.* for three Lives, then the Bond to be void. It was held that the Condition reciting that it is Copyhold Land, and that a Grant ſhould be made thereof by Copy, he is *eſtopped to ſay that it is not Copyhold* Land. Cro. J. 275. pl. 1. Mich. 13 Jac. B. R. Karne v. Pryther.

29. Where the *Condition of a Bond is General*, As *to enfeoff one of all his Lands in Dale*, there he *may ſay that he had no Lands there.* All. 13. Trin. 22 Car. B. R. Curiam in Caſe of Paine v. Skeltroppe.

30. In Debt upon *Bond* with Condition, reciting *whereas Plaintiff had carried* 12000 *Billets &c.* if Defendant ſhould pay after the Rate &c. then the Obligation to be void, the Defendant is eſtopped to deny the Carriage. Allen. 52. Paſch. 24 Car. B. R. Hart v. Buckmaſter.

31. In Debt on *Bond to perform all Covenants* ſpecified *in an Indenture betwixt A. and B.* the Defendant *pleaded there was no Covenants*; To which the Plaintiff demurred; And per Curiam, this being general of all, is well; Contra if it were to perform any certain Covenant; As to be Nonſuited in Formedon, he cannot ſay there is none; Contra to be Nonſuited in all Actions pendent in C. B. Keb. 381. pl. 89. Mich. 14 Car. 2. B. R. Brazier v. Acton.

32. You cannot make Eſtoppel but upon *Concluſion upon a particular thing*. If I grant all my Lands I had by my Father, this is no Eſtoppel, but if it be Black Acre it is; Per Bridgman Ch. J. Cart. 159. Mich. 18 Car. 2. C. B. Per Holt Ch. J. Show. 59. S. P.

33. Debt upon *Bond* conditioned, that *whereas there was a Suit in Chancery between the now Plaintiff and ſeveral Infants by their Guardian, and that it was decreed, that the now Plaintiff ſhould pay to the ſaid Infants or Guardian, to the Uſe of the Infants*, 840 *l. in Satisfaction of their Right and Title to a Leaſe of Martley-Hall*, and other Lands in Suffolk, *if therefore the ſaid Guardian ſhall procure the ſaid Infants at their ſeveral Ages of* 21 *to releaſe all their Right*, Title, and Intereſt *in and to the ſaid Leaſe, then to be void*; The Defendant *pleaded in Bar that E. and P. two of the ſaid Infants, never had, or pretended to have, any Right* Title or Intereſt, to the ſaid Manor, which they might releaſe. Upon Demurrer to this Plea the Plaintiff had Judgment, for *whether the Infants had a Title or not, the Defendant had obliged himſelf to procure a Releaſe de facto*, though they had not any Right, and the rather, becauſe by the Condition they had a Pretence in Equity though they had no Title or Intereſt in Law. Saund. 215. Hill. 20 & 21 Car. 2. Doughty v. Neal. 2 Keb. 471. pl. 65. S. C. adjudged.

34. *Debt on Demiſe of Tithes*; The Defendant *pleads that nothing paſſed by the Indenture*; To which the *Plaintiff demurred*; Et per Curiam *he is eſtopped, this being of Tithes of the Leſſor's own Land, and ariſing out of Farnham great Park, rendring Rent &c.* Here can be no Apportionment, for if nothing paſſed out of Farnham, then all iſſues out of the reſt, and this being but to try the Right of the Payment of Tithes of Farnham Park, the Court conceived it ill; but if this had been a Demiſe of all his Corn, Grain &c. in D. it were no Eſtoppel, but as Grant of the Land of the Part of the Father; alſo, where nothing paſſes there can be no Apportioment, but only upon an Eviction; and notwithſtanding **Smith and Bank's Caſe**, Judgment for the Plaintiff Niſi. 3 Keb. 324. pl. 16. Trin. 26 Car. 2. B. R. Snelgrave v. Fielding. This Caſe ſeems not clearly reported.

35. *Executor ſues* A. upon a Bond. A. *pleads* the Teſtator made *another laſt Will.* Defendant is eſtopped to plead ſo. 1 Mod. 113. pl. 11. Paſch. 26 Car 2. B. R. Anon.

36. General *Recital* is not an Eſtoppel, but a Recital of a particular Fact is ſo; Per Holt Ch. J. Show. 59. Mich. 1 W. & M. cites Sand. 8. 1 Inſt. 52.

(Q) The Party himſelf.

A Man ſhall not be eſtopped to ſay a Thing which ſtand with the Deed.

Otherwiſe e Contra.

* Br. Eſtoppel, pl. 3. cites S. C. but without the Word (not) and ſo it ſeems it ſhould be here, and that it is put in by Miſtake.

1. IF a Man be obliged by a falſe Surname, as by Name of J. S. where his Name is J. D. he ſhall * not be eſtopped to avoid this, becauſe he may be known by divers Surnames. 3 H. 6. 25. b.

* Br Eſtoppel, pl. 3. cites S. C.

2. The ſame Law if he be bound by a falſe proper Name. Contra. * 3 H. 6. 25. b.

Br. Eſtoppel, pl. 2. cites S. C. ——Fitzh. Eſtoppel, pl. 16. cites S. C.

3. If a Man binds himſelf to J. S. Vicar, he may ſay that the Obligee was a Canon profeſſed, and ſo the Obligation is void and ſhall not be eſtopped, (for this ſtands with the Obligation.) 3 H. 6. 23. adjudged.

Fitzh. Eſtoppel, pl. 16. cites S. C.

4. If a Man makes Obligation to his Feme by a ſtrange Name, he ſhall not be eſtopp'd to ſay, that ſhe is his Wife, in Debt thereupon 3 H. 6. 23.

5. If the Condition of an Obligation made to the Sheriff be for the Appearance of ſeven Perſons in certain, the Obligor ſhall be eſtopped by the Deed to ſay, that he deliver'd it for the Appearance of two Perſons in certain only. H. 11. Ja. B. R. adjudg'd between *Corbet and Day.*

Fol. 874.

6. If the Condition be to deliver up one ſuch Obligation in which the Obligee is bound, the Obligor is eſtopp'd to ſay, that he was not bound in the ſaid Obligation. Mich. 11 Car. B. R. adjudged upon a Demurrer between *Miller and Grewe.* Intratur Paſch. 11 Car. 219.

Cro. J. 73. pl. 1. S. C. adjudg'd.

7. If a Man leaſes Land to me by Indenture, and after I enter into the Land by Force of this Leaſe, and J. S. ejects me by an elder Right, upon which I bring a Writ of Covenant againſt my Leſſor, my Leſſor cannot ſay, that I was not in the Land by his Demiſe, for this is directly againſt his Deed by which he had demiſed it to me. Tr. 3 Jac. B. R. adjudged between *Stile and Herring.*

8. As

8. As if a Man leaſes to me by Indenture the Land of J.S. who is then ſeiſed alſo of the Land, and after I enter upon J. S. who re-enters, **upon which I bring Writ of** Covenant, **the Leſſee cannot** ſay that I was not in the Land by his Demiſe, **though I was a Diſſeiſor to J. S. by my Entry; For the Leſſor is eſtopp'd to ſay this inaſmuch as this was a Leaſe by Eſtoppel againſt him. Tr. 3 Ja. B. R. adjudg'd between** *Stile and Herring*. Cro. J. 73. pl. 1. S. C. adjudged.

9. If A. leaſes Black-acre (of which he has nothing, but J. S. is ſeiſed of it) to B. for Years by Deed indented, **and** A. purchaſes it in Fee, **the Leſſor is concluded as well as the Leſſee to** ſay that the Leſſor had nothing in the Land; **for this is contrary to the Deed. Co. Litt. 47. b. Litt. 58.** Mo. 20, 21. pl. 69. Hill. 2 Eliz. S. P. that the Heir of the Leſſor is eſtopp'd to avoid the Leaſe.——Dal. 26. pl. 4. S. C. & S. P. in totidem Verbis.——Hetl. 91. Paſch. 4 Car. C. B. in Rothwell's Caſe. S. P.

10. If A. mortgages Land to B. in Fee **upon Condition** upon payment of 10 l. to re-enter, **and after** A. before the Day of Payment, **he being in Poſſeſſion**, makes a Leaſe for Years by Indenture, and after performs the Condition, **this ſhall be a good Leaſe againſt himſelf by Eſtoppel, though he had nothing in the Land at the Time of the Demiſe. Mich. 15 Car. B. R. between** *Omelaughland and Hood*, **per Cur. in Writ of Error upon a Judgment in Ireland adjudged, and the Judgment affirm'd accordingly, ſcilicet, that the** Feoffee of A. ſhall be eſtopp'd, **which was more ſtrong than A. himſelf, and ſo reſolv'd a Fortiori. Intratur Trin. 14 Car. Rot. 183.** Mar. 64. pl. 99. Edwards v. Omellhallum. S. C. & S. P. held clearly by the whole Court, (Crooke only abſent;) For all who claim the Eſtoppel ſhall be bound thereby.——Where one mortgages Lands, and after leaſes by Eſtoppel, and after procures Money to be repaid, and Aſſignment to be made, it was held that the Leaſe by Eſtoppel would firſt take Place before the Aſſignment, cited by Twiſden as the Caſe of a poor Man in Hackney. Keb. 876. Paſch. 17 Car. 2. B. R. in Caſe of Whaley v. Anderſon.

11. *A Servant retained another Servant for his Maſter by his own Deed indented for* a certain *Salary beyond the Statute*, the *Maſter made the Servant who retained the other his Executor*, or he took Adminiſtration, his own Deed ſhall bind him to pay the Salary to the ſecond Servant retained, where he ſhall not be charged if his own Deed had not been. Br. Eſtoppel, pl. 207. cites 46 E. 3. 10.

12. *Debt upon Obligation againſt J. N. of T.* the *Defendant ſhall not ſay, No ſuch Vill*, Hamlet nor Place known by the Name of T. in the ſame County, Judgment of the Writ, for his own Deed is Eſtoppel. Br. Eſtoppel, pl. 69. cites 9 H. 5. 8.

13. Debt upon Obligation againſt one who is *bound by the Name of J. N. of T.* he ſhall not *ſay that he was of N. nor that there is no ſuch Vill as T.* Br. Eſtoppel, pl. 214. cites 10 H. 6. 8.

14. Treſpaſs of a Cloſe broken, and Graſs cut, the *Defendant pleaded his Franktenement*, the *Plaintiff ſaid*, that to ſay it is his Franktenement he ſhall not be received; For *his Father whoſe Heir* &c. *enfeoff'd us by his Deed which here is with Warranty*, Judgment if againſt the Deed of his Anceſtor which comprehends Warranty ſhall he be received to ſay, that it is his Franktenement, and the *Defendant ſhew'd Title how he entred after* &c. and ſo admitted for a good Eſtoppel. Br. Eſtoppel, pl. 89. cites 22 H. 6. 50 and 51.

15. Debt upon an Obligation upon Condition *to perform the Conditions* in certain Indentures, the *Defendant ſaid that there were never any ſuch Indentures*, and the Plaintiff tender'd Demurrer, and the Defendant durſt not demur but made another Anſwer; the Reaſon ſeems to be inaſmuch as he is *eſtopp'd* by the Obligation and Condition. Br. Dette, pl. 21. cites 28 H. 6. 7.

16. Note

16. Note per Priſot arguendo, that if a Man be *bound that he and his Feoffees, if any there are, ſhall releaſe by ſuch a Day*, he may *ſay, that no Feoffees ever were*, but if it was that he and all who were his Feoffees ſhould releaſe, he ſhall be eſtopped to ſay, that there were not any Feoffees, quod nullus negavit, and ſo ſee that the Obligation with Condition cannot be Eſtoppel. Br. Eſtoppel, pl. 18. cites 35 H. 6. 17.

17. *Debt upon an Obligation againſt A. B. of F.* the *Defendant ſaid, that he was dwelling at M.* the Day of the Writ purchaſed, *and not at F.* Per Needham and Davers Juſtices, it may ſtand with the Obligation that he was of F. and dwell'd in M. For *F. may be a Place in M. or his Manſion Houſe named F. in M.* and yet that F. is no Vill, Hamlet nor Place known out of the Vill and Hamlet. Br. Eſtoppel, pl. 160. cites 2 E. 4. 17.

18. Debt *againſt R. H. of E. in the County of O.* Gentleman upon Obligation, the *Defendant ſaid, that in the ſame County are two E's, viz. Over E. and Nether E. and none without Addition*, and the other would have eſtopped him by the Obligation, which ſhall be intended his Deed till it be diſproved, and by the beſt Opinion it is no Eſtoppel; For *it ſtands with the Obligation, for he ſays ſo much and more, but* he ſhall be eſtopped to ſay *No ſuch Vill*, Hamlet nor Place known *in the ſame County*. Br. Eſtoppel, pl. 156. cites 5 E. 4. 4. 6.

Br. Eſtoppel, pl. 8. cites S C and 38 H. 8.

19. A Man ſhall not confeſs and avoid *Leaſe for Years by Indenture* to ſay that he *had Nothing at the Time of the Demiſe*; *Contra of Leaſe by Parol or by Deed Poll.* Br. Confeſs and Avoid, pl. 3. cites Littleton tit. Tenant for Years.

20. Where a Man is *bound to W N in* 10 *l.* upon *Condition that a Stranger ſhall pay to the Obligee* 10 *l. becauſe the Stranger is bound to the Plaintiff by Obligation*, the *Defendant ſhall not ſay that there was not any ſuch Obligation* of 10 l. Br. Eſtoppel, pl. 170. cites 18 E. 4. 4. per Litt. Chocke, Brian and Nele J.

21. *And* if a Man be *bound to make a Feoffment of his Manor of D.* it is no Plea that he *has no ſuch Manor of D.* Ibid.

22. And if he be bound to *ſtand to the Award of J. N.* it is *no Plea that there is no ſuch J. N. in Rerum Natura*; for it is contra to his Obligation. Ibid.

23. Debt upon Obligation the *Defendant ſaid, that where he is nam'd J. S. of D.* he ſaid that *there are two D's, Over-D. and Nether-D. in the ſame County, abſque hoc that there is D. only*; Judgment of the Writ; and becauſe the *Obligation was J. S. of D. in the County of W.* and the Writ was accordingly, therefore by the Juſtices he was eſtopped to plead that there is no D. only; quod nota. Br. Eſtoppel, pl. 172. cites 21 E. 4. 51. 53, 54.

24. *Contra if the County had been omitted in the Obligation.* Ibid.

25. A Man *bound by Name of J. S. of S.* and is ſued by the ſame Name, and the *Defendant appears by Attorney, and imparls* till another Term, he *ſhall not ſay that there are two S's, and none without Addition* where the Action is founded upon the Obligation; quod nota; per all the Juſtices; for the *Imparlance is no Matter.* Br. Eſtoppel, pl. 198. cites 22 E. 4. 1.

26. Debt upon Obligation *againſt J. S. of D.* &c. he ſhall *not ſay that there are two J. S's, Elder and Younger* &c. by Reaſon of the Obligation, but ſhall anſwer; Per Cur; quod nota. Br. Eſtoppel, pl. 199. cites 9 H. 7. 21.

27. Leſſee for Life makes Leaſe for Years, and *after purchaſes the Reverſion*, and dies within the Term, the Leaſe for Years is determin'd, and the Heir in Reverſion may confeſs and avoid. Mo. 20. pl. 69. Hill. 2 Eliz. Anon.

28. A. leaſes to B. *for Years*, which Leaſe being in Force for two Years; A. leaſed to C for Years to begin preſently. Waſte is brought againſt C. If the Leaſe to C. be by Indenture A. will eſtop C. by Indenture to ſhew that the *ſecond Leaſe had another Beginning* than the Indenture purports. 3 Le. 203. pl. 256. Trin. 30 Eliz. C. B. Thorp v. Wingfield.

29. If A. enters into a *Bond* to B. *condition'd, that A. ſhall uſe and maintain C. his Wife*; In an Action upon this Bond *A. ſhall not be eſtopped to ſay that C. was married to D. (who is yet living) before ſhe married A. and ſo A. cannot uſe and maintain her as his Wife*, for he may confeſs and avoid, becauſe ſhe might notwithſtanding be called in common Speech, or named his Wife in a Writing; Per Curiam. Mo. 477. pl. 683. Mich. 39 & 40 Eliz. Prat v. Phanner.

30. *Bond for Performance of Covenants in an Indenture between A. and M. his Wife on the one Part*, and the Defendant of the other Part. The Husband *A. ſealed* the Indenture, *but M. did not.* The Defendant may ſay that the Deed ſhewn is not the Deed of A. and M. but he is eſtopped by the Condition to ſay that there *is not any ſuch Deed.* Cro. E. 769. pl. 12. Trin. 42 Eliz. B. R. Skipwith v. Steed.

31. Bond *to pay* 10 *l. for Carriage of* 12000 *Billets*; He is eſtopped to ſay the Obligee *did not carry them.* Allen 52. Paſch. 24 Car. B. R. Hart v. Buckminſter.

32. In *Debt on Obligation*, the Condition was *to pay a Legacy deviſed by the laſt Will of J. S.* The Defendant *pleads* that it is true that J. S. did by his laſt Will give the ſaid Legacy of 40 l. to the Plaintiff, as ſet forth, but ſays *that after J. S. did revoke that laſt Will and Teſtament*, and after died, *and by the latter left Nothing thereby to the Plaintiff*; To which the Plaintiff demurred, becauſe being intended a Bond made after the Death of J. S. the Defendant is *eſtopped by the Condition* of the Bond *to ſay that there was no ſuch laſt Will, eſpecially no Time of either Will being mention'd*; which the Court agreed; and Judgment for the Plaintiff Niſi; and if the Bond were before J. S. died, the Defendant has undertaken, and muſt pay it at his Peril. 3 Keb. 303. pl. 43. Paſch. 26 Car 2. B. R. Backwell v. Bardjew.

33. Though the Rule be that a Man is eſtopped to aver againſt any Thing in his own Deed, yet that is, *ſuppoſing it to be his Deed*; for *where the Deed is void he is not eſtopped*, as in the Caſe of an *Uſurious Contract*; Per Parker Ch. J. and ſo he ſaid he thought it might be done in Caſe of a *falſe Recital of a Conſideration in the Condition of a Bond* for reſtraining a Man from uſing his Trade, as was the principal Caſe, and of which he delivered the Opinion of the Court. Wms's Rep. 196. Hill. 1711. in Caſe of Mitchell v. Reynolds.

10 Mod. 139. S. C. is that of falſe Recitals of Conſiderations in the Conditions of Bonds the ſpecial Matter may be given in Evidence.

34. *Leſſor, Leſſee and Under-Leſſee.* Under-Leſſee covenants to *perform all the Covenants in the original Leaſe* which on the Leſſee's Part were to be performed or done. Under-Leſſee is now eſtopped to ſay that there are *no ſuch Covenants* in the Original Leaſe, and ſo a Judgment was affirmed. 8 Mod. 33. Hill. 7 Geo. Atkinſon v. Coatſworth.

35. The Parties to an Indenture are eſtopped to *deny eſſential Words, but not Deſcriptive* Words in a Deed, As if Land which is arable, and has been ſo Time out of Mind, is called the Name of ſome certain Meadow, the Leſſee is not eſtopped to ſay it is Arable, and not Meadow. 8 Mod. 311. Mich. 11 Geo. Skipwith v. Green.

(R.) Where the Plea ſtands with the Deed, and where not.

1. A Man ſhall not be eſtopped to ſay that a Deed was firſt delivered after the Time of the Date; for this ſtands with the Deed. * 8 H. 6. 6. b. † 21 E. 4. 38. Curia.

* Br. Travers Sans ceo, pl. 59. cites S. C. ——Fitzh. Iſſue, pl 48. cites S. C. † Br. Count, pl. 71. cites S. C. —— Br. Faits, pl. 74. cites S. C. —— Ibid. pl. 94 cites 12 H. 6. 1. S. P. accordingly; but a Deed pleaded to be delivered before the Date of it is not good.——S. C. cited per Cur. 2 Rep. 4. b. in Goddard's Caſe Hill. 24 Eliz. C. B. the S. P. and affirmed to be good Law; but yet the Jury are not eſtopped to find it.——3 Le. 100. pl. 144. Denton v. Goddard S. C. adjudged——S. P. per Cur. 3 Keb. 332. pl. 32. Trin. 26 Car. 2. B. R. in Caſe of Newland v. Dandy.——Comb. 83. Paſch. 4 Jac. 2. B. R. Hardeſty v. Hardeſty S. P. adjudged accordingly.

2. If a Deed be dated in a Place in certain, he ſhall be eſtopped to ſay that it was delivered at another Place, for this is contrary to the Deed. 8 H. 6. 6. b.

3. A Man ſhall not be eſtopped by an Intendment in a Record or Specialty. 8 H. 6. 7.

Though there be an Intendment contrary.

4. As if a Dean and Chapter make a Deed, and in the Deed is mentioned that they made it in Domo noſtra Capitulari, though it ſhall be intended that this was made in Ely, where their Manſion is, yet it may be averred, that it was made in another Place againſt the Intendment, for it may be that their Manſion was there, or that they have a Chapter there. 8 H. 6. 6. b. 7.

5. *Waſte* againſt J. ſuppoſing that he did Waſte *in Tenements which ſhe held in Dower of his Inheritance*, and the *Defendant ſaid that W. Father of the Plaintiff, whoſe Heir he is, was ſeiſed in Fee and enfeoffed A. and B. with Warranty*, and that A. and B. leaſed to him for Life; Judgment if againſt the Warranty ut ſupra, &c. And by the beſt Opinion it is no Eſtoppel, For it may ſtand with the Writ, *that after the Feoffment* with Warranty *the Feoffor came to the Land and died ſeiſed* &c. For *Eſtoppel ought to be good to every common Intent*, and after She pleaded ut ſupra, *abſque hoc that ſhe held in Dower of the Heritage of the Plaintiff*. Br. Eſtoppel, pl. 9. cites 20 H. 6. 19.

6. In *Debt againſt J. S. of D.* the *Defendant ſaid that* the Day of the Writ purchaſed *he was dwelling at S. and not at D.* Judgment of the Writ; and the Plaintiff pleaded the Obligation for Eſtoppel, becauſe he *was bound* in the Sum *by Name of J. S. of D.* Per Priſot this this is no Plea; For he may ſay, Not his Deed, and therefore no Eſtoppel, and ſo was the Opinion of the Court. But it ſeems that the Reaſon of Priſot is not material; For to every Indenture which is pleaded for Eſtoppel, the Party may ſay Non eſt Factum, yet it is a good Eſtoppel prima facie; But it ſeems to me the Reaſon is, inaſmuch as it may ſtand with &c. For it *may be that he dwelt at D. at the Time of the making of the Obligation, and yet that he dwelt at S. the Day of the Writ purchaſed.* Br. Eſtoppel, pl. 104. cites 37 H. 6 5.

7. If a Man *vouches J. N. as Heir of J. N.* and *he ſays that he has an elder Brother alive*, the *Tenant may eſtop him, becauſe he releaſed to him by*

by Deed with Warranty by Name of J. N. Son and Heir of J. N. Br. Eſtoppel, pl 98. cites 9 E 4. 29. Per Danby J.

8. If a *Feme Covert* be *bound by Name of A. S. Widow*, *or* if an *Infant* be bound *by Name of J. S. of* 30 *Years old*, yet the Feme may may plead Coverture, and the Infant Infancy; Per Chock. Ibid.

Eſtoppel as to Rents demanded as due prior to Receipts given. See tit. Rent (F. c)

(R. 2) Eſtoppel againſt Eſtoppel.

1. **If a Man in one Action** makes Title to a Common by Grant after Time out of Memory, **and after** in other Action between them makes Title by Preſcription, **and the other admits it, this laſt Eſtoppel ſhall avoid the firſt** * **Eſtoppel, ſo that he may make Title to the Common by Preſcription.** 11 H. 6. 27. b. 28. * Fol. 875.

2. In Eſtoppel *both Parties ought to be eſtopped*; Arg. Litt. Rep. 271. cites 33 H 6. 51.

3. *Eſtoppel againſt Eſtoppel* ſets the Matter at large; Per Croke J. Arg. cites Co. Litt. 352. b. 12 H. 7. 4.

4. In Eſtoppels *both Parties are to be eſtopped*, ſo that if a Man takes a Leaſe of his own Land of an Infant or Feme Covert by Indenture, it is no Eſtoppel. Cro. E. 37. Hill. 27 Eliz. C. B. in Caſe of James v. Landon. Cro. E. 701. pl. 16. Mich. 41 & 42 Eliz. B. R. Brereton v. Evans.

(S.) What act or thing ſhall be an Eſtoppel againſt Eſtoppel.

1. **If** joyntenancy be pleaded with B. and the other ſays that he is ſole Tenant, **by this** Traverſe **he has ouſted himſelf to eſtop him** to Vouch **as ſole Tenant.** 41 E. 3. 5. Fitzh. Eſtoppel, pl. 3. cites 41 E. 4. S. C.

2. In Debt **if** Payment is alleged at B. according to the Condition, **if** Plaintiff rejoins that he did not pay it there, **this gives to the Defendant Advantage to allege it in** another Place in a new Action **without any Eſtoppel.** 3 H. 4. 9. Br. Eſtoppel, pl. 53. cites S. C. —— Fitzh. Eſtoppel, pl. 95 cites S. C.

3. **If Plaintiff** pleads that Nothing paſſed by a Deed, and the other maintains that it did paſs, **in a new Action the Parties are at Large, and Plaintiff may ſay that it paſſed.** 11 H. 4. 30. **Curia.** Where the firſt Iſſue never was tried; for it ſeems that it is no Eſtoppel by the pleading to Iſſue but by the Trial and Judgment. Br. Eſtoppel, pl. 62. cites S. C. —— Fitzh. Eſtoppel, pl. 99. cites S. C.

4. **In** Formedon **if the** Tenant pleads Jointenancy with a Stranger, and Demandant ſays that he is ſole Tenant, and after the Writ abates; **In a new Writ the Tenant may take upon him the** Sole Tenancy, **and ſhall not be eſtopped, becauſe each is eſtopped againſt the other.** 19 H. 6. 62. b. If the one Party pleads an Eſtoppel, and the other pleads another Eſtoppel againſt him again, this is Eſtoppel againſt Eſtoppel, which puts the Matter at Large, as was agreed arguendo. Br. Eſtoppel, pl. 183. cites 19 H. 6. 62.

5. In

Br Attaint, pl. 78. cites S. C.

5. In an Aſſiſe if the Tenant ſays by Bailiff that he is not Tenant, upon which they are at Iſſue, and the Aſſiſe paſſes againſt him, he may bring an Attaint as Tenant, notwithſtanding his Pleading in the firſt Action, for the other affirm'd him Tenant by the ſame Record; and ſo Eſtoppel againſt Eſtoppel. 40 Aſſ. 20. adjudged.

Jo. 393. pl. 3. Dixie v. Beaumont, S. C.

6. If *Husband and Wife* are *Tenants in Tail, to them and the Heirs of their two Bodies*, Remainder *to the Heirs of the Husband*, and they *having Iſſue, the Husband levies a Fine to J. S. and his Heirs*, and the *Husband dies*, and the *Wife enters*, and after *by Indenture between J. S. and the Wife, reciting that he held in Tail, Remainder to J. S. and his Heirs; he ratifies and confirms to her all her Eſtate* and Title in the Premiſſes, *Habend' to her and the Heirs of her Body, and of her late Husband engender'd*; though the Heir is barred by the Fine, yet he is reſtored to the Eſtate Tail by the Confirmation; for *as the Fine was an Eſtoppel to the Heir to claim againſt the Fine, ſo the Indenture is an Eſtoppel to him in Reverſion, to ſay, he ſhall not hold in Tail*, and there is an Eſtoppel againſt an Eſtoppel, which ſets the Matter at Large; Per Croke J. but Barkley J. argued e contra; but Jones and Brampton Ch. J. did not argue it, becauſe the Parties were about Agreement, which was afterwards made, and ſo no Judgment was given; But Croke ſays that Jones told him that he was clear of Opinion that the Confirmation was good, and created a good Eſtate in the Wife deſcendable to her Heirs. Cro. C. 476. pl. 5. Trin. 13 Car. B R. Baker v. Willis.

(T) What Perſon may be eſtopped.

In reſpect of Eſtate.

The Iſſue in Tail.

See tit. Eſtate (F. a) pl. 1. S. C.

1. If Tenant in Tail acknowledges a Tenure of the King by Eſtoppel, this ſhall not bind the Iſſue. 1 H. 4. 5.

Br. Eſtoppel, pl. 57. cites S. C.

2. In Formedon if Warranty and Aſſets are pleaded in Bar, and Demandant ſays that he has no Aſſets, and it is found againſt him, by which he is barred, yet his Iſſue in a new Formedon may deny the Deed, becauſe the Land is intailed. 7 H. 4. 40.

3. In Præcipe againſt Tenant in Tail he as Tenant for Life prays in Aid of a Stranger who enters the Aid and bars Defendant, this ſhall not bind the Iſſue, but he may enter. 8 H. 4. 8. b.

4. But if he had prayed in Aid of the King the Iſſue ſhould be put to Petition. 8 H. 4. 9.

5. If Tenant in Tail brings a Quod ei deforceat, and claims for Life, the Reverſion to another, and recovers, yet the Iſſue may enter. 8 H. 4. 9.

Br. Confeſſion, pl. 29. cites S. C.

6. If a Man recovers a Rent againſt Tenant in Tail by Confeſſion, this ſhall not bind the Iſſue. 34 Aſſ. 7.

7. Treſpaſs. *Tenant in Tail of a Villein in Groſs.* The *Villein brought Action againſt his Lord*, and he *pleaded that he his Villein, regardant to his Manor of B* Judgment if he ſhall be anſwer'd; and the *other ſaid, that Frank and not Villein Modo & Forma*, and *found for the Villein*; the *Tenant in Tail had Iſſue and died*; the *Iſſue in another ſuch Action pleaded Villeinage in Groſs in the Plaintiff*, and *he pleaded the firſt Recovery had againſt his Father for Eſtoppel*; Judgment if againſt this Recovery had againſt

againſt his Anceſtor, whoſe Heir he is, ſhall be received to ſay, that he is Villein; and it was agreed that Trial of Frank or Villein *in Action perſonal* againſt the Anceſtor or the Party, is not Eſtoppel to claim in Groſs after; And per Brian J. it is not Eſtoppel; for the Iſſue was, if he was Villein *Modo & Forma*, and *otherwiſe it would be if the Iſſue had not been upon Modo & Forma* by him; for then it is *in the Right*, and ſhall bind the Heir in Tail, and put him to his Attaint. Br. Eſtoppel, pl. 168. cites 13 E. 4. 2. 3.

8. Iſſue in Tail *by Acceptance of Rent reſerv'd on Feoffment* of his Anceſtor in Tail, ſhall be concluded, but the Right is not extinguiſh'd. Mo. 301. pl. 449. Paſch. 33 Eliz. Rot. 384. Hulme v. Jee.

9. No Eſtoppel of the Father binds the Heir in Tail by Force of the Statute of *W.* 2. cap. 1. Jenk. 113. pl. 20.

10. In Formedon, if the *Tenant pleads Ne Dona Pas*, and a Verdict paſſes againſt the Demandant, the Heir in Tail has no Remedy but by Error or Attaint. If the Tenant *pleads any Collateral Plea*, and it is found againſt the Demandant in the Formedon by Trial, yet a Formedon lies for the Heir. Where a Recovery is againſt Tenant in Tail by Default, his Heir may have a Formedon. No Eſtoppel of the Father binds the Heir in Tail by the Force of Weſtm. 2. cap. 1. Jenk. 113. pl. 20.

11. *Judgment of Debt* was given *againſt Tenant in Tail, the Lands intailed deſcend to the Iſſue in Tail*, then *a Scire Facias is iſſued againſt his Heir and Tertenant*, and the *Heir in Tail was returned Heir in Fee, and Tertenant warned*, and *he not appearing, there was Judgment quod habeat Executionem by Default*, and an *Elegit iſſued*, and *the intail'd Lands were extended*, and the Plaintiff upon the Extent brought Ejectment, and the Defendant offered to give in Evidence that the Lands were intailed upon him; but it was held, that he was *eſtopped* to give that in Evidence, *becauſe a Scire Feci was returned, and he might have pleaded it*, which is a ſtrong Caſe, all the ſpecial Matter being found by the Jury; And the Caſe of **Hannor v. Vale**, Hob. 283. is grounded upon the ſame Reaſon, and it is reaſonable; for if the Defendant had pleaded this Matter, it may be the Plaintiff would have acquieſced; but if this ſhould be allowed, it would compel a Man to proceed nolens volens. Ld. Raym. Rep. 590. cited by Holt Ch. J. as an exact Report which he had of the Caſe in 2 Sid. 12. [Mich. 1657. B. R.] Gilburn v. Rack.

S. C. cited by Holt Ch. J. by the Name of Tilburn v. Ragg, in 1655. 2 Ld. Raym. Rep. 1051. accordingly, and ſays, that that Reſolution was founded on the Book of 39 Aſſ. 18. where the Eſtoppel is of ſuch a Nature, as that it creates an Intereſt in, or works upon the Eſtate of the Land, there the Jury are eſtopped. —— And per Powell J. the Law is clearly with the Caſe of Tilburn v. Ragg, if Scire Feci is returned, and the Heir in Tail omits his Time of coming in and Pleading, and lets Judgment go by Default. Ibid.

See Tit. Falſifying Recoveries by Tenant in Tail (H).

(U) What Perſon ſhall be eſtopped.

In reſpect of Eſtate.

He who comes in under the Eſtate.

1. IF there be Tenure by Eſtoppel between the Tenant of the Land and me by Homage, his Alienee ſhall be ſubject to it alſo. 11 H. 4. 29.

S. P. Br. Eſtoppel, pl. 7. cites S. C. and though Judgment was after

2. If a Villein brings Action againſt his Lord, who claims him as regardant to his Manor, and is found Frank, if the Lord after aliens the Manor, the Alienee ſhall be eſtopped by this Recovery to claim him for his Villein, becauſe he comes under the Eſtoppel. 9 H. 6. 67. b. Dubitatur.

affirmed by Attaint, yet by the beſt Opinion by Bab. and Marten, it is no Eſtoppel, by reaſon that the Defendant is not Party nor privy as Heir, and cannot have Error nor Attaint; But per Paſton, it is Eſtoppel which runs with the Manor to bind the Lords; Brooke makes a Quære thereof, and after the Plaintiff pleaded Frank, and of Frank Eſtate &c. —— Fitzh. Eſtopple, pl. 25. cites S. C.

Fol. 876.

3. If a Man recovers without lawful Title a Rent-charge in Aſſiſe againſt the Tenant of the Land, whoever ſhall come to his Eſtate after ſhall be eſtopped by this Recovery as well as he himſelf ſhould be. 30 E. 3. 21. b.

4. If after a Verdict againſt the Iſſue in Tail (who would avoid a Statute acknowledged by the Father) that he is ſeiſed of the Land in Fee, the Iſſue before Judgment makes Leaſe for Years to another, and after Judgment is given againſt him, though the Judgment was after the Deed, yet becauſe the Leſſee comes after the Verdict, and ſo under the Eſtoppel, he ſhall be bound by the Eſtoppel. By Reports, 14 Jac. adjudged between *Crawley and Marrow.*

See ſupra (Q) pl. 10. S. C. and the Notes there.

5. If A. mortgages Lands to B. in Fee, upon Condition to re-enter upon Payment of Money, and after he being in Poſſeſſion demiſes by Indenture to C. and after performs the Condition and makes Feoffment to D.—D. ſhall be bound and eſtopped to avoid the Leaſe as well as A. himſelf, becauſe he claims under A. who was eſtopped. Mich. 15 Car. B. R. between *Omelaughland and Hood* adjudged per Cur. in Writ of Error upon a Judgment in Ireland upon a ſpecial Verdict. Intratur Trin. 14 Car. Rot. 183.

6. *Privies in Eſtate*, As the *Feoffee*, *Leſſee* &c. ſhall take Advantage of Eſtoppels; Per Raymond Ch. J. 2 Ld. Raym. Rep. 1551. in delivering the Opinion of the Court, cites 1 Salk. 276. Trevivan v. Lawrence.

(U. 2) What Perſons ſhall be eſtopped.

But Ibid. 143. (B) ſays, that in Anno 4 H. 6. it is adjudged contrary, and therefore Quære the Law in that Caſe.

1. THE *King* is not bound by Eſtoppels; Per Hobart Ch. J. Godb. 299. cites F. N. B. 142. (A) 143. (B).

2. The *King ſhall not be concluded* if he has Matter to ſerve him. Br. Eſtoppel, pl. 206. cites 8 E. 4. 6.

(X) What Perſon ſhall be bound by an Eſtoppel.

The Heir.

Br. Eſtoppel, 1. pl. 57. cites S. C.

WHERE the Anceſtor is eſtopped, there the Heir ſhall be eſtopped for Land in Fee. 7 H. 4. 40.

2. The

2. **The Heir ſhall not be eſtopped to claim certain Land** by an Eſtoppel acknowledged by his Father, where he claims the Land by another Anceſtor. **Contra 14 H. 6. 22. b.**

3. Difference between Eſtoppels or Concluſions which *ſtand upon Recompence*, and ſuch as ſtand upon *Affirmance or Admittances* of any Matter by *Matter of Record*, the firſt ſhall conclude the *Heir*, but not the laſt. 8 Rep. 54. b. cites 39 H. 6. 27. Vide 21 H. 6. 24. 18 E. 3. 9. b. Fitzh. Eſtoppel 219.

4. If *my Fathes brings Writ of Treſpaſs againſt John, and names him Robert, and* my Father *recovers againſt him*; and *after he brings Writ againſt me by Name of John*, I ſhall not eſtop him, *but if Franktenement had been in Debate*, there I ſhall have Advantage as Heir, and ſo ſhall every one who ſhall have the Land after by my Father. Br. Eſtoppel, pl. 15. cites 33 H. 6. 7. 19. 50. per Moile.

5. In *Avowry* the *Plaintiff pleaded Hors de ſon Fee*, to which the *Defendant ſaid, that* to this you ſhall not be reſceived, for *at another Time your Grandfather, whoſe Heir you are, and my Predeceſſor, upon Contention were agreed upon a Deed indented, by the which it was recited, that as your Grandfather held of my Predeceſſor by Homage Fealty and 10 s.* Rent, *he confirmed the Eſtate of your Grandfather, and he ſealed the one Part, and your Grandfather the other Part*; Judgment if againſt this Deed you ſhall be reſceived to ſay Hors de ſon Fee, and ſhewed the Deed which was entered de Verbo in Verbum, and how the *Deed was the Words of the Predeceſſor, the Defendant*, Prior of D. *but both Parties ſealed the Deeds indented*, and the Caſe was, that *Grandfather, Father and Son, by one Venter, and Daughter by another Venter* were, and the *Deed was made between the Grandfather the Plaintiff, and the Prior of D. Predeceſſor* of the Defendant, and *the Grandfather died*, and the *Father was ſeiſed and died*, and the *Son entred* and *died without Iſſue*, by which the *Siſter of the whole Blood was Heir to him*, and the *Avowry was made upon this Daughter*, and becauſe all the Words of the Deed indented were the Words of the Prior, and alſo was by Recital, and a Recital is no Eſtoppel, and yet if it was Eſtoppel it does not eſtop the Plaintiff, for the *Daughter of the half Blood is Heir to her Grandfather, and to the Eſtoppel*, and not the Daeghter of the whole Blood, by the Opinion of all the Court; Quod Nota; and ſo ſee the *one was Heir to the Eſtoppel, and the other to the Land*, and it ſeems that ſhe cannot vouch as Heir to the Grandfather, nor be vouched as Heir to the Grandfather, for ſhe is not Heir to him. Br. Eſtoppel, pl. 23. cites 35 H. 6. 33.

6. If *Præcipe quod reddat* be brought *againſt one who is not Tenant*, and *he appears and pleads as Tenant, and loſes*, he is eſtopped at another Time to avoid it for this Cauſe, but *his Heir ſhall have Writ of Error*, or ſhall ſave it by way of Anſwer; Per Forteſcue. Brooke ſays, Quære; For mirum inde. Br. Error, pl. 104. cites 36 H. 6. 33.

7. A. ſeiſed in Fee *takes a Leaſe for* 30 *Years of his own Land*; the Leaſe expires; A. dies; the Heir diſtrains as in his Feehold, and held good; for it is his Freehold, and the Eſtoppel does not *tranſlate the Franktenement* from one to another. And. 128. pl. 174. Paſch. 20 Eliz. London v. James.

8. It was agreed, That if he in the *Reverſion ſuffers a common Recovery to Uſes, his Heir* cannon plead that his Father had not any Thing at the Time of the Recovery, for he *is eſtopped to ſay that his Father was not Tenane to the Præcipe*, and therefore it is a good Recovery againſt him by way of Eſtoppel. 4 Le. 238. pl. 384. Paſch. 3 Jac. C. B. Duke v. Smith. Godb. 147. pl. 189. S. C. agreed. The Reporter ſays, Quære this Caſe.

9. If the *Son concludes himſelf by pleading concerning the Tenure and Services* of certain Lands, *this ſhall bind the Uncle, but* if the Uncle die without Iſſue, this ſhall *not bind the Father*, becauſe he cannot be Heir

to the Son, and conſequently not to the Eſtoppel in that Caſe; *but if* it be ſuch *an Eſtoppel* as *runs with the Land*, then it is otherwiſe. Co. Litt. 12. a.

10. An *Eſtoppel of the Part of the Mother ſhall not bind the Heir when he claims from the Father.* As if Lands be given to the Husband and Wife, and to the Heirs of the Husband, the Husband makes a Gift in Tail and dies, the Wife recovers in a Cui in Vita againſt the Donee, ſuppoſing that ſhe had Fee-Simple, and makes a Feoffment and dies, the Donee dies without Iſſue, the Iſſue of the Husband and Wife brings a Formedon in the Reverter againſt the Feoffee, and notwithſtanding that he was Heir to the Eſtoppel, and the Mother was eſtopped, yet for that he claimed the Land as Heir to his Father, he was not eſtopped. Co. Litt. 365. b.

11. There is a Diverſity between Eſtoppels or Concluſions which ſtand upon Recompence, and other Eſtoppels which ſtand upon Affirmance or Admittance of any Matter by Matter of Record; As if *Abator marries the right Heir* and has Iſſue, and Abator *makes Leaſe* for Life rendering Rent, and he and his Wife dies; In this Caſe the *Iſſue* has mere Right of the Part of the Mother, yet if he *accepts the Rent and gives Acquittance*, this ſhall eſtop him and his Heirs to avoid the ſaid Leaſe in reſpect of the Acceptance of the Recompence. 8 Rep. 54. b. Mich. 6 Jac. Sym's Caſe.

12 *R.* was *ſeiſed of a Reverſion in Fee*, A. his *Uncle* [Tenant for Life] *levies a Fine with Proclamations and dies, having Iſſue J. who dies, leaving Iſſue W.* then *R. dies without Iſſue.* Ruled, that W. the Grandſon of A. ſhall inherit, notwithſtanding the Fine of his Grandfather; and the Reaſon is, becauſe R. dying after A. the Eſtate never paſſed through A. and conſequently *W. the Grandſon claiming from R. is in Effect a Stranger to the Fine of A. and may aver that Partes* &c. Vent. 418. cited by Hale Ld. Ch. B. as Cro. C. 16 Car. 1. Edwards v. Rogers.

(X. 2) Succeſſor.

3. If a Prior and Covent bind themſelves by a falſe Name the Succeſſor ſhall be eſtopp'd by it. 11 H. 6. 32.

[See (Y)]

(X. 3) Eſtoppel by Verdict.

4. A Man ſhall not be eſtopp'd by a Thing found by Verdict which was not put in Iſſue. 32 Aſſ. 9.

5. A Man ſhall not be eſtopp'd by a Thing found by Verdict if it was not directly put in Iſſue. 32 Aſſ. 9.

Br. Eſtoppel, pl. 140. cites S. C.

6. If a Man pleads in Aſſiſe that J. S. made Feoffment after the Death of M. by Deed, and the Plaintiff [ſays] he made the Feoffment by the Deed in the Life of M. and the Jury find that he made the Feoffment by the Deed in the Life of M. this Verdict ſhall eſtop the Tenant in other Action to ſay that nothing paſs'd by the Deed, for this was put in Iſſue, and not only the Time, for if nothing paſs'd by the Deed it was not any Feoffment. Contra 32 Aſſ. 9.

Br. Eſtoppel. pl. 140. cites S. C.

7. In aſſiſe if the Tenant pleads to the Aſſiſe and puts in Evidence the Deed of Feoffment of the Plaintiff, upon which it is found his Deed, he ſhall not after be receiv'd to deny the Deed, for this conduces to the Iſſue, and he may have Attaint of it. 32 Aſſ. 9.

5. In

5. In a *Scire Facias on a miſ-recited Judgment* the *Defendant pleads Nul tiel Record*; but it is *found Quod Habetur tale Recordum*; the Defendant is eſtopp'd to ſay, that this was not the Judgment againſt him, but that it was another Judgment, becauſe it is already determined againſt him, that there is ſuch a Judgment againſt him; Per Holt Ch. J. 2 Ld. Raym. Rep. 1050. Mich. 3 Ann. in Caſe of Treviban v. Lawrence.

(Y) Eſtoppel by Verdict.

Fol. 877.

What Perſons may be eſtopp'd.

1. IN Aſſiſe againſt Baron and Feme, if they plead that J. S. made Feoffment in the Life of M. by Deed, upon which they are Iſſue, and it is found againſt the Tenant. After the Death of the Baron in another Action the Feme ſhall not be receiv'd to ſay, that nothing paſſed by the Deed againſt the Verdict, for this was put in Iſſue, for if nothing paſs'd he did not make any Feoffment. Contra 32 Aſſ. Br Eſtoppel, 140. cites S. C.

2. *Waſte* was brought *by an Infant againſt his Guardian*, and the *Infant was by Attorney who pretended that he was of full Age*, and there per Perſey if the Infant recovers and brings Aſſiſe againſt the Guardian, he ſhall be eſtopped by this Admittance to claim the Land by his Nonage; But Finch ſaid, that he ſhall be aided by Proteſtation, and ſhall aver the Nonage; But Quære inde. Br. Eſtoppel, pl. 48. cites 48 E. 3. 10. S. C. cited

3. Where *one makes a Leaſe for Years* of Land *by Indenture, and has nothing in the Land*, and *afterwards purchaſes the Land and aliens it*; although it be a good Leaſe for Years by Eſtoppel againſt him and his Aliennee by way of Pleading, and ſhall bind them, yet it ſhall not bind *the Jury*, but they *may find the Truth*; *and* if they find the Truth, *the Court ſhall adjudge it to be a void Leaſe*. Cro. C. 110. Paſch. 4 Car. C. B. the third Reſolution in the Caſe of Iſeham v. Morrice. by Tirrel J. Cart. 155.

(Z.) Eſtoppel by Specialty.

Who ſhall take Advantage of an Eſtoppel by Specialty.

A Stranger.

1. IF a Man geants by Indenture the Ward of the Land of J. S. which he has for Cauſe of Nurture of him, and names him in it Heir of W. S.—J. S. ſhall not eſtop the Grantor by this Indenture, becauſe he is a Stranger to the Deed. 30 E. 3. 21 adjudged.

Fol. 877.

(A. a) How long the Eſtoppel ſhall continue.

Br. Eſtoppel, pl. 109. ſays that it ſeems it ſhall not be any Eſtoppel, and cites

1. IF a Man leaſe for Years by Indenture to the Tenant of the Land in Fee, **this ſhall not be any Eſtoppel after the Years expir'd.** 4 Rep. 53. b. Mich. 29 & 30 Eliz. B. R. *Rawlins's Caſe.* * 54. *London's Caſe.* **Co. Litt. 47. b. Contra** † **14 H. 6. 22. b. admitted.**

S. C.——Ibid. pl. 96. cites S. C.——* Becauſe the Eſtoppel does tranſlate the Frankenement from the one to the other. And. 128. London v. James.——Mo. 181. pl. 323. Trin. 26 Eliz. James's Caſe.——Cro. 36. pl. 1. James v. London.

† The Indenture is no Eſtoppel but only during the Leaſe. Br. Eſtoppel, pl. 221. cites 14 H. 6. 22. per Halles and Mountague.—— Br. N. C. pl. 518. cites S. C.——Fitzh. Eſtoppel. pl. 32. cites S. C.

2. **If a Man leaſes Land by Indenture for Years, which he hath by the Wardſhip of J. S. Son and Heir of W. S. as Guardian in Nurture, after the Term expired he ſhall not be eſtopped to ſay, that he is not the Heir of W. S. 30 E. 3. 21. adjudged.**

3. In Writ of *Waſte againſt Tenant in Fee-ſimple*, if he *pleads no Waſte done*, and it is *found for him*, and *Judgment is given that the Plaintiff ſhall take nothing by his Writ*, yet the Tenant *is eſtopped of the Fee-ſimple for ever*; Per Priſot and Moyle, & non Negatur. Br. Eſtoppel, pl. 111. cites 36. H. 6. 28, 29. 34.

Cro. E. 36. pl. 1. James v. Landon, S. C. adjudged.

4. J. ſeiſed of Lands in Fee took a Leaſe for Years of a Stranger by Deed indented of his own Land. The Term expired, and the Stranger entred, and J. brought Treſpaſs. The Juſtices agreed that this ſhould be Eſtoppel againſt the Leſſee but only during the Term; and took a *Difference between Eſtoppel by Matter in Fact, and* by Matter *of Record.* Mo. 181. pl. 323. Trin. 26 Eliz. James's Caſe.

5. Where a *falſe Tenure* is *found for the King of a Tenure by Knight's Service in Capite*, and the *Heir ſues general Livery*, the Heir who ſues the Livery is eſtopped, but not his Heir; for *this is a Perſonal Eſtoppel only*; it is not an Eſtoppel *upon a ſpecial Livery*, for *the Words* of that *are, ut dicitur, and not poſitive.* Jenk. 330. pl. 59.

1 Salk. 276. pl. 3. S. C.—S. C. cited by Raymond Ch. J. 2 Ld. Raym. Rep. 1551. Mich. 2 Geo. 2. in delivering the Opinion of the Court in the Caſe of Palmer v. Ekins.

6. When a Eſtoppel runs upon the Land it *alters the Intereſt of the Land*; For if a Man by Indenture makes a *Leaſe of Dale*, reſerving Rent, *in which he has nothing* at that Time, *and after he purchaſes Dale, and bargains and ſells it to a Stranger*, the Bargainee ſhall hold it liable to the firſt Leaſe, and he coming under him that made the Leaſe, is eſtopped to ſay that Bargainor had nothing to let in the Premiſſes at the Time of the Leaſe made, for this Eſtoppel runs upon the Land, and alters the Intereſt of it; Per Holt Ch. J. 6 Mod. 258. Mich. 3 Ann. B. R. in Caſe of Trevivian v. Lawrence.

(B. a) In what Caſes there ſhall be an Eſtoppel. Where it paſſes by way of Intereſt.

1. IF **the** Tenant of the Land and a Stranger join in a Leaſe for Years by Indenture, **this is the Leaſe only of the Tenant, and the Confirmation of the Stranger, and yet the Leaſe as to the Stranger operates by Concluſion. Co. Litt. 45.**

2. If

2. If Baron and Feme leaſe for Years by Indenture, rendring Rent, where the Baron had all the Eſtate in the Land, and the Feme nothing, after the Death of the Baron the Leſſee in an Action of Debt for the Rent brought by the Feme, ſhall not be eſtopped to ſay, that at the Time of the Leaſe made the Feme had nothing in the Land, for this ſhall not enure by way of Eſtoppel, inaſmuch as it enures by way of Intereſt. Mich. 42 & 43 Eliz. B. R. adjudged between *Brierton and Evans.* Cr. E. 700. pl. 16. Brereton v. Evans S. C. adjudged.— See ſupra (P) pl. 6. S. C contra, and the Notes there.

3. If A. is ſeiſed of 10 Acres, and B. of other 10 Acres, and they join in a Leaſe for Years by Indenture, theſe are ſeveral Leaſes according to their ſeveral Eſtates, and the Indenture ſhall not eſtop him, inaſmuch as it paſſes by way of Intereſt. Co. Litt. 45. [a].

4. So if two Tenants in Common of Land join in a Leaſe for Years by Indenture, yet thoſe are ſeveral Leaſes, and no Eſtoppel, for the Cauſe aforeſaid. Theſe are ſeveral Leaſes. Brownl. 39, 40.— S. P. 134.

in Caſe of Cradock v. Jones.——S. P. 29. contra One. Cro. J. 166. pl. 4. Trin. 5 Jac. Mantle v. Wollington.——Two Tenants in Common grant a Rent of 10s. to B. theſe are ſeveral Grants, and B. ſhall have ſeveral Rents of 10 s. Arg 3 Le. 255. Mich. 32. Eliz. C. B. in the Serjeant's Caſe.

5. But if two Coparceners join in a Leaſe for Years by Indenture, this is but one Leaſe, becauſe they have not ſeveral Frankements, but ſhall join in Aſſiſe. Fol. 878. Mo. 682. pl. 239.

Mich. 42 & 43 Eliz. B. R. held e contra.

6. If two Jointenants in Fee, or for Life, join in a Leaſe for Years by Indenture, reſerving Rent to one of them, this ſhall enure to him only by Eſtoppel by Force of the Indenture, but otherwiſe it would be where it is by Parol or by Deed-Poll. Co. Litt. 47.

7. If Baron conveys Land to the Uſe of himſelf and his Wife, and to their Heirs of their Bodies begotten for the Jointure of the Feme, the Remainder to his right Heirs, and after dies having Iſſue B. and after B. being the Iſſue, to whom this ought to deſcend in Tail after the Death of his Mother, and the Reverſion in Fee being deſcended to him, levies a Fine come ceo &c. to D. in Fee, this enures by Eſtoppel to bar B. to claim the Entail after the Death of his Mother, and alſo ſhall enure to paſs the Reverſion in Fee to D. ſo that D. may enter upon the Feme if ſhe makes any Diſcontinuance contrary to the Statute of 11 H. 7. Co. adjudged. *Sir George Brown's Caſe.* 3 Rep. 61. S. C.— 2 And. 44. S. C. —— Cro. E. 513. Linch v. Spencer S.C. See tit. Jointreſs (I) pl. 17. S. C. and the Notes there.

8. If A. Leſſee for the Life of B. leaſes for Years by Indenture, and after purchaſes the Reverſion in Fee, and after B dies within the Term, A. may avoid this Leaſe, becauſe it takes Effect by way of Intereſt, and is determined by the Death of B. Co. Litt. 47. b. S. C cited 1 Salk. 275. that the Leaſe ended by the Death of Ceſtuy

que vie, and Holt Ch. J ſaid that the Reaſon is, becauſe Tenant for Life has a Freehold which is a greater Eſtate, and the Leaſe will need no Eſtoppel if the Life endures.—— But if A. had nothing in the Land and made a Leaſe for Years by Indenture, and after purchaſe the Land, the Leſſor is as well concluded as the Leſſee, to ſay that the Leſſor had nothing in the Land, and here it works only upon the Concluſion, and the Leſſor cannot confeſs and avoid as he might in the other Caſe. Co. Litt. 47. b.

8. If a Man makes a Leaſe for Life, and the *Leſſee for Life makes a Leaſe for Years, and afterwards purchaſes the Reverſion and dies within the Term*, the Leaſe for Years is determin'd, and the Heir in Reverſion may confeſs and avoid it. Mo. 20. pl. 69. Hill. 2 Eliz. Anon. Dal. 26. pl. 4. S. C. in totidem Verbis.

9. *A. Tenant in Tail*, Remainder *to B. in Tail*, Remainder over &c. *A. leaſes to J. S. for the Life of J. S.* not warranted by the Statute *and dies (without Iſſue,) leaving B. in Remainder his Heir*, and to whom the If Leſſee for 10 Years makes a Leaſe for 20

the Reverſion in Fee deſcends. *B leaſes to W. R. (living J. S.) for 99 Years to commence after the Death of J. S.* reſerving Rent; *J. S. ſurrenders to B.* (and C. a Stranger) *upon Condition and dies.* Then a Præcipe is brought againſt, B. (and C. the Stranger), and a Recovery with ſingle Voucher had (to the Uſe of B. and her Heirs. Afterwards the *Condition is broken, and*) *W. R. enters*; (B. grants the Reverſion, and then J. S. dies). The Defendant the Heir of B. diſtrains for the Rent. W. R. brings a Replevin, (and the Defendant avows for the Rent reſerved upon the 99 Years Leaſe as claiming under the Grantee of the Reverſion. It was agreed that this was a Diſcontinuance, and a tortious Reverſion in Fee out of which this Leaſe was made; but whether by the Surrender of this *tortious Reverſion* being gone the Leaſe ſhould be ſo too was the Doubt of the Caſe. Saunders took it to be as if he had made a Leaſe, having no Eſtate, and after purchaſed it ſhould be a Leaſe by Eſtoppel. And Pemberton Ch. J. held it to be by Eſtoppel, though an Intereſt paſs'd at preſent, the Leſſor having a wrongful Eſtate.) See Vent. 357. Anon. and Skin. 2, 3. Mich. 33 Car. 2. B. R. Paulin v. Hardy.

Years, and after purchaſes the Reverſion, it ſhall bind him for no more than ten. Arg. to which Pemberton Ch J. ſaid the Difference is where the Party that makes the Eſtate has a legal, and where a Defeaſible Eſtate only; for in the latter a Leaſe may work by Eſtoppel, though an Intereſt paſs'd ſo long as the Eſtate out of which the Leaſe was derived remain'd undefeated. Vent. 358. Mich. 33 Car. 2. B. R. Anon

N. B. What is within the Parentheſes is as the Caſe is reported in Skinner. 2, 3. and ſo is differently ſtated from the S. C. in Vent. 357, 358. and differ as to the Death of J. S.

10. *A. made a Feoffment* to the Uſe of *himſelf for Life, and after the Death of him and M. his Wife*, to the Uſe *of B.* (eldeſt Son of A.) *for his Life, and after the Death of A. M. and B.* to the Uſe *of B. and the Heirs Male of his Body*, and for default of ſuch Iſſue, to the Uſe *of the Heirs of B.* —*B. had Iſſue a Daughte*, and then by Fine and Indenture *granted to G. for 500 Years.* B. dies; M. dies; A. ſtill living. Upon a Reference out of Chancery to the Ld. Ch. J. Hale, and after hearing the Arguments of Counſel, his Lordſhip was of Opinion, That the Eſtate as above limited to B. was a Contingent Remainder; and that the Eſtate which comes to the Heir upon the happening of the Contingency feeds this Eſtoppel, and then the Eſtate by Eſtoppel becomes an Eſtate in Intereſt, and ſhall be of the ſame Effect as if the Contingency had happened before the Fine levied. Pollext. 55, 56. and 66. January 3, 1672. Weale v. Lower.

11. *Some* Eſtoppels *are abſolutely concluſive, and ſome by Concluſion give an Intereſt.* The Leſſor made a *Leaſe to W. R. for* 20 *Years*, and *about a Year afterwards he made another Leaſe to W. W. for* 20 *Years*; now if there was an *Attornment to this ſecond Leaſe*, then it amounts to a Grant of the Reverſion of the Leſſor; but if no Attornment then it is a Leaſe by Eſtoppel. 3 Salk. 152, pl. 3. Holman v. Hore.

12 There is a *Difference* where the *Indenture immediately paſſes ſuch an Intereſt as was intended by the Parties, and afterwards by ſome Matter Ex Poſt Facto that Intereſt is determined by an Extinguiſhment of the Eſtate of the Leſſor, out of which the Eſtate was derived.* In ſuch Caſe the Parties are not eſtopp'd to ſhew the Special Matter. Carth. 248. Mich. 4 W. & M. in B. R. Hilman & Ux', alias Gilman v. Hore.

13. *Or* in Caſe where a *Leaſe* is made *to A. for* 40 *Years, and the Leſſor ouſts him, and* then *leaſes for* 40 *Years to B. who enters, and then A.* the firſt Leſſee *re-enters*, and both theſe Leaſes are by Indenture. In this Caſe B. in an Action of Debt againſt him for Rent reſerved on his Leaſe may plead the whole Truth, and is not eſtopp'd, becauſe ſuch an Intereſt paſs'd by the Indenture as was intended, viz. a Term for 40 Years. But the Leſſor's Eſtate out of which the Intereſt was deriv'd, being by *Diſſeiſin*, was by the Re-entry of A. determin'd, and ſo conſequently the Term was, out of which it was derived. Carth. 248. Hilman v. Hore.

44. *Upon*

14. *Upon a Demiſe by Indenture, by one who has nothing in the Land,* if the *Leſſor brings Debt* for Rent, and *declares upon the Demiſe,* and the Defendant *pleads Nihil Habuit in Tenementis,* if the Plaintiff *replies that he had a ſufficient Eſtate whereout to make the Demiſe, he has loſt the Benefit* of the Eſtoppel; *but if he replied that the Leaſe was made by Indenture, and concludes, Unde petit Judicium, if he ſhall plead this Plea againſt his own Acceptance of the Leaſe by Indenture,* there the Defendant ſhall be eſtopped; but *if the Defendant had pleaded Nil debet,* the Plaintiff might have taken Advantage of the Eſtoppel upon Evidence, becauſe the Pleadings are not brought to ſuch a Point in the Caſe, as to give the Plaintiff an Opportunity of replying the Eſtoppel. 2 Ld. Raym. Rep. 1051. per Holt Ch. J. Obiter. Mich. 3 Ann. in Caſe of Trebiban v. Lawrence.

15. A. *leaſes Land* which is *not his,* but *after he purchaſes it*; the Leaſe ſhall bind him, his Heirs and Aſſigns, and an Eſtoppel that affects the Intereſt of the Land ſhall run with it whoever takes it. Per Holt Ch. J. 6 Mod. 258. Mich. 3 Ann. B. R. Trevivan v. Lawrence & al'.

16. An Eſtoppel in pleading does not bind the Jury unleſs it works on the Intereſt of the Land; Per Holt Ch. J. 3 Salk. 151. Paſch. 3 Ann. in Caſe of Trevivian v. Lawrence.

17. If a Mortgagee brings an Ejectment againſt the Mortgagor and he pleads Not Guilty, the Mortgagor ſhall never be allow'd to give in Evidence a precedent Mortgage, he being eſtopp'd as to that Matter; Per Holt Ch. J. 3 Salk. 151. Paſch. 3 Ann. in Caſe of Trevivian v. Lawrence.

(C. a) Pleadable in what Caſes; And How.

1. IN Aſſiſe the Tenant intitled himſelf that a *Fine was levied to P. and S. and to the Heirs of P. whoſe Eſtate P. had and died, and the Tenant is Heir to him,* and gave *Colour, the Plaintiff ſaid, that the ſame S. was ſeis'd in Fee and enfeoff'd him, abſque hoc, that T. had the Eſtate of P. and S.* and the *Tenant ſaid, that the ſame S. in the Bar is the ſame S. in the Fine, who had not but for Term of Life to him and P. and to the Heirs of P.* Judgment if he ſhall ſay againſt the Fine that S. had Fee, & non allocatur; For the *Iſſue is tender'd before by the Traverſe of the Que Eſtate,* and therefore he *ought to maintain it,* viz. *That he has the Eſtate of P. and S.* and ſo he did, and ſo ſee *where Title is made, and the Bar is traverſed, the Defendant ſhall not plead Eſtoppel againſt the Title, but maintain the Iſſue, quod nota.* Br. Eſtoppel, pl. 66. cites 11 H. 4. 81.

2. *Forger* of Deeds was brought *in the County of W. and D.* inaſmuch as the Defendant forged divers Deeds *of the Manor of D. which extended into the Counties of W. and D.* by which he was diſturbed of his Poſſeſſion, the *Defendant ſaid, that Anno* 2 *H.* 6. *W. and L. brought Aſſiſe in the County of L. againſt the now Plaintiff of the ſaid Manor of D. the Defendant in the Aſſiſe ſaid, that* 12 *Acres in the County of D. were held as of his Manor of D. and ſo Parcel of the Manor in the County of D.* Judgment of the Writ brought in the County of L. only, and if &c. Nul tort, by which the Aſſiſe was awarded, which *found the Seiſin and Diſſeiſin, and the Plaintiff recover'd and had Execution, which Eſtate in the Manor the Defendant has, Judgment of the Writ,* and the Opinion

there was, that the Plea is not well pleaded, becauſe he pleaded *Matter of Eſtoppel, and concluded to the Writ*, where the Concluſion *ſhould be Judgment if againſt this matter of Record ſhall he be received to ſay, that the Manor extended into the Counties of W. and D.* wherefore the Defendant pleaded accordingly, and there it is ſaid, if Eſtoppel be good to a common Intent it is ſufficient; For it may be here that at the Time of the Aſſiſe Anno 2 H. 6. the Manor extended into two Counties, and yet at the Time of the Forging into the one County only, as if the Land Parcel in the other County was recover'd of later Time, or releaſed by the Lord to the Ter-tenant, or Diſſeiſin thereof made; Newton and Portinton mutata Opinione, ſaid, that he *ought to traverſe* alſo, *abſque hoc that this which was in the County of D. was Parcel at the Time of the Making*. Br. Eſtoppel, pl. 90. cites 22 H. 6. 53.

3. If a Man pleads Eſtoppel, and *concludes to the Writ* it is ill. Br. Eſtoppel, pl. 90. cites 22 H. 6. 53.

4. A *Leſſee by Indenture cannot plead Nil habuit in Tenementis ſpecially*, any more than a General Nil habuit &c. *without admitting an Intereſt*. 2 Ld. Raym. Rep. 1551. Mich. 2 Geo. 2. B. R. Palmer v. Ekins.

(D. a) Pleadings.

At what Time Eſtoppel muſt be pleaded.

1. IF a Man has Matter of Concluſion as *Recovery, Fine levied by Anceſtor*, or the like, and does not plead it by way of Eſtoppel, as the Form is, but *joins Iſſue upon the dying ſeiſed of the Anceſtor* &c. where the Recovery had eſtopped him, *and compelled him to make Title after the Matter of Record*, there if the Iſſue be found againſt him per Pais, he has *loſt the Advantage of Eſtoppel* for ever, *by Reaſon that he did not plead it at firſt*, and rely upon it. Br. Eſtoppel, pl. 112. cites 38 H. 6. 29.

(E. a) Pleadings. *Eſtoppel.*

Where, and what Plea to a Deed in one Action, ſhall eſtop Defendant from pleading a variant Plea in another Action on the ſame Deed.

1. IN a Sci. Fa. the Tenant pleads a *Releaſe*. The Plaintiff avoids this by *Dureſs at B.* The Tenant pleads Eſtopple, becauſe the Plaintiff had before in a like Action, in which he was named, avoided it by *Dureſs at E.* and it was held that he could *not vary from the Place*. Br. Faits, pl. 12. cites 45 E. 3. 2.

2. *Nor* ſhall he at any other Time avoid it *by Nonage, or other Cauſe than the firſt* Cauſe; Per Thorpe; Quod non negatur. Br. Faits, pl. 12. cites 45 E. 3. 2.

3. *Debt upon Obligation*, the *Defendant ſaid*, that he was Lay, and *not lettered, and it was read to him with Condition where it is Single*, and ſo Not his Deed; To which the Plaintiff ſaid, that to this he ſhall not be

be reſceived, for *at another Time he himſelf brought Detinue againſt A. B. of the ſame Obligation, who prayed Garniſhment againſt this Defendant, who* came upon Scire Facias, and *ſaid, that that Writing delivered was upon certain other Conditions to be performed to deliver it to the Plaintiff*, and otherwiſe not, and ſaid, *that the Conditions were not performed*, and the others e contra, *by which the Plaintiff recovered the ſame Writing againſt the Defendant*; Judgment &c. becauſe he has confeſſed the delivering it as a Deed &c. it is no Eſtoppel, for he ſaid, *that Writing*, and not *his Writing*, and therefore no Eſtoppel; and where a Man pleads not his Deed, the Entry is, that *the Writing aforeſaid is not his Deed*; But per Bab. clearly, it is a good Eſtoppel; For it cannot be his Deed at one Time, and at another Time not his Deed. Br. Eſtoppel, pl. 6. cites 9 H. 6. 59.

(F. a) Relief in Equity.

1. IF a *legitimate Daughter and her Siſter, a Baſtard, join in ſuing of their Livery*, this ought not to bar in Conſcience, howſoever it may eſtop in Law. Cary's Rep. 27. cites Doct. & Stud. 34.

2. An *Eſtate by Eſtopple ſhall not be awarded in Equity*, nor is the Jury bound to find it, and *if found, the Court ſhall judge the Leaſe void*, and ſo the Law ſeems to be in Caſe of Obligations, Covenants, or Perſonal Contracts, *but where the Eſtate is bound by the Concluſion, and converted into an Intereſt*, though it be found by the Jury, yet *the Court ſhall judge* according to the Law, *that the Eſtate is good by reaſon of the Eſtoppel.* Pollexf. 67. in Canc. Jan. 3. 1672. in the Caſe of Weale v. Lower.

For more of Eſtoppel in General, See **Fines** (L. a. 2) (L. a. 3) **Former Action, Miſnomer, Record, Rent, Vacate,** and other Proper Titles.

Estoppel. See Estate B. 6. 17.

* Eſtray.

(A) What Thing.

1. SWANS **may be taken as Eſtrays.** 7 H. 6. 27. b. Br. Eſtray, pl. 3. cites S. C. but not S. P. —— Fitzh. Bar, pl. 6. cites S. C. & S. P. —— S. C. cited per Cur. 7 Mod. 16. b.

* The Reaſon of Eſtray is, becauſe when there is none that can make Title to the Thing, the Law gives it to the King if the Owner does not claim it within a Year and a Day, and alſo becauſe the Cattle might not periſh, which are called Animalia Vagrantia &c. Per Cook Ch. J. Godb. 150. pl. 195. Paſch. 5 Jac. C. B. Taylor v. James.

It

It becomes an Eſtray after the firſt Proclamation, and not ſooner; Per Holt Ch. J. 11 Mod. 90. pl. 12. Trin. 5 Ann. B. R. Henly v. Welch.

2. *No Fowl* can be an Eſtray but a Swan. 4 Inſt. 480. cap. 66.

(B) The Goods of whom ſhall be ſaid Eſtrays.

1. IF the Goods of the King ſtray into the Manor of a common Perſon, and there remain by a Year and a Day after Proclamation &c. yet it is not a Stray, for the King ſhall not loſe it. 39 E. 3. 4.

Br. Eſtray, pl. 4. cites S. C —— Fitzh. Eſtray, pl. 3. cites S. C.

2. So if the Chattel of J. S. ſtray into the Manor of the King, and the King ſeizes it, and after within the Year it ſtrays into the Manor of a common Perſon, and there remains for a Year and a Day after Proclamation, yet this ſhall not bind the King. 39 E. 3. 4. But Quære.

2. If Goods *of an Infant*, *Feme Covert*, *Executor*, *Man in Priſon*, or beyond Sea, ſtray, and are proclaimed according to the Law, if none claims them within a Year and a Day, they ſhall be all bound. The ſame Law of Wreck of the Sea; For Law is ſtrict and binding in both Caſes. 5 Rep. 108. b. Paſch. 43 Eliz. B. R. in Sir H. Conſtable's Caſe.

But before Seizure he may retake it. 12 Rep. 100.

4. If the Eſtray *ſtrays again into another Manor*, the firſt Lord cannot take him if the other claims him as an Eſtray, becauſe the Poſſeſſion was rather in regard of his Manor than himſelf; Per Hobart Ch. J. Winch. 68 Mich. 21 Jac. C. B. in Caſe of Pleadall v. Goſmore.

(B. 2) In what Place it may be taken.

7 Rep. 16. b. cites S. C. by the Name of Sir John Tiptoft's Caſe.

1. IN *Treſpaſs*, a Man *juſtified for Stray*, *becauſe he is Lord of the Manor of D. and that he, and all thoſe whoſe Eſtate he has in it, Time out of Mind have had Stray there*, by which, becauſe the Beaſts came their eſtraying, he ſeized them as Stray, and proclaimed in Fairs and Markets; But per Strange, if the *Owner has* Cauſe to have *Common* there, *and puts his Beaſts there to Common*, this is not Stray, becauſe they are there by Authority. Br. Eſtray, pl. 3. cites 7 H. 6. 27.

2. *And* it ſeems by him, that the *Lord* of the Soil *ought to take Notice whether they are the Beaſts of the Common* or not, and this ſeems to be true, *if they have the Mark of the Cammoner.* Ibid.

(C) Proclamation.

1. IF the next Market Town be in another County than where the Eſtray is ſeized, Quære, whether the Proclamation ought to be there?

2. He

2. He who *juſtifies for Eſtray made Preſcription in his Manor, and ſaid further, that according to the Cuſtom in the Realm of England uſed, they ſhall proclaim them in two Market Vills, viz in D. and S. and on the Market Days, viz. the Monday in D. and the Saturday in S.* and ſo it ſeems, that Eſtrays ſhall be proclaimed in the two next Market Vills, by the Common Law, and two Market Days, the one in the one Vill, and the other in the other Vill. Br. Eſtray, pl. 10. cites Lib. Intr.

3. The Eſtray ought to be *proclaim'd* in Market in two ſeveral Vills adjoining; and therefore till this be done, and the Year and Day paſs'd, the Lord of the Franchiſe has not any *Property*. Finch's Law 45. Proclamation ſhould be made in the Pariſh Church.

Cro. E. 716. pl. 42. Mich. 41 & 42 Eliz. C. B. Brownlow v. Lambert. ——— In one or three Markets adjoining, at three ſeveral Days. Bendl. 19. Paſch. 28 H. 8. ——— It ought to be cried in the Market and in the Church Prout moris eſt. Br. Eſtray, pl. 4. cites 39 E. 3. 3. ——— Fitzh Eſtray, pl. 3. cites S C.

4. In the Proclamstion it ought to be *ſhewn of what Kind the Eſtray is*, as Sheep, Horſe &c. and ought to *tell the Name of the Seiſer*, ſo as the Owner may know whither to reſort for his Cattle. Godb. 151. pl. 195. Paſch. 5 Jac. Taylor v. James. Noy 144. S. C. but S. P. does not appear.

5. The *Proclamation* muſt be in convenient Time which the Court will adjudge of; Per Hobart Ch. J. Win. 68. Mich. 12 Jac. C. B. in Caſe of Pleadall v. Goſmore.

(D) Eſtray.

[*Retaking.*]

1. IF Swans ſtray into my Water, and I ſeiſe them, and a *Stranger, who Right has to put Swans into my Water by Cuſtom, takes takes theſe Swans of his own Tort, and after puts them into the Water as his proper Swans, and gives Notice, yet I may take them again. 7 H. 6. 28. *Fol. 879.

2. If the Chattle of J. S. ſtrays into the Manor of the King, and he ſeiſes it, J. S. cannot take it within the Year before that he has proved it to be his Chattel. 39 E. 3. 4. (Quære this for how can he make his Proof?) Br. Eſtray, pl. 4. cites S. C. & P. by Knivet. ——— Fitzh. Eſtray, pl. 3. cites S. C.

3. If a Man takes Beaſts as Eſtray, and *keeps them for three Quarters of the Year*, and after *they eſtray from him, and another gets them*, the *firſt Lord* who keeps them for three Quarters *cannot retake them, becauſe he has no Property* in them *till he has kept them the Year and Day, and Proclamation paſſed*; quod nota bene; for the Poſſeſſion of the ſecond Lord is good againſt him who has no Property. Br. Eſtray, pl. 11. cites 33 H. 8. Finch's Law 45. S P. accordingly.

4. So *if it be but the Day before the Year ended.* Brownl. 236. Trin. 8 Jac. Harvey v. Blacklole. After the Seiſure by the Lord for an Eſtray it is a Poſſeſſion of the Eſtray in the Lord, and the Beginning of Property. Win. 68. Mich. 21 Jac. C B in Caſe of Pleadall v. Goſmore. ——— If this Eſtray within the Year eſtray out of the Manor, the Lord may chaſe back the Eſtray until he be ſeiſed by another Lord which hath Eſtrays; but if he be ſeiſed by another Lord, then the firſt has loſt all his Poſſibility of gaining the Property, and the other Lord ought to proclaim it De Novo; Agreed. Hutt. 67. Hill. 20 Jac. in Caſe of Pleydell v. Goſmore.

(E) Abuſer.

How the Lord ought to demean himſelf.

Cro. J. 147. pl. 6. Bagſhaw v. Goward, S. C and though it

1. IF a Horſe be taken as a Stray, the Lord who took it cannot labour him within the Year, for within the Year and Day he has not any Property in him. H. 4 Ja. B. R. adjudged between *Bagſhaw and Gaelard.*

was alleged to be the Common Courſe to uſe Stray Horſes with Wyths about their Neck, the Court held it to be an Abuſe. —— Noy 119. Bagſhaw v. Gawin, S. C. reſolved that he cannot work the Eſtray. —— Yelv 96 S. C. adjudged. — Godb. 151. S. P. —The Lord cannot work the Eſtray, but may keep him in his Stable. Hutt. 68.

Cro. J. 148. pl. 6. S. C. & S. P admitted per Cur —— Noy 119 S. C & S. P. reſolved;

2. If a Cow be taken as an Eſtray it may be milch'd within the Year, becauſe ſhe will be the better for it, and tends to the Preſervation of the Cow; for he who takes an Eſtray ought to find him Victuals, and to provide that it does not periſh for Want of good Keeping; But otherwiſe of a Diſtreſs. Hill. 4 Jac. B. R. per Cur. in *Bagſhaw and Gallard's Caſe.*

and Noy ſaid it was reſolved in one Prideaux's Caſe that a Man might ſhear an Eſtray but not work him. —— See tit. Diſtreſs (P) pl 8.

Brownl. 236. Harvie v. Blacklole, S. C. & S. P. as to the Fettering. —— Win.

3. It is not a good Cuſtom that when a Stray is taken within the Manor, that the Bailiff ſhall put it in a great Moore, Part of the Manor, for his Suſtenance, and there ſhall remain during the Year, and if he be unruly, that he ſhall be fetter'd till he be gentle. H. 8 Jac. B. per Cur. between *Harvey and Blackdon.*

67. cites Harvey v. Blacklock, S. C. as adjudged that an Eſtray, though unruly, cannot be fettered.

Per Hutton and Winch J. ſuch unruly Colt may be fettered, ſo it be in an ordinary Manner; but per Hobart Ch J. contra;

4. But at an Aſſizes at Sarum 1621. between *Pledall and Coſmore* in Trover and Converſion, it was ruled upon Evidence per Tanfield Chief Baron, that if the Eſtray being a Colt, after Proclamation be unruly, ſo that he cannot be kept within the Fences, the Fences being in good Repair, and for this he croſs-fetters him, this is lawful though the Year is not paſſed, inaſmuch as he ought to keep it ſafe, and is anſwerable for it if it be loſt.

for the Lord has rather the keeping of him than the Property, and his Poſſeſſion being in regard of his Manor, and not of himſelf, he cannot anſwer for the Wrong the Colt does in the Lands of others Winch 68. Mich. 21 Jac. C B. in Caſe of Pleadall v. Goſmore. —— Adjudged by three J. contra Hobert Ch. J. that the fettering the Colt as he fettered his owu Horſes was lawful. Winch. 125. Paſch. 1 Car. S. C.

The Eſtray within the Year is as a Pledge in the Cuſtody of the Law till Amends be made to the Lord, and that is the Reaſon that the Lord cannot work him.

5. If an Eſtray be ſeiſed, and Proclamation made, the Lord of the Manor may juſtify the detaining of him till ſufficient Amends be made by the Owner for the Paſture during the Time of his being there; and if the Lord requires more for Amends than is reaſonable, yet if the Owner does not tender ſufficient Amends for the Paſture the Retainer of him is lawful. At the Aſſizes at Sarum 1621, between *Pleadall and Coſmore*, ruled upon Evidence in Trover and Converſion per Tanfield Chief Baron then Judge of the Aſſizes. New Entries 170. a.

Win. 68. S. C. —— If the Quantity of Amends comes in Queſtion it ſhall be

be tried in this Court. Godb. 151. C. B. Tailor v. James. —— The Party ought to demand the Amends for the feeding at his Peril, ſo that the Reaſonableneſs may be adjudged per Cur. Noy 144. Taylor v. James.

6. It ought to be kept in Land *in the Lord's Poſſeſſion.* Godb. 150. pl. 195. Paſch. 5 Jac. C. B. Tailor v. James.

7. The Lord cannot *ride* an Horſe that is an Eſtray. Yelv. 96. Hill. 4 Jac. B. R. Bagſhaw v. Gaward.

8. Nor can he *work an Ox.* 12 Rep. 100. Trin. 10 Jac. per Cur. Anon.

(F.) Property. When and how gained. And by whom.

1. *LESSEE for Life of a Manor ſeiſes an Eſtray and dies before the Year, and the Day paſſed*; It ſeemed that the Executors of the Leſſee ſhall have it, and not he in the Reverſion; For although the Leſſee had not an abſolute Property in it during his Life, yet when the Year is paſt, the Property ſhall have Relation to the Time of the Seiſure. Mo. 11. pl. 43. Hill. 4 E. 6. Anon. S. P. 11 Mod. 90. Trin. 5 Ann. B. R. Henly v. Welch.

2. If a Man have Waif and Stray within his Manor by Preſcription, and *another* Man *takes the* Waif or *Stray out of the Manor* &c. he who has the Manor ſhall have an Action of *Treſpaſs* for them &c. and that *without any Seiſure of them before.* F. N. B. 91. (B) Trover lies for an Eſtray without an actual Seiſure; Per Keeling Ch. J. obiter. 2 Keb. 589. in pl. 5. Hill. 21 & 22 Car. 2. B. R.

3. *Waif in one Manor ſtrays into another*; Per Cathin Ch. J. no Property is changed by the Waif without *Seiſure*, unleſs in the King's Caſe by Prerogative. D. 338. a. pl. 40. Trin. 16 Eliz. Anon.

4. When Cattle come into other Men's Grounds ſtraying from the Owners, then the Party or Lord into whoſe Grounds or Manors they come cauſeth them to be ſeiſed, and a *Wythe put about their Necks*, and to be *cryed in three Markets* adjoining, ſhewing the Marks of the Cattle, and then if the true Owner claims them not within a Year and a Day, the Property of them is in the Lord of a Manor whereunto they did ſtray, if he have all Eſtrays by Cuſtom or Charter, elſe to the King. Bacon's Uſe of the Law. 65.

5. If *two Tenants in Common* be *of a Manor*, to the which Waif and Stray does belong, a Stray does happen, they are Tenants in Common of the ſame, and if the *one does take the Stray*, the *other has no Remedy by Action but to take him again.* Co. Litt. 200. a.

6. *But if by Preſcription the one is to have the firſt Beaſt* happening as a Stray, *and the other the ſecond*, there an Action lies if the one takes that which pertains to the other. Co. Litt. 200. a.

7. If any *Eſtray happen within the Manor of the Wife*, if the *Husband dies before Seiſure, the Wife ſhall have* it, for that the Property was not in the * Wife before Seiſure. Co. Litt. 351. b. * It ſeems that this ſhould be (Husband.)

8. A Man ſeiſed of a Manor to which he has Stray appendant by Preſcription &c. *by his Bailiff he ſeized an Ox as a Stray* within the Manor, *and makes Proclamations* according to Law, and within the Year, *and lets the Manor with all Royalties, and Liberties*, and after *the Year and Day paſſed*; Brown J. was of Opinion, that the Leſſor ſhould have it,

it, foraſmuch as he had the Poſſeſſion, and when the Year and Day are paſſed, the Propriety ſhall have Relation to the Time of the firſt Seiſure; But all the Juſtices were againſt him, and that the *Leſſee ſhall have it*, foraſmuch as the Propriety of the Stray is not altered or changed before the Year and Day, and the Lord of the Manor untill the Year and Day are paſſed, has but the Cuſtody, ſo that the Owner may relieve it always within the Year and Day, if he will pay for the Meat of it. 12 Rep. 100. Trin. 10 Jac. Anon.

9. The Lord gains no *Property* in an Eſtray till the Year and Day be paſt &c. nor can he maintain an Action of *Treſpaſs for taking from him* ſuch Eſtray in the Interim, for he cannot ſay Quare Ovem &c ſuam cepit till the Year expired, but he may maintain a ſpecial Action upon his Caſe for ſuch taking. Clayt. 107. pl. 182. Aſſisa. Apr. 8. Car. Whitfield Judge. Burdet v. Matthewman.

(G.) When and how to be delivered to, or demanded or ſeiſed by the Owner.

1. IF a Horſe, Ox, or Cow come as *Eſtray*, and the *Lord of the Manor* who has Strays there *takes it*, and the *Owner comes within a Month and demands his Beaſts*, and the *other retains it for his Food*, this is a good Juſtification; And ſo ſee that though the Property be not changed to the Lord within the Year, yet he may juſtify the retaining for his Food; For he is not bound to give Food to the Beaſt of the Owner for nothing, *and* he may retain *it till the Owner be known* who will claim it, otherwiſe it is of Diſtreſs. Br. Juſtification, pl. 17. cites 44 E. 3. 12.

S. P. and ſo by the Affirmance of the Neighbours, and it need not be by Oath.

2. If the Owner demands the Eſtray and makes any *reaſonable Proof*, As if he *ſhew the Marks &c.* it is ſufficient, and the Party at his Peril ought to deliver him the Eſtray. Godb. 150. pl. 195. Paſch. 5 Jac. C. B. Taylor v. James.

Noy 144. S. C.

3. If he can inſtruct him, and *give any Reaſon why* the Eſtray belongs to him, it is ſufficient, As in the Caſe of Wreck, ſi dicere poterit. Godb. 150. pl. 195 Haſch. 5 Jac. C. B. Taylor v. James.

4. *Agreement* ought to be made *for the Keeping*, and the Quantity thereof ſhall be *tried* if it come in Queſtion. Godb. 151. pl. 195. Paſch. 5. Jac. C. B. Taylor v. James.

5. Treſpaſs for his Horſe; Defendant that one P. was Owner of the Horſe, and that the Horſe eſtrayed out of his Poſſeſſion and came to the Hands of the Plaintiff, and that he by Command of P. *demanded* the Horſe within a Year &c. *and tendered Amends*, and that the Plaintiff refuſing to deliver him he took him; To this there was a frivolous Replication, and upon that a Demurrer; And per Cur. *without telling any Marks, or making any Proof of Property*, (which may be done upon the Trial) the Owner may ſeiſe his Horſe where he finds him. 2 Salk. 686. pl. 1. Mich. 4 Ann. B. R. Henly v. Walſh, cites Co. Ent. 40. 170. b. Raſt. 680. 7 H. 6. 2. 44 E. 3. 14. Br. Eſtray 1.

(H.)

(H.) Pleadings and Evidence.

1. *Treſpaſs of a Mare* taken Vi et Armis; the *Defendant ſaid, that the King had Eſtrays in the Foreſt of L. and the Mare came ſtraying, and he took it there to the Uſe of the King* &c. Per Kirton, he *does not ſay that he was ſeiſed as an Eſtray one Year and a Day, nor that it was cried* in the Church, nor Markets, ſo that the Property may alter; Per Knivet, if it was ſeiſed for the King as an Eſtray, it is not lawful for you to take him before Suit made, and Proof of the Property; and per Kirton, he *ſhall ſay that he ſeiſed as Eſtray and kept it for a Year and a Day, and made Cry in the Market, and in the Church*, Prout moris eſt. Br. Eſtray, pl. 4. cites 39 E. 3. 3.

2. *Detinue of an Aſſe* eſtrayed; the Plaintiff *counted that he eſtrayed from him, and was with the Defendant for a Month, and at the End of the Month the Plaintiff demanded it of the Defendant and offered reaſonable Satisfaction, and he would not deliver it*; and the *Defendant ſaid that he tendered but 2 s. which was not ſufficient* for this time, *Priſt*; and the Plaintiff ſaid, that he offered ſufficient, Priſt; and the other e contra, and ſo to Iſſue; and ſo it ſeems that he who takes as Eſtray may retain it till he has ſufficient for the finding of the Beaſt. Br. Eſtray, pl. 1. cites 44 E. 3. 14.

3. Action upon the Caſe by a Prior, *for that where he and his Predeceſſors, by reaſon of his Franchiſe, have always had all Beaſts Eſtrays coming within their Manor* &c. there had the Defendant taken two Horſes &c. And held a Title good enough, without claiming as appendant to the Manor, or by Grant, or ſuch like, &c. becauſe the Writ is not to try the Right, but to puniſh the Tort. Thel. Dig. 105. lib. 10. cap. 14. S. 3. cites Mich. 13 E. 3. Brief 674. But ſays the Defendant ſhall have Traverſe to ſuch Title. 46 E. 3. 29.

4. *Treſpaſs of Cygnets taken*; The Defendant *ſaid, that he is Lord of the Manor of B. and that he and thoſe Que Eſtate &c.* have had the Eſtrays there &c. Time out of Mind, and that the Cygnets at the Time &c. were Eſtrays there, by which he *ſeiſed as Eſtray*, and proclaimed them in Fairs and Markets, and as ſoon as he knew that they belonged to the Plaintiff, he delivered them to him at D. &c. and a good Plea, and not double; For the firſt Plea excuſes him of the Tort, and the other of the Damages, that he ſhould not recover the Value of the Cygnets. Br. Double Plea, pl. 41. cites 7 H. 6. 27.

5. Treſpaſs of a Horſe taken; Fulth. ſaid, that *H. was Sheriff of the County of E. and the Defendant was his Bailiff* ſuch a Year, and at M. in the County aforeſaid the ſame Horſe came an Eſtray, and none knew him, nor demanded him, by which the Defendant, as Bailiff of the ſaid Sheriff of E. *ſeized him, and had him proclaimed at the Market Days, and ſhewed what in certain, and none came to challenge him, by which he took and ſold him, and the Sheriff accounted thereof in the Exchequer*, and demanded Judgment, ſi Rege inconſulto you ought to proceed. Quære of the Aid of the King. Br. Eſtray, pl. 5. cites 14 H. 6. 5.

6. In an Action upon the Caſe by R. againſt D. *for miſuſing of the Plaintiff's Horſe*, by Occaſion of which Miſ-uſe the ſeid Horſe became blind of one Eye, and Gall-back'd. The Plaintiff counted, *that the ſaid Horſe was ſtolen by three Felons, after whom the Plaintiff made freſh Suit*, and that the Felons were apprehended, and attainted at his Suit before Windham J. and that the ſaid Horſe came unto the Hands of

the Defendant, who miſuſed it ut ſupra. The Defendant ſaid, that before that, and the ſaid Attainder of the ſaid Felons, *the ſaid Felons had waived the ſaid Horſe within his Manor, in which* Manor he had Waiſe and Eſtray &c. And it was holden by the Court that the ſame was no Plea without traverſing the freſh Suit whereof the Plaintiff had declared; for by the freſh Suit the Property of the Plaintiff in the ſaid Horſe was preſerved, and ſo upon that Miſuſer of the Horſe by the Defendant, an Action well lies; and Judgment was given for the Plaintiff accordingly. 2 Le. 192, 193. pl. 242. Trin. 28 Eliz. C. B. Rook v. Denny.

7. The Lord of a Manor cannot preſcribe, that if any *Stranger drives an Eſtray out of the Manor*, that he ſhall be amerced in the Court of the Manor. D. 199. b. Marg. pl. 58 cites 41 Eliz. Perkins v. Cumberford.

8. *Trover* of a Cow at Salop. Defendant *pleads* he ſeized her a Stray in his Manor of D. and cauſed her to be *proclaimed* in two Market Towns next adjoining, and that Plaintiff claimed her, and Defendant demanding of Plaintiff to pay for her Feeding, Defendant refuſed, and ſo denied to deliver her, and traverſes that he is guilty of the Converſion apud Salop; And on Demurrer, becauſe he alleged not that the Proclamations were made *in the Pariſh Church*, and becauſe he *traverſed the Vill*, and likewiſe for want of a Profert, Defendant claiming by a Grant of the King, Judgment pro Quer'. Cro. E. 716. pl. 42. Mich. 41 & 42 Eliz. C. B. Brownlow v. Lambart.

9. In the Replication, the Plaintiff avows the taking as an Eſtray &c. as Bailee &c. and that he delivered the Mare and Colt to the Copyholder of the ſaid Manor to depaſture in a Cloſe which is within the ſaid Manor, and that a Year and a Day was paſt, and that within the Year the Plaintiff had refuſed to ſatisfy for the Feeding. Per Cur. the *Bailee cannot delegate his Authority to another, or deliver the Eſtray to be kept by another*, but the Eſtray *ought to be kept within the Demeſnes of the Manor, in Loco aperto*, ſo that it be obvious to the View if Search be made. Noy 144. Taylor v. Jeanes.

10. In a Juſtification for an Eſtray, the *Defendant did not allege that it came into the Manor as an Eſtray*, and therefore the Plea was held inſufficient. Brownl. 236. Trin. 8 Jac. Harvey v. Blacklock.

11. In blaiming a Right to Eſtrays, it ſhould be ſaid *Tanquam ad Manerium prædict' pertinen'*; for a Man cannot have Eſtrays *in Groſs by Preſcription*, becauſe they lie in Grant, and will not originally paſs without Charter, and therefore where they are in Groſs they are to be claimed by a *Que Eſtate*, and made Title unto by meſne Conveyances. Jo. 283. Anno 8 Car. in Itin' Windſor, in Totterſhall's Caſe.

12. Treſpaſs for his Horſe; Defendant pleaded, that one P. was Owner of the Horſe, and that the Horſe eſtrayed out of his Poſſeſſion and came to the Hands of the Plaintiff, and that he by Command of P. demanded the Horſe within a Year &c. *and tendered Amends*, and that the Plaintiff refuſing to deliver him he took him; To this there was a frivolous Replication, and upon that a Demurrer. Without telling any Marks, or making any Proof of Property which may *be made on the Trial*, the Owner may ſeize his Horſe where he finds him; Per Cur. 2 Salk. 686. Mich. 4 Ann. Henly v. Walſh.

13. Though the Defendant does not plead directly that he tendered Amends, but only that he demanded the Horſe *proferendo Satisfaction'*, yet the Court held this a direct Affirmation, like the Caſe of Warrantizando vendidit, where the Participle affirms as directly as a Verb; So dans plagam mortalem is well enough. Ibid. ſays, Vide 2 Cro. 630 4 Rep. Long's Caſe.

14. And

14. And per Cur. though it was ſaid he tendered *Amends generally*, and did *not expreſs any certain Sum*, yet that was good in this Caſe; and a Difference was taken between this Caſe and that of a Tender of Amends for a Treſpaſs; In that of a Treſpaſs, if the Defendant pleads a Tender of Amends, he muſt ſhew what he tendered, for he muſt tender a certain Sum, and the Law puts this Difficulty upon him becauſe he is the Wrong-doer, and the other is confeſſedly a Party injured; But the Owner of the Eſtray is no Wrong-doer, and it is impoſſible he ſhould know how long his Horſe had been in the Lord's Cuſtody, nor how much will make a proper Satisfaction. 2 Salk. 686. Mich. 4 Ann. Henly v. Walſh.

15. Another Exception was, that the Defendant does *not aver* that the *Amends* tendered was *refuſed*; Et adjornatur. Ibid.

16. Where the Plaintiff brought Treſpaſs for *taking his Eſtray*, and *then in his Replication does not ſet forth that he proclaimed him*, and it does alſo there appear *that it was more than a Year and a Day after the taking it as an Eſtray*, that the Defendant as Owner took it away; In this Caſe the Plaintiff's *Replication deſtroys his Action*; For now, after the Year and Day the Lord had the abſolute Property, which is a much greater Property than a Lord has in an Eſtray, and if you firſt declare for him as an Eſtray, and in your Replication ſhew that the Property was abſolute in you, it is bad; Per Holt Ch. J. Holt's Rep. 564. pl. 42. Hill. 4 Ann. Henly v. Walſh.

17. Holt Ch. J. cited Noy 144. Godb. 150. to ſhew, that in Caſe of an Eſtray, the *Lord ought to make a Demand of* what the *Amends* ought to be *for the keeping*, and then if the Party thinks the Demand unreaſonable, he ought to *tender ſufficient* Amends; but if he tender inſufficient Amends, the Lord ought ro take Iſſue, and let the Jury ſettle what the Keeping is worth. Note, in this Caſe the Action was brought for an eſtray Colt, and by the Replication it appeared that it was *after the Year*, and rhen it *ceaſed to be an Eſtray*, and became the Lord's Property. Per Holt Ch. J. it became an Eſtray after the firſt Proclamation, and not ſooner; the Owner is ſubject to pay for no more than a Year's Keeping, which ſhall commence irom the Seiſure. Per Powell J. the pleading a Tender of ſufficient Amends is well, and a good Iſſue. 11 Mod. 89. pl. 12. Trin. 5 Ann. B. R. Henly v. Welch.

18. If in Treſpaſs by the Lord for taking his Eſtray after the Year, the Lord does not *ſhew that it was proclaim'd the next Market Day after it was found at the next Market Town*, he has no Property in the Eſtray, and the Action fails; For the Lord to juſtify himſelf muſt ſhew that he did what the Law required of him to give him this Title. Per Holt Ch. J. to which Powell agreed, and Judgment accordingly. Holt's Rep. 564. Henley v. Walſh.

For more of Eſtray in General, See other proper Titles.

Eſtreats.

Eſtreats.

Note, that eſtreats of fines may be discharged. — 1. By Motion in a ſummary way on motion. Park. 54. Salk. 54. 1. Salk. 54. — 2. By a more ſolemn way by pleading to the eſtreat. Lane 55. Trem. 569. — 3. By obtaining a Certiorari from the Exchequer to bring the record of the fine, & then pleading on ſuch certiorari, of which there is a precedent in Trem. 559.

1. THE *Chancellor (after the End of the Norman Period) put the King's Seal to all Patents* which was the Foundation and Baſis of the Revenue; but *when any ſuch Patents were ſealed, they were eſtreated into the Exchequer*, and the Execution iſſued out of the Court of Exchequer for all the Reſervations on ſuch Patents; for as the Chancery was a Cheque upon the civil Juſtice by iſſuing Originals, ſo likewiſe it kept the Foot and Foundation of all certain Revenues of the Crown, which were eſtreated into the Exchequer, in Order to be there gathered and paid in. Gilb. Hiſt. View of the Court of Exchequer. 8.

2. Likewiſe *all Fines upon Crimes in the Court of King's Bench were to be eſtreated* into the Exchequer, in Order to levy ſuch Fines there, or if they were already levied, they were yet to be eſtreated in Order that the Clerk of the Crown might account for ſuch Fines ſo received in the Court of Exchequer. Gilb. Hiſt. View of the Court of Exchequer. 9.

3. A *By-Law* was made *in a Court-Leet* held for the King within his Honour of Graſton, *that every Perſon within the Leet, who ſhould receive* or place *any Inmate* in a Houſe there, *without giving Security to the Overſeers of the Poor &c. ſhould pay 5 l. per Month*, and T. S. was fined 20 l. for a Breach of the ſaid By-Law, which Fine was eſtreated, and Proceſs iſſued upon it; Hale Ch. Baron ſaid it is a good By-Law, and frequent in Leets, but *it is hard to eſtreat the Fine before taking the uſual Remedy* for it *by Diſtreſs*; *and to extend the Party's Lands when perhaps he may have ſomething to plead* to it, as that he is not within the Leet, or that he received no Inmate; but the Officers ſaid it was uſual to eſtreat ſuch Fines into the Exchequer when they belong'd to the King; otherwiſe when they belong to Subjects; and the Party was ordered to plead. Hardr. 471. pl. 6. Trin. 19 Car. 2. in Scacc. Anon.

4. The Barons of the Exchequer have now agreed, that they may cauſe *Proceſs* to iſſue on *a Recognizance* eſtreated with a *Reſpectuatur*; but B. R. directed that in ſuch Caſes the Sums be ſcraped out in this Court and then they cannot proceed. Per Aſtry. Comb. 68. Mich. 3 Jac. 2. B. R. Anon.

Eſtreat diſcharged on Motion Park. 54.

5. E. ſued a Writ out of C. B. againſt S. directed to the *Sheriff* of York, who *ſent a Warrant to S. the Bailiff of the Liberty of P. who did not return the Writ*, for which he was *amerc'd* 50 *l.* (viz. Time after Time) which was eſtreated into the Exchequer. Afterwards E. and S. agreed, and *on producing a Certificate from Plaintiff's Attorney that the Debt was ſatisfied*, theſe *Amercements were diſcharged* upon Motion to the Barons. 1 Salk. 54. pl. 3. Mich. 9 W. 3. Eyres v. Smith.

Ibid. 55. in a Nota ſays, there ought to be a Conſtat of the Eſtreats, and as the Clerks ſaid, the Court uſes not to diſcharge the Amercements, but allow you to compound them.

6. In an *Information in Nature of a Quo Warranto* Iſſues were returned upon three ſeveral Diſtringas's, and upon a Motion for a Rule to eſtreat them, Holt Ch. J. ſaid that *the Courſe of the Court is to ſend them up into the Exchequer at the uſual Times*, which are *twice a Year*, viz. *on the laſt Days of the two iſſuable Terms*; but in extraordinary Caſes there may be a Rule to eſtreat them, and the Motion was denied. 1 Salk. 55. pl. 4. Mich. 11 W. 3. B. R. The King v. Mayor of Hertford.

7. If

7. If *Recognizances* are eſtreated into the Exchequer becauſe not punctually complied with; yet *if the Party appears and takes his Trial next Seſſions*, he may *compound* for a very ſmall Matter *in the Court of Exchequor*, becauſe the Effect though not the exact Form of the Recognizance, is complied with. 10 Mod. 278. Hill. 1 Geo. 1. B. R. The King v. Tomb.

8. *Judges of Oyer and Teminer are the proper Judges, whether Recognizances ought to be eſtreated* or ſpared. It is for the Advantage of publick Juſtice that it ſhould be in the Power of Juſtices of Oyer and Terminer, to ſpare the Recognizance, if upon the Circumſtances of the Caſe they ſee fit. Per Cur. 10 Mod. 278. Hill. 1 Geo. 1. The King v. Tomb.

For more of Eſtreate in General, See **Amercements**, and other Proper Titles.

See also Lane 55. — Hardr. 409. — Trem. 559. 569. — 1 L. Raym. 243. — Bunb. 24. — Sav. 53. — Lambert. 385. Park. 54. 1 How. Pr. Exchq. 111.

Eſtrepement.

(A) What it is.

1. THERE are two Kinds of Eſtrepements, the one *Original*, and may be ſued out with the original Præcipe, by which the Land is demanded, or at any Time pending the Plea directed to the Sheriff, the Party or both; The other is *Judicial* to be granted by that Court where the Plea dependeth. 2 Inſt. 328.

2. There is a Difference between Eſtrepement and Waſte; For *Waſte is by particular Tenant, who may be puniſhed by Writ of Waſte*; and *Eſtrepement is by him who has Eſtate of Inheritance by defeaſible Title.* Br. Eſtrepement, pl. 10. cites F. N. B. 60, 61.

(B) Granted in what Caſes, and when; And upon what Writ.

1. *Stat. Glouceſter*, 6 E. 1. cap. 13. *AFTER a Plea is moved in London by Writ, the * Tenant ſhall have no Power to make Waſte or Eſtrepement of the Tenement † hanging the Plea; if he do the Mayor and Bayliffs ſhall cauſe it to be kept ſafe at the Suit of the Demandant. And the ſame ſhall be obſerv'd in other Cities and Boroughs, and throughout the Realm.*

* If the Tenant makes a *Feoffment pendente Placito*, in Law he remains Tenant, and the Demandant may have an *Eſtrepement againſt him and the Feoffee alſo*; And *ſo againſt the Tenant and the Vouchee or Prayee in Aid.* 2 Inſt. 328. — F. N. B. 61. (B) S. P.

If there are *two Tenants* the Demandant may ſue an *Eſtepement againſt one* of them; and after Judgment a Writ of Eſtrepement lies againſt the Tenant and a Stranger by the Common Law. 2 Inſt. 328.——F. N. B (P) S. P.

† This is to be *underſtood of a Judicial Writ of Eſtrepement granted out of C. B. &c. when the Principal Writ is return'd*; For before that it is not depending there; but the Demandant may have an original Writ of Eſtrepement together with the Principal Writ out of Chancery. 2 Inſt. 329.

In a Formedon of a Manor if a Tenancy eſcheats after a Writ of Eſtrepement ſued out, this Writ ſhall extend to it, becauſe it comes in lieu of the Services, and yet that Land was not demanded. 2 Inſt. 329.

2. Eſtrepement was ſued for *Waſte done meſne between the Judgment in Writ of Waſte and the Execution*, and the Writ awarded good; Per Cur. Br. Eſtrepement, pl. 12. cites 4 E. 3. 32.

3. *Aſſiſe* the *Plaintiff recovered* and came *and ſaid, that the Defendant had Cut Trees meſne between the Verdict and Judgment*, and prayed Writ of Eſtrepement; Per Shard, of all Damages which the Defendant has done between the Verdict and Judgment you ſhall have Writ to the Sheriff to inquire, and upon this returned, you ſhall recover your Damages, and this is beſt for you; For in Writ of Eſtrepement the Defendant ſhall have anſwer, and ſo ſhall he not have here, wherefore ſue ſuch Writ if you will. Br. Eſtrepement, pl. 7. cites 21 E. 3. 3.

2 Inſt. 328. S. P. and cites S. C.

4. *Scire Facias upon a Fine*, the *Plaintiff prayed Writ of Eſtrepement* againſt the Defendant and had it by Award in Banco; and yet per Wangf. he ſhall not have it but *upon Original*, and *not after Judgment, nor upon Writ Judicial*; For by him if a Man brings a Formedon and recovers, and the Tenant does Waſte meſne between Judgment and Execution, yet Eſtrepement does not lie, and yet it was granted in this Scire Facias by award; quod nota. Br. Eſtrepement, pl. 6. cites 33 H. 6. 6.

5. *Scire Facias to have Execution of certain Land*; the Plaintiff pray'd Writ of Eſtrepement to the Defendant, that he ſhould not make Waſte &c. and per Brian and Vaviſor, Writ of Eſtrepement lies as well in Scire Facias as upon Original; for *it lies upon every Action and Execution where the Plaintiff or the Demandant cannot recover Damages*, and Scire Facias to anſwer to the Waſte was *denied, becauſe he had it not before Writ of Eſtrepement awarded*; but if the Tenant does Waſte after Writ of Eſtrepement awarded, there he ſhall have Sci. Fa. for it does *not lie upon Surmiſe only, but upon Matter of Record and Surmiſe* it lies well. Br. Eſtrepement, pl. 8. cites 14 H. 7. 7.

6. *Error in B. R. upon a Recovery in Aſſiſe*, and *he againſt whom the Execution was* came and *prayed Writ of Eſtrepement againſt him who recovered*, and per Fineux Ch. J. the Writ does not lie; for now Damages are given in Writ of Error by Statute, and *where a Man may recover Damages there lies no Eſtrepement*. Br. Eſtrepement, pl. 9. cites 14 H. 7. 10.

7. *And* per Cotler *in Writ of Waſte*, the *Tenant did Waſte pending the Writ*, he ſhall not have Eſtrepement before the Waſte aſſigned; but *after the Waſte aſſigned, he ſhall have Writ* of Eſtrepement; Quære, for Keble denied it. Ibid.

8. *And in Aſſiſe, which found for the Plaintiff*, and *Matter is pleaded in arreſt of Judgment*, or if a *Releaſe* be *pleaded after Verdict*, or if the *Juſtices take Adviſement*, there Eſtrepement lies, Per Read J. becauſe the Damages cannot be given, but becauſe it is made before Judgment, and for Fear of Waſte after he ſhall have Writ of Eſtrepement; Per Rede. Ibid.

9. *Original of Formedon* was ſhewn in C. B. *returnable the next Term*, and the *Demandant ſurmiſed Waſte* and Deſtruction, *and prayed Eſtrepement*; Per Engleſield, the Statute of Glouceſter cap. 13. is, That if a Man does Waſte or Deſtruction, pending the Plea, that the Party ſhall have Eſtrepement, and the Plea is not pending till the Writ be return'd. Br. Eſtrepement, pl. 1. cites 18 H. 8. 5.

10. *Where*

10. *Where Action is brought*, as Formedon &c. *in which a Man ſhall not recover Damages*, there he ſhall have Writ of Eſtrepement. Br. Eſtrepement, pl. 10. cites F. N. B. 60, 61.

11. A Writ of Eſtrepement was granted *in a Writ of Dower Unde Nihil habet*, becauſe at firſt it is uncertain whether the Demandant will recover Damages or not in this Writ. Bendl. 33. pl. 55. Paſch. 3 E. 6. Anon.

12. In every Præcipe where the *Demandant is to defeat the Poſſeſſion* of the Tenant, there for doubt that his Adverſary will do Waſte, he may have Writ of Eſtrepement to prohibit him to do Waſte. Mo. 69. pl. 186. Trin. 6 Eliz. Anon.

13. A Writ of Eſtrepement was brought againſt Husband and Wife, *after Judgment in a Quid Juris clamat, and before Execution*; and it was granted. Dyer 325. b. pl. 39. Trin. 15 Eliz. Catesby v. Baudes, and Ibid. cites S. P. Mich. 30 H. 8. Bowldes v. Newport.

A Writ of Eſtrepement lies for Waſte done after Verdict and before Judgment. 2 Inſt. 328.

14. *Pending a Writ of Partition between Coparcenors*, the *Tenant committed Waſte*; the Court would not grant a Writ of Eſtrepement, becauſe in this Caſe there was equal Intereſt between the Parties and the *Writ will not lie but only where the Intereſt of the Tenant is to be diſproved.* Gouldsb. 50. pl. 12. Paſch. 29 Eliz. Anon.

Bendl. 29. pl. 43. Paſch. 43 H. 8. Anon. P. C. and denied by all the Juſtices, becauſe both Tenants are in Poſſeſſion of the ſaid Lands, and either of them may take Trees there. — In Writ of Partition a Writ of Eſtrepement was denied, becauſe in ſuch Writ no Land is demanded. 4 Le. 60. pl. 150. Mich. 26 Eliz. C. B. Barker's Caſe. — Ibid. 122. pl. 147. Baker's Caſe, S. C. in totidem Verbis. — 2 Inſt. 329. S. P.

15. *Entry ſur Diſſeiſin* of a Diſſeiſin made to himſelf. The Plaintiff pray'd a Writ of Eſtrepement, and it was doubted if he ſhould have it, becauſe he is in this Action to recover all his Damages; But afterwards the Writ was granted; for otherwiſe the Plaintiff might have his Houſes and Woods defaced and deſtroyed, and turn'd to his Remedy to recover in Damages againſt one who perhaps is not worth ſo much. Cro. E. 484. pl. 21. Trin. 38 Eliz. C. B. Wright v. Penry.

Cro. E 393. pl. 16. Paſch. 37 Eliz. C. B. Ardern v. Darcy.

16. *Error was brought to reverſe a Common Recovery in Lancaſter in* a Writ of Entry, and whilſt that Writ was depending, an *Eſtrepement was awarded to the Tertenants*, and an Attachment thereupon; and adjudged that it was well granted. Cro. E. 774. pl. 4. Mich. 42 & 43 Eliz. B. R. Holland v. Dauntſy.

Mo. 622. pl. 850. Holland v. Jackſon & al' S. C. and awarded by all præter Fenner, that the Writ was well maintainable; and that ſo it is in Attaint.

17. This Writ lies *in Action of Waſte* as well *at any Time before Judgment* as after Judgment, and before Execution; for he cannot recover Damages for more than is contain'd in the Count, and he cannot aſſign any Waſte done after the Writ purchas'd; Reſolv'd. 5 Rep. 115. b. Trin. 43 Eliz. C. B. Foliamb's Caſe.

It may be directed to the Party and the Sheriff before Judgment. Noy 143. Ray's Caſe.

18. *Where Damages are to be recovered, but not Pendente Placito*, there without Queſtion Eſtrepement doth lie. 2 Inſt. 328.

19. *Error* was brought *to reverſe a Common Recovery had againſt an Infant*, and upon that Sci. Fac. ad audiendum Errores; Eſtrepement was pray'd, and per Curiam allow'd; becauſe it lies in the Original Writ; See likewiſe in a Writ of Entry in the Poſt. Noy 134. Trin. 7 Jac. B. R. Louch's Caſe.

20. In a Partitione facienda, by Tenant in Common againſt the other an Eſtrepement was granted *for all that the Plaintiff had confeſt to be held in Common, and not of more*, for by ſuch means, a Man may be inhibited to cut his own Bows, according to his occaſions. But Bendlowes, cap.

cap. 5. fo. 4. ſeemed, that an Eſtrepement does not lie between Tenants in Common. But in M. 6 Jac. it was ruled that the Eſtrepement ſhall ſhall be granted, although that Cook Ch. J. held with Benlowes. But note. that in 5 Jac. Lady Lucy v. Oxenbridge, an Eſtrepement was granted in a Partitione faciend', becauſe it is a real Action, and no damages to be recovered. And Brownlowe ſhewed many Preſidents contrary to Benlowes. Noy 143. Baily v. Knighton.

21. A Writ of Eſtrepement was granted in Waſte becauſe that for Waſte done, *pending the Writ*, the Plaintiff cannot recover Damages; Per tot Cur. Godb. 164. pl. 229. Paſch. 8 Jac. C. B. Anon.

22. In an Action of Waſte for *digging Earth to make Brick* Eſtrepement was awarded, and on Affidavit that the Writ of Eſtrepement was delivered to the Sheriff, and that he gave Notice of that to the Party, and he notwithſtanding continues to do Waſte, *Attachment* was awarded. 2 Brownl. 168. Paſch. 10 Jac. C. B. Anon.

23. Affidavit that Waſte was committed after an Eſtrepement, yet no *Attachment* was granted, but had it appeared by Pleading, or upon the Return of the Sheriff, it had been otherwiſe. Winch. 15. Paſch. 19 Jac. Sir George Tipping's Caſe.

24. In a *Writ of Partition* after Summons an Eſtrepement was granted generally againſt the Parties, and their Servants, for in Partition no Damages are to be recovered. Het. 32. Mich. 3 Car. C. B. Anon.

25. It ſeems that Eſtrepement lies not *on a Writ of Error* of a Judgment *in Partition*. Sid. 369. pl. 7. Trin. 20 Car. 2. B. R. Danby v. Palmes.

(C) Granted. Out of what Court; And to whom.

1. QUÆRE, if *Juſtices of Aſſiſe* may award an Eſtrepement, and ſee the Regiſter, and Na. Br. thereof according to the Regiſter, fo. 77. Br. Eſtrepement, pl. 7. cites 21 E. 3. 3.

2. Note, that a Man ſhall have Writ of Eſtrepement *out of the Chancery, or out of the Court where the Plea pends*, and may have it *to the Sheriff, or to the Party, or to both*, and it was granted *upon a Scire Facias upon a Recovery in Formedon*. Br. Eſtrepement, pl. 2. cites 2 H. 6. 13.

(D) Granted. Againſt whom.

1. QUÆRE if Writ of Eſtrepement lies *againſt Tenant by the Warranty, or* the *Praiee in Aid*, and if it lies againſt *the Alienee who purchaſes pending the Writ*. Br. Eſtrepement, pl. 5. cites 28 H. 6. 8.

3. *But* if *a Stranger makes Eſtrepement, pending the Writ, by Commandment of the Tenant*, the Tenant ſhall be charged. Ibid.

3. If a *Stranger* of his own Wrong, *without the Privity of the Tenant, doth Eſtrepement* or Waſte *after the Writ ſued out*, the Tenant ſhall not be puniſhed for this Waſte. 2 Inſt. 328.

(E.) Writ, Pleadings, Proceedings and Judgment.

1. *Jointenancy at the Original is a good Plea*; Otherwiſe to ſay that he was Jointenant at the Time of the Judgment given. F. N. B. Marg. in the Engliſh Edition, cites 5 E. 2. Eſtrepement. 11.

2. Eſtrepement was ſued *pending a Writ of Waſte*, and *aſſigned the Eſtrepement in Trees cut*, and the *Defendant ſaid that he had not done any Waſte after the Writ delivered to him*; and a good Plea, per Cur. Br. Eſtrepement, pl. 13. cites 12 R. 2. In the Eſtrepement pendente Placito the Demandant ſhall not recover Damages before Judgment is given in the Principal. 2 Inſt. 328. cites 12 R. 2. Eſtrepement 6.

3. Note that Writ of Eſtrepement may *vary from the firſt Record or Addition of the Name or Vill* &c. and yet good, becauſe *it is Original and not Judicial Proceſs*; quod nota. Br. Eſtrepement, pl. 3. cites 3 H. 6. 16. Thel. Dig. 77. Lib. 9. cap. 1. S. 11. cites S. C.

4. By which the *Defendant* came and *ſaid that he was within Age at the Time* &c. *and that his Guardian did the Waſte, abſque hoc that he did the Waſte*, and a good Plea, per Cur; quod nota. and yet Contra in Writ of Waſte; For there he is charged of his own Act, whoſoever did the Waſte, but here he is *charged by the Act of the Law only*. Ibid. In Eſtrepement the Tenant ſhall not have his Age; For it is in Nature of a Treſpaſs. 2. Inſt. 328. cites S. C.

5. *Præcipe* quod reddat brought *againſt one who had made a Leaſe for Years without Impeachment of Waſte before the Writ brought*, and the *Demandant brought Eſtrepement, and deliver'd it to the Tenant*, and the *Leſſee did Waſte, pending the Writ*; the Demandant *ſhall not recover Damages by the Eſtrepement againſt the Tenant*; for he did not do the Waſte, and the Leaſe was lawful at the Time of making of it. Br. Eſtrepement, pl. 4. cites 3 H. 6. 17.

6. Eſtrepement &c. in which the *Plaintiff counted that he had brought a Formedon in Deſcender* againſt the Defendant &c. *and had purchaſed a Writ of Eſtrepement, which he deliver'd to the Deſendant, who notwithſtanding afterwards had committed Waſte* contrary to the Prohibition, and in Contempt thereof; the Defendant pleaded, Quod nullum fecit Vaſtun, contrary to the Prohibition, but it was found by Verdict quod fecit, and thereupon the Plaintiff recover'd Damages and Coſts. Mo. 100. pl. 245. Paſch. 15 Eliz. Playſtow v. Bachelor. Bendl 216. pl. 250. C. B. the S. C. and Pleadings and Judgment for the Plaintiff accordingly.

7. The Demandant *in a Writ of Intruſion pray'd an Eſtrepement pending the Writ, and had it, and declared* upon it *that the Tenant after the Prohibition fecit Vaſtum, Eſtrepementum in proſternendo &c.* to which the *Tenant pleaded Not Guilty*; But the Court did not allow the Plea, becauſe there is no Iſſue; but he ought to plead Quod non fecit Vaſtum &c. after the Prohibition. 4 Le. 79. pl. 167. Mich. 29 Eliz. C. B. Hoo v. Hoo.

8. A *Writ of Intruſion was brought in the Per againſt the Heir* of the Intruder; and becauſe it was brought in the Per, the Court on conſidering the Stat. Glouc. cap. 1. in the End of it granted the Writ of Eſtrepement; but had the Writ not been in the Per, they doubted whether it would lie or not. Godb. 112. pl. 134. Mich. 28 & 29 Eliz. C. B. Anon.

9. The *Statute of Glouceſter, cap.* 13. *is* ſo *conſtrued that* by a Conſequent *the Party ſhall recover Damages for Waſte done (Pendente Placito) after the Writ deliver'd*, and therefore it is good Policy to purchaſe the Writ of Eſtrepement together with the Writ. 2 Inſt. 329.

10. *The Writ* itſelf *founded upon this Statute is but a Prohibition*, and upon the Attachments the Parties do plead. 2 Inſt. 329.

11. *Upon a Writ of Eſtrepement at the Common Law*, viz. *after Judgment the Plaintiff ſhall recover Damages for the Waſte done before*, without any Prohibition formerly delivered. 2 Inſt. 329.

12. Upon a Writ of Eſtrepement grounded upon this Statute of Glouceſter cap. 13. the *Sheriff may reſiſt them that do offer to do Waſte*, and if otherwiſe he cannot do it, he may lawfully impriſon them, or make a Warrant to others to do it, and if Neceſſity requires it, may take the Poſſe Comitatus: So odious in Law is Waſte and Deſtruction. 2 Inſt. 329.

13. Oath was made that the *Servants of Tenant in Dower had done Waſte after the Writ of Eſtrepement made known to them, but* the Court would not commit them, becauſe it was *not directed immediately to her and her Servants*, for then it had been a Contempt of the Court. Hob. 85. pl. 113. Trin. 12 Jac. Cumberland (Earl) v. the Counteſs Dowager.

For more of Eſtrepement in General, See tit. **Waſte**, and F. N. B. 60. (U) to 62. (R)

Eveſque.

What. [*Who is.*]

* Fol. 880. 1. **IF a Man be** elected, and the Temporalities granted **to him yet he is not Biſhop** before Conſecration. 41 E. 3. 6. 46 E. 3. 32, **Quære. For he** may refuſe **to be Biſhop after Election and before Conſecration, but not after.** 41 E. 3. 5. b.

Br. Preſentments al Egliſe, pl. 3. cites S. C. — Fitzh. Quare Impedit, pl. 129. cites S. C.

A Commiſſion ſhall not iſſue to the Biſhop by the Name of Biſhop before Conſecration, but only by the Name of Elect. Br. Quare Impedit, pl. 74. cites 21 E. 3. 39. 40. 2. **A Biſhop** elected before Conſecration **is not Biſhop.** 11 H. 4 38. b.

I. A Man may be Biſhop, Abbot or Prior *without Inſtallation.* Br. Quare Impedit, pl. 83. cites 22 H. 6. 25.

II. *Suffragan Biſhops* are properly Vicegerents of Biſhops, inſtituted to aid and aſſiſt in the Spiritual Office, and is ſo called a Suffragiis. 2 Inſt. 79.

III. Every Biſhop many Hundreds of Years after Chriſt *was Univerſal Incumbent of his Dioceſe, receiv'd all the Profits which were but Offerings of Devotion, out of which he paid the Salaries of ſuch as officiated under*

der him, as Deacons and Curates in Places appointed. Vaugh. 22. Paſch. 19 Car. 2. C. B. cites Seld. Hiſt. of Tithes c. 6. par. 3. fol. 80. b. c. 9. par. 2. fol. 253.

IV. Biſhop was a *Temporal Judge*, and *ſat with the Sheriff* in his Turne, till ouſted by Act of Parliament; Per Coventry; Arg. Palm. 345. Hill. 20 Jac.

V. A Biſhop *may conſiſt of Spiritualties only*, as if one be conſecrated Biſhop of a Place where he has Nothing, yet he is Biſhop, and may confer Orders, and diverſe great Abbots had ſuch Biſhopricks Propter Dignitatem. See Lat. 246, 247. Mich. 3 Car. in Caſe of Evans v. Aſcough.

VI. Originally the Biſhop was *Incumbent of the whole Dioceſe*, and ſerved the Cure by others; Per Eyre. J. 2 Salk. 540. pl. 2. Mich. 7 W. 3. B. R. The King v. Birch.

VII. Heretofore when a Biſhop was to be tranſlated there was no Election, for the Rule of the Canon Law was Electus non poteſt eligi; and becauſe it was pretended he was married to the firſt Church, which Marriage could not be diſſolved but by the Pope, thereupon Petition was made to the Pope, and upon the Pope's Conſent the Party was tranſlated; this was ſaid to be *by Poſtulation*. Vide Widdr. 48. b. Sed per Cnr. this was an Uſurpation, and againſt Law, and reſtrained by 16 R. 2. and 9 H. 4. cap. 8. and Tranſlations are ever by Election, and not by Poſtulation. 1 Salk. 137. Paſc. 11 W. 3. B. R. in Caſe of the Biſhop of St. David's Caſe v. Lucy.

Who may elect.

This in Roll is (B) tho' another (B) follows.

3. The Patronage of all Biſhopricks is in the King though he has given a Conge to the Chapters to elect them. 17 E. 3. 40. b.

4. In ancient Time the King gave the Biſhopricks. 17 H. 3. 40. b.

5. And after the King gave a Conge to the Chapter to chuſe them. 17 E. 3. 40. b.

6. 1 E. 3. Rot. Clauſo Memb. 11. in Dorſo there is ſuch Proteſtation made by the King, Cum Eccleſia Cathedralis viduatur & de jure debeat & ſoleat de Conſuetudine provideri per Electionem Canonicam ab ejuſmodi potiſſimum celebrandam Collegiis Capitulis & Perſonis ad quos Jus pertinet petita tamen prius ab illuſtri Rege Angliæ ſuper hoc Licentia & obtenta; Et demum celebrata Electione, Perſona electa eidem Regi habeat præſentari, ut idem Rex contra Perſonam ipſam poſſit proponere ſi quid rationabile habeat contra eum. And the Proteſtation is further, that if the Pope makes Proviſion without ſuch Canonical Election, the King ſhall not be bound to give to him his Temporalties, yet there of Grace for the Time preſent he gives the Temporalties to the Abbot elect of Canterbury. Vide the like 11 E. 1. Rot. Finium M. 5. for the Abbot of St. Auguſtin Cantuar' &c. See this there at large.

7. *Antiſtitum Roffenſium* ſubrogandorum Jus erat olim penes *Archiepiſcopos Cantuarienſes*. *Landavenſis* item Eccleſiæ *Patronus* olim erat *Comes Gloceſtriæ*. *Sodorenſis* etiam Epiſcopii in Mannia Patronus habetur hodie *Derbienſis Comes* utpote, Jure Avito, Inſulæ Dominus. Notæ Seldeni ad Eadmerum 144.

8. All the Archbiſhops and Biſhops of England have been *founded by the Kings of England*, and do hold of the King by Barony, and have been called by Writ to the Court of Parliament, and are Lords of Parliament. Co. Litt. 97. a.

9. All

Co. Litt. 134. a. S P. and ſays, that K. John by his Charter acknowledging the Cuſtom and Right of the Crown

9. All the Biſhopricks in England were at firſt of the King's Foundation, and *Donative per Traditionem Baculi*, viz. the *Croſier (which was a paſtoral Staff) et Annuli*, viz. *a Ring, whereby he was married to the Church.* And King H. 1. being requeſted by the Biſhop of Rome to make them elective, refuſed; but King John by his Charter, bearing Date 15th June, 17th Year of his Reign, granted that the Biſhopricks ſhould be eligible. Co. Litt. 344. a.

in former Times, yet granted De Communi conſenſu Baronum that they ſhould be eligible; And afterwards the Manner and Order, as well of Election of Archbiſhops and Biſhops, as of the Confirmation of the Election, and Conſecration, is enacted and expreſſed in the Stat. 25 H. 8. but by 31 H. 8. and 1 E. 6. they were made Donative by the King's Letters Patents; but thoſe Statutes are repealed, and the 25 H. 8. remains yet in full Force and Effect.

(B) What Perſon may elect a Biſhop, and who may be elected.

Who may elect.

Utcunque Canonibus priſcis adeo cautum fuerit ne Principes Epiſcopos aut inſtituerent, aut deſignarent, aut deſignatos, ſeu Electos in Dignitatis Poſſeſſionem mitterent, in utroque tamen Imperio tum Occidentis, tum Orientis Antiſtites Sacri a Regibus inſtituti occurrunt frequentiſſimi. Selden's Notes on Eadmer 144.

1. IN Time of King John after the Death of Hubert Archbiſhop of Canterbury the Covent elected another without Aſſent and Licence of the King before obtained to elect, as they before had done, but amended this in another Election. Speed 493.

2. The Election of the Biſhop by Dean and Chapter commenced by Grant of the King, but the Grant was to elect after Licence obtained, as appears by the Statute of 25 E. 3. Statute of Proviſors Raſtal 325. D.

3. And King John was the firſt that granted it by his Charter dated 15 Jan. Anno 16 as appears by Matthew Paris's great Hiſtory 253. Da. 1. *Dean and Chapter of Ferne's Caſe* 46. and Præmunire 90.

Fitzh. Quare Impedit, pl. 129. cites S. C.

4. The Pope may elect a Biſhop. 41 E. 3. 5. b. admitted 46 E. 3. 32. —— Br. Preſentation al Egliſe, pl. 3. cites S. C.

Fol. 881.

5. If a Biſhop be elected, he ought to be confirmed by the Pope. 41 E. 3. 5. b. (Quære by whom this Election is.)

6. The Chapter is to elect the Biſhop. 11 H. 4. 38. b.

7. Hill. 8 E. 3. B. R. Rot. 23. The Archbiſhop of York Summonitus per Breve de Venire Facias ad reſpondendum Domino Regi for Conſecration of the Biſhop of Durham Elect Biſhop without the Aſſent of the King, and Defendant ſays that he is a Peer of the Realm, and ought not to be compelled to anſwer by Attachment and Diſtreſſes, therefore &c. To which it is anſwered, that Contemptus Exceſſus & Tranſgreſſiones prædicti tangunt uſurpationem Juris Regii contra Coronam per quod prædictum Breve de Venire Facias fuit inventum per Concilium Regis quia in novo Caſu novum Remedium eſt apponendum Dies Datus eſt ad audiendum Judicium.

8. King

8. **King** William Rufus, **after the Death of the Archbiſhop of Canterbury,** kept the See without the Archbiſhop for four Years, and **diverſe other Eccleſiaſtical Promotions then vacant he aſſumed into his Hands putting to Sale the Free Rights of the Church.** **Speed.** 428. b. See (E) pl. 5.

9. **But King** H. 1. made a Law againſt Reſervations of the Eccleſiaſtical Poſſeſſions upon Vacancies. **Speed.** 435. See (E) pl. 5.

(C.) Biſhop.

How he may be elected.

1. **AFTER the Death of a Biſhop** the Pope reſerved **to him** the Benefice of the Biſhoprick, and gave it to another, **this is an Election.** 41 E. 3. 5. **admitted.** Fitzh. Quare Impedit pl. 129. cites S. C.

2. Licence to **chuſe a Biſhop, Rot. Romæ.** 15 E. 2. M. 7.

3. 25 *H.* 8. *cap.* 20. *S.* 4. *On avoidance the King ſhall grant his* Licence *under the Great Seal, to elect a new with a Letter Miſſive, containing the Name of the Perſon they ſhall chuſe, And in Caſe of Delay* 12 *Dayes the King may nominate and preſent by Letters Patents.*

And on Refuſal to confirm, *inveſt and conſecrate, within* 20 *Days, the Dean and Chapter, and every Archbiſhop and Biſhop, and all others ſo offending, their Aiders and Abetters ſhall incur a* Præmunire.

4. The *King may give Power to another to give his Aſſent to go unto the Election, and to certify* the ſame Election unto him again, and thereupon to take the Fealty of the Abbot, Prior or Biſhop, and to certify the King thereof in the Chancery. F. N. B. 170. (B)

5. Biſhop was conſecrated *without Cong' d'eſlire* by Direction of the King. Palm. 22. Paſch. 17 Jac. Bale Biſhop of Oſſery's Caſe. Conge d'eſlire is but a Form or Ceremony, which the Kings of this Realm have agreed to obſerve, and if they will not obſerve this Courſes it is well enough. Cro. J. 553, 554 pl. 15 Mich. 17 Jac. B. R. in the ſame Caſe by the Name of Keven Obrian & al. v. Knivan.

6. After the Counſel of *Lateran*, Biſhops were elected by *Conge d'eſlire* 10 E. 3. but before were *Donative* by the King, and by Donation was his Prerogative to preſent; Arg. Palm. 345. Hill. 20 Jac. B. R. Until the Time of William Rufus, and ſo until the Time of King John. Noy. 95. in Caſe of Evans v. Aſcough cites Eadmer.

7. When a Biſhoprick is void, the Courſe is firſt to have a *Conge d'eſlire.* 2dly, *Letters Miſſive* whom they ſhall chuſe; Per Whitlock J. (But per Jones theſe never are recorded.) Lat. 245. Mich. 3 Car. in Caſe Evans v. Aſcough.

8. The Manner of making a Biſhop, as well in Caſe of Tranſlation as new Creation is thus; *when a Biſhop dies, the Dean and Chapter certify the King in Chancery and pray his Licence to elect,* upon this the *King gives his Conge d'eſlire,* upon which the elect, and then *certify the King, Archbiſhop and Party, and then the King by his Letters Patents gives his royal Aſſent,* and *commands the Archbiſhop to confirm and conſecrate him,* whereupon the Archbiſhop examines the Election and the Party, and then confirms the Election, and Conſecration himſelf.

This is the Manner of Proceeding in Creations, and it holds likewiſe in Caſe of Tranſlation, ſave only that he is not conſecrated; for a Conſecration is like an Ordination, Character indelibilis, and ſuffices for ever. 1 Salk. 136. Paſch. 11 W. 3. B. R. in Caſe of the Biſhop of St. David's v. Lucy.

(C. 2) Of the Election, Confirmation, and Conſecration, and the Effect of either.

Lat. 247. Mich. 3 Car. in Caſe of Evans v. Aſcough, Whitlock, J. cited S. C. but held that this is to be underſtood of a Biſhop confirmed; For before Confirmation he has nothing; But the Chief Juſtice e contra, becauſe it is a Miniſterial Act.

1. A Biſhop elected *may certify Excommunication before he is conſecrated*; For after his Election by Congee of the King the Power of the Guardian of the Spiritualties ceaſes, and ſo for Neceſſity he ought to certify it. 8 Rep. 69. a. Mich. 6 Jac. in a Nota in Trollop's Caſe cites F. N. B. 62. (N).

2. There are three Principal Acts required to the making of a Biſhop, viz. Election, Confirmation and Conſecration; By Election he is *Epiſcopus Nominis non ordinis neque Juriſdictionis.* But by *Confirmation* he obtains *Poteſtatem Juriſdictiones*, as to excommunicate and to certify Excommunication after Election and Confirmation, then he has Poteſtatem *Ordinationis*, as to conſecrate Elects, confer orders &c. But the Poteſtas Juriſdictionis is not Univerſal (as the Poteſtas Ordinationis is) but ty'd to the Place and confin'd to his See, As to take Oath, to Excommunicate, to Correct, to puniſh Offences, and this Power he takes by the Confirmation, per Whitlock J. And agreed by all the J. that by Election only till Confirmation the Elect has nothing in him, neither in Caſe of Tranſlation nor Creation, and that the Name is not changed in Caſe of Creation until Conſecration, and not by Confirmation is cited 4 H. 4. 2. 9 H. 5. 13. 20 E. 3. Brief. 50. and 38 E. 3. 31. See Lat. 245, 246. Mich. 3 Car. in Caſe of Evans v. Aſchough.

3. A *Biſhop elect* may ſit in Parliament as a Lord thereof. 4 Inſt. 47. Cap. 1.

4. When a *Biſhop is tranſlated*, the *Old See is not void* by the Election, *till that Election is confirmed*; for though he be elected, the King may not now conſent, nor the Archbiſhop confirm; And it is not reaſonable they ſhould loſe their old Preſentment till they gain the new. 1 Salk. 136, 137. Paſch. 11 W. 3. B. R. in Caſe of Biſhop of St. David's v. Lucy. cites 1 Jon. 162.

5. As there are *four things required* to complete a Parſon, viz. Preſentation, Admiſſion, Inſtitution and Induction; ſo there are four things Analogically requiſite in making of a Biſhop; Election, which reſembles Preſentation; Confirmation, which reſembles Admiſſion; Conſecration, which reſembles Inſtitution; and Inſtallation or Inthronization, as in the Caſe of an Archbiſhop, which reſembles Induction; Per Doderidge, cites Widrington 69. b. 1 Salk. 137. Paſch. 11 W. 3. B. R. in Caſe of Biſhop of St. David's v. Lucy.

(D) Biſhop. Conſecration. Creation of him. Who may do it. [*And How.*]

1. THE Pope **may do it.** 46 E. 3. 32.

2. **King H. 1. baniſh'd Thurſton Archbiſhop of York for five Years for receiving Conſecration of the** Pope, **but at laſt received [him] for the Pleaſure of the Pope, and his Agreement to obſerve the Cuſtoms of the Realm.** Speed 443. b. 458. b.

3. 5 & 6 E. 1. *Appoints the Form of Conſecration of Biſhops, and is confirm'd by the* 8th *of Eliz.* 1. *and* 14 *Car.* 2. 4.

4. *Upon Election made* three Inſtruments are diſpatched, 1ſt. To the *Party Elect*, 2dly, to the *Archbiſhop*, 3dly, To the *King* to certify this, and then is an Act of Aſſent to the Election, becauſe it cannot be without his Aſſent, 4thly, Then the *King writes to the Arch-Biſhop* to conſecrate and inſtall him Elect, 5thly, Then the *Archbiſhop* ſends a *Citation* to all that will oppoſe this Conſecration, and prefixes a certain Day, and at the Day if none come they are all pronounc'd Contumacious, and the Biſhop confirm'd, and then he is conſecrated; Then the Biſhop ſues to do his *Fealty to the King*, which being done the King writes to his Eſcheator, to deliver to him the *Temporalties*. Per Whitlock J. Palm. 472. 472. 3 Car. In Caſe of Evans v. Aſcuiſhe.

(D. 2) Tranſlation.

1. IN Caſe of Tranſlation five Things are done, 1ſt. *Intimation* by the Chapter of the Death of their Biſhop, and pray Conge d'eſſire; 2dly, *Conge d'eſtire* to them; 3dly, A *Certificate* of the Election; 4thly, The *Aſſent* of the Biſhop and King; 5thly, *Writ* to the Biſhop to confirm and inſtall him. Per Calthorp. Lat. 238. Mich. 3 Car. in Caſe of Evans v. Aſcough.

2. A Biſhop in Caſe of Tranſlation may *refuſe the ſecond* Biſhoprick; Per three Juſtices. Lat. 247. Mich. 3 Car. in Caſe of Evans v. Aſcough.

(E) Temporalties. What Intereſt the Biſhop has in the Temporalties before Grant.

1. **IF a Biſhop be** elected and confirmed, **yet the Franktenement of the Temporalties is not in him before Reſtoration made to him by the King.** 38. E. 3. 30. b.

When a new Biſhop is made he may not De Jure before his Conſecration claim the Temporalties of his Biſhoprick, although *Ex gratia* the King by his

his Letters Patents may grant them unto him after his Confirmation, and before his Conſecration, and the Grant then made is good; But after he is conſecrated, inveſted, and inſtalled, he may ſue for his Temporalties out of the King's Hands by a Writ *de Reſtitutione Temporalium*, directed to the Eſcheator, cites F. N. B. 169. Yet upon ſuch Writ the Temporalties are not De Jure to be delivered until the Metropolitan hath certified the Time of his Conſecration, although that the Freehold of the Temporalties be in him by the Conſecration, cites 38 E. 3. Godbolt. Parſon's Law, cap. 1. Quære, If ſuch Certificate be neceſſary upon a Tranſlation. Watſ. Clergyman's Law, 8vo. 764.

Jenk. 210. pl. 44. S P. and cites S. C.

2. **But** the Franktenement is in the King. 38 E. 3. 30. b.

3. If a Biſhop is attaint of Treaſon the Liberties and Temporalties of the Biſhoprick are forfeited to the King, but that is only for the Natural Life of the Biſhop. D. 108. a. in pl. 28. Mich. 1 P. & M. has a Nota that this is clear.

4. The Cuſtody of the Temporalties of every Archbiſhop and Biſhop within the Realm after the ſame became void belonged to the King during the Vacation by his Prerogative, and came to the King as Founder, and belongs to him in ſo high a Preregative incident to his Crown as no Subject can claim the Temporalties of an Archbiſhop or Biſhop by Grant or Preſcription. 2 Inſt. 15. Cap 5.

5. Ranulph an Eccleſiaſtical Perſon, and King William Rufus his Chaplain, a Man ſubacto ingenio, & profunda nequitia, was a Factor for the King in *making Merchandize of Church Livings*, inaſmuch as when any Archbiſhoprick, Biſhoprick, or Monaſtry became void, firſt he perſwaded the King to keep them void a long Time, and *converted the Profits thereof, ſometimes by letting, and ſometimes by Sale of the ſame*, whereby the Temporalties were exceedingly waſted and deſtroyed. Secondly, *After a long Time no Man was preferred to them per traditionem annuli & baculi*, by Livery of Seiſin, *freely*, as the old Faſhion was, *but by Bargain and Sale from the King to him that would give moſt*, by Means whereof the Church was ſtuffed with unworthy and inſufficient Men, and many Men of lively Wits and towardlineſs in Learning, deſpairing of Preferment, turned their Studies to other Profeſſions. This Ranulph for ſerving the Kings's Turns was advanced, firſt to be the King's Chancellor, and after to be Biſhop of Dureſme, who after his Advancement to ſo high Dignities, made them Servants to his ſacrilegious and Simoniacal Deſigns. *King Henry the Firſt* ſeeing this Miſchief, and foreſeeing the great Inconvenience that would follow thereupon, was contented for his own Time to bind his own Hands, to the End the Church now naked and bare might receive ſome Comfort, and have Means to provide Things neceſſary for their Profeſſion and Calling. He thereupon *at his Coronation made a Charter to this Effect*; *Quia regnum oppreſſum erat injuſtis exactionibus, ego in reſpectu Dei & amore quem erga vos omnes habeo, ſanctam Dei Eccleſiam imprimis liberam fac' ita quod nec vendam, nec ad firmam ponam, nec mortuo Archiepiſcopo, ſive Epiſcopo vel abbate, aliquid accipiam de Dominio Eccleſiæ vel hominibus ejus, donec Succeſſor eam ingrediatur, & omnes malas conſuetudines, quibus regnium Angliæ opprimebatur, inde auſero.* He committed the ſaid Ranulph then Biſhop of Durham to Priſon for his intolerable Miſdeeds and Injuries to the Church, where he lived without Love, and died without Pity, ſaving of thoſe that thought it Pity he lived ſo long. 2 Inſt. 15. cap. 5.

(F) Grant of the Temporalties.

Fol. 882.

1. ALL the Biſhops of Wales are of the Patronage of the King of England, and he is to grant the Temporalties to them; for before the Conqueſt the Principality of Wales was held of the King of England, and by the Rebellion and Forfeiture of the Prince, the Principality came to the King of England, by which the Biſhopricks were annex'd to the Crown. 10 H. 6. 6. Fitzh. Corody, pl. 7. cites S. C. —Co. Litt. 97. a. S. P.

2. 11 E. 1. Rot. Clauſo M. 8. Reſtitutio Temporalium Priori de W. per Regem qui habet &c. Ratione Cuſtodiæ Heredis &c. patroni dicti &c.

At what Time.

3. The King may grant the Temporalties after Election, and before Conſecration. 41 E. 3. 5. b. admitted. Br. Preſentment al Egliſes, pl. 3. cites S. C. —— Fitzh. Quare Impedit, pl. 129. cites S. C.

III. The King's Grants of the Temporalties of a Biſhop in the Lifetime of the Biſhop is good. For the Law underſtands this to be a mere Poſſibility. Jenk 210. in pl. 44.

How.

4. The King cannot grant a leſs Eſtate than a Fee by Reſtitution; For if he limits no Eſtate yet it is good, and the Law will ſay it is a Fee, and if he limits that he ſhall have for Life or Years this is a void Limitation. D. 1. 45. b. Dean and Chapter Fernes.

(G) Inveſtiture.

1. ANSELM Archbiſhop of Canterbury depriv'd diverſe Prelates for receiving Inveſtiture from the King H. 1. but after they were reſtor'd Ex gratia (as he pretended) by the Pope upon hearing of the Matter. Speed. 436. b.

2. The Roman Synod made a Canon that Inveſtiture appertains to the Pope, but this notwithſtanding the King H. 1. uſed to give Inveſtiture as he gave it to *Ralph Archbiſhop of Canterbury*. Speed 440. b.

(H) Inveſtiture.

How it ought to be.

1. IN Time of Edward the Confeſſor the Prelates uſed to receive Inveſtiture of the King by Donation to them by the King of a Paſtoral Staff and a Ring, as Wolſtan did it, *Matthew Paris.* And ſo it was uſed in H 1ſt's Time. Speed 436. b.

2. Suffragans are inveſted by a Ring only without a Staff, becauſe they are not ſo fully Biſhops as the others. Doctor Feild 148.

3. Before the Conqueſt, and after, till the Time of King John, Biſhops were *inveſted* by the King *per Baculum & Annulum*; but King John granted it by Charter, that there ſhall be Canonical Election with three Reſtrictions, 1ſt, to demand *Conge* of the King before. 2dly, His *Aſſent after.* 3dly, That he ſhall have the *Temporalities during Vacation*, and this is mentioned in the Statute 25 E. 3. de Proviſoribus, which is confirmed by 13 R. 2. cap. 2. Jo. 160. Trin. 3 Car. B. R. in Caſe of Evans v. Askwith.

Co Litt. 344. a. S P. that at the firſt all the Biſhopricks in England were of the King's Foundation, and Donative per traditionem Baculi, (viz) the Croſier which was the Paſtoral Staff, et Annuli, whereby he was married to the Church. And K. H. 1. being requeſted by the Biſhop of Rome to make them elective refuſed, but King John by his Charter of 5 June 17th of his Reign granted that they ſhould be eligible. —— Ibid. 134. a. S. P. and that K. John acknowledging the Cuſtom and Right of the Crown in former Times, yet granted de Communi Conſilio Baronum that they ſhould be eligible, which afterwards was confirmed by divers Acts of Parliament; and afterwards the Manner and Order, as well of Election of Archbiſhops and Biſhops, as of the Confirmation of the Election and Conſecration is enacted and expreſſed in the Stat. 25 H. 8. but by the Stat 31 H. 8 and 1 E. 6. they were made Donative by the King's Letters Patents; but both theſe Statutes are repealed, and the Stat. 25 H. 8. remains in full Force. —— Jo. 160, 161. S. P.

(I) Metropolitan.

1. THE Pope would have Thurſtan Arehbiſhop of York in Time of H. 1. to be inſtall'd (againſt all Right and Cuſtom) without profeſſing any Subjection to the See of Canterbury. Speed 440. b.

2. Metropolitan *may certify the Conſecration of a Biſhop, and from ſuch Day he ſhall have his Temporalities.* Br. Quare Impedit, pl. 74. cites 21 E. 3. 39, 40.

3. 23 *H.* 8. *cap.* 9. *S.* 4. *The Arcchbiſhop may cite for* Hereſy *in any Dioceſe within his Province upon Conſent or Neglect of the Biſhop or Judge there.*

4. *S.* 5. *This Act ſhall not reſtrain the Juriſdiction of the* Prerogative Court for Probate of Teſtaments.

5. Archbiſhop has a *concurrent Juriſdiction* with the Biſhops throughout his Province, and may *admit and inſtitute* till the inferior Biſhoprick is full. Vent. 309. Paſch. 29 Car. 2. B. R. Arg. in Caſe of Woolley v. Robinſon.

Though it has been heretofore conceived that the Archbiſhop has a concurring Juriſdiction in every inferior Dioceſe, yet this was not as he was Archbiſhop, but as he was Legatus natus to the Pope, (for the Archbiſhop of York neither has it nor claims it within his Archbiſhoprick) and then this Power is ended, being abrogated with the Pope, and the late Practice, if any ſuch hath been, was an Uſurpation. 2 Roll 313. Prohibition (C. a) pl. 8. cites Hob. 24 b. Dr. James's Caſe.

6. 23 *H.* 8. 9. takes away the Juriſdiction of the Metropolitan only as to Proceedings in that Court; Arg. ut ſupra.

7. In Caſe the inferior Ordinary refuſes to *admit*, the Archbiſhop may do it. Ut ſup. cites Hob 13. Hutton's Caſe, and Mo. 879.

8. The Archbiſhop has without Doubt *provincial Juriſdiction over his Suffragan Biſhops*, which he may *exerciſe in what Place of his Province he pleaſes*, for it is not material to be in the *Arches*, any more than in any other Place. 12 Mod. 237. Mich. 10 W. 3. Biſhop of St. David's v. Lucy.

3 Salk. 90. pl. 1. S. C. & S. P. and that the Archbiſhop may likewiſe convene the Party before himſelf, and judge himſelf, and ſo may any other Biſhop; for the Power of a Chancellor or Vicar General is only a delegated Power in Eaſe of the Biſhop.

9. If the Biſhop makes a Simoniacal Contract it is a perſonal Offence in him, and againſt the Duty of a Biſhop, and puniſhable by the Metropolitan by Eccleſiaſtical Cenſures. 12 Mod. 238. Mich. 10 W. 3. Biſhop of St. David's v. Lucy.

(K) Power.

What is Epiſcopal Power in or out of the Dioceſe.

1. THE Ordinary and Commiſſary have Power ro *make Holidays and Feaſting-Days, and* to make *Conſtitutions provincial to bind the Clergy, but not* to bind *the Temporalty*, nor they cannot *allow nor diſallow the Patent of the King* in their Convocation. Br. Ordinary, pl. 1. cites 20 H. 6. 13.

2. The Biſhop has *no* Power of *Juriſdiction out of* the Dioceſe, *but to abſolve Perſons excommunicated*; Per Whitlock J. Lat. 174. Mich. 3 Car. in Brown's Caſe.

3. Let a Perſon be ever ſo orthodox and able, yet he is puniſhable for his Preſumption, if he *preaches without Licence of the Ordinary*; but the Ordinary *ex debito Juſtitiæ ought to give* ſuch Licence to one that is fit, but if he does refuſe, no *Mandamus* will lie, but his Remedy is to *appeal*; Per Holt Ch. J. 12 Mod. 433. Mich. 12 W. 3. in Caſe of Turton v. Reignolds.

A Libel in the Spiritual Court againſt a Parſon of a Donative for preaching without Licence; The Ordinary in this Caſe cannot proceed to puniſh him for ſo doing. If he preach any Thing againſt the Doctrine of the Church, or marry without Licence, the Ordinary may proceed to puniſh him. A Prohibition granted as to the Suſpenſion, and the Spiritual Cenſures, and putting him out of Poſſeſſion, but not as certifying to the Juſtices for preaching without Licence; Per Holt Ch. J. Holt's Rep. 658, 659. pl. 5. Mich. 7 Ann. Bewick v. Twiſden.

For more of Eveſque in General, See **Prerogative, Preſentation, Prohibition,** and other Proper Titles.

Excom-

Exception.
See Estate 12. b. 14. 17. Reservation 2. 2. to 2. Com. Dig. Chait 2. 5.
Exchange. See Exchange.

Excommunication.

(A) By whom it may be.

[*Or rather, of whom it may be.*]

1. H. 2. ordained, that no Biſhop ſhould excommunicate any Man holding of the King in Chief, or any other of the Officers of the King, without his Licence. This was one of his Clarendon Laws. Janus Anglorum. 93. 52. Speed 457.

This Excommunication the Prelates could not pronounce without Warrant by Authority of Parliament, becauſe it concerned Temporal Cauſes. 2 Inſt. 527.

2. 25 E. 1. cap 4. *All Archbiſhops and Biſhops ſhall pronounce Sentence of Excommunication againſt thoſe that by Word, Deed, or Counſel, do contrary to the ſaid Charters,* [viz. of Magna Charta,] *or that in any Point break them; and the ſaid Curſes ſhall be twice a Year denounced; and if the Prelates be remiſs in the Denunciation of the Sentences, the Archbiſhops of Canterbury and York ſhall compel them to the Execution of their Duties.*

S. P. and that upon ſhewing Letters of Abſolution in Court, the Plaintiff ſhall have Re-ſummons againſt the Defendant.

3. By *Excommunication the Writ ſhall not abate, As upon* Plea of *Villeinage, Profeſſion, Præmunire* &c. but ſhall be ſine Die & Tempore, and may be revived by Re-ſummons or Re-attachment; Quod Nota. Br. Excommengement, pl. 1. cites Litt. 44.

4. If one be excommunicated *in a foreign Dioceſe* the ſame is void, and coram non Judice; Per Cook Ch. J. Godb. 191. in pl. 272. Trin. 10 Jac. C. B. cites 8 H. 6. and 2 H. 4. and he ſaid, that the principal Cauſe of making the Stat. 23 H. 8. was to maintain the Juriſdiction of Inferior Dioceſſes.

(A. 2) Notes, &c.

1. THE Judges of the Common Law are *Judges of* the Excommunication. The Court of B. R. has a Superior Power; There is no Judgment in the Spiritual Court given of Excommunication, but Proceſs only there awarded to denounce this; Per Coke Ch. J. 2 Bulſt. 266. in Caſe of Pole v. Godfrey, cites 5 E. 3.

2. If the Excommunication be *without Cauſe* it is not good, and the Cauſe muſt be within the *Juriſdiction* of the Perſon excommunicating; Per Doderidge J. Roll R. 434. in Starling's Caſe.

(A. 3) For what Cauſe.

1. 5 & 6 E. 6. cap. 4. S. 2. STriking *in a Church or Church-Yard is Excommunication ipſo facto.* See Tit. Striking (A) and the Notes there.

(B) In Diſability of Suits: By whom it may be certified.

1. NO Letters of Excommunication are to be received in Stay of Actions, unleſs under the Seal of the Ordinary. 20 H. 6. 1. Br. Excommengement, pl. 2. cites S. C. — Br. Certificate de Eveſque, pl. 1. cites S. C. —— Fitzh. Excommengement, pl. 11. cites S. C. —— For if it be by his ordinary Seal it is not good. F. N. B. 62. (N) Marg. cites 20 H. 6. 1.

2. An Excommunication under the Bull of the Pope, ſhall not be received in Stay of Actions. 30 Aſſ. 19. adjudged. Fitzh. Excommengement, pl. 10. cites S. C —— Co Litt. 134. a. S. P. and in Marg. cites ſeveral very ancient Books. —— 5 Rep. 15. b. and 23. a. b. Hill. 23 Eliz. in Cawdrey's Caſe, S. P.

In a Bill of Debt ſuch Plea was alleged, and becauſe the Defendant did not ſhew Letters of Excommunication under Seal of the Biſhop proving it, nor other Seal authentick, therefore non allocatur; And Thorpe ſaid, that in the Time of E. 1. becauſe one notified Excommunication &c. of the Pope to the King's Treaſurer, the King would have had him Drawn and Hang'd, notwithſtanding the Chancellor and Treaſurer fell on their Knees before the King &c. and by Award &c. he forejured the Realm; And two other ſuch Excommunications were diſallowed in B. R. in the like Manner. Br. Excommengement, pl. 11. cites 30 Aſſ. 19. and ſays, And ſo ſee the Puniſhment of this before any Statute of Præmunire.

3. Excommunication certified under the Seal of the Commiſſary, ſhall not be allowed. 20 H. 6. 1. adjudged. Br. Certificate d'Eveſque, pl. 1. cites S. C. —— Fitzh. Excommengement, pl. 11. cites S. C. —— Br. Certificate d'Eveſque, pl. 30. cites 7 E. 4. 14. S P. becauſe the Court cannot write to him to aſſoil the Party. —— Br. Excommengement, pl. 2. cites S. C. —— 8 Rep. 68. a. Mich. 6 Jac. S. P. reſolved in Trollop's Caſe.

4. If a *Biſhop certifies* Excommunication, *and dies before the Certificate is returned in Court*, it is void. Br. Excommengement, pl. 21. cites Fitzh. Excom. 26. in 8 E. 2. Itin. Canc. Gilb. Hiſt. of C. B. 165. S. P. becauſe he may ſtand aſſoiled by the preſent Ordinary that now is, after the Deceaſe of the Biſhop who has certified, and the Court will not receive any Certificate but from ſuch Perſon whom they can write to to aſſoil.

5. *A Biſhop* cannot certify *Excommunication* made *by another Biſhop*. Br. Excommengement, pl. 21. cites 20 E. 3. and Fitzh. Excommengement, pl. 29. and 33 E. 3. S. P. and S. C. cited Gilb. Hiſt. of C. B. 165. becauſe they muſt have the Certificate from the Biſhop, whoſe Subject he was, and he might have been aſſoiled by his own Ordinary after the firſt Certificate to the Biſhop.

Ibid. in Marg. ſays that Fenner and Gawdy held accordingly, that Excommunication lies on ſuch Certificate. Mich. 42 & 43 Eliz. in Mallorie's Caſe.

6. The Certificate of an Excommunication by ſpecial *Commiſſioners Delegates* by the King's Commiſſion, upon an Appeal from a Sentence in the Prerogative Court of Canterbury, was allowed in C. B. under their Common Seal. D. 371. pl. 4. Mich. 22 & 23 Eliz. The Book ſays, Quære.

7. In Time of Vacation the *Guardian of the Spiritualties*, or the Biſhop, if he be Guardian of &c. ought to certify. F. N. B. 62. (N).

Br. Nonability, pl. 33. cites 12 E 4. 15. that it is not good; Per Littleton.

8. The *Archdeacon* certified, and it was ſaid that he was Ordinary immediate, and yet it was doubted whether good or not, becauſe the King cannot have Benefit to ſeize Temporalties, he having none as the Biſhop hath. F. N. B. 62. (N) Marg. cites 8 H. 6. 3.

S. P. reſolved, but where in Battery the Defendant pleaded in Diſability that the Plaintiff was excommunicated under the Seal of the Chancellor of Oxford, ſetting forth, that the Court there was a Spiritual Court, and that Time out of Mind they have excommunicated the Defendant for not appearing to an Action of Debt brought in that Court, and that they had Power Time out of Mind to hold Pleas in Debt, and then pleaded a Confirmation of their Privileges by the Statute 13 Eliz. &c. Exception was taken that it was a repugnant Preſcription to give a Spiritual Cenſure in a Temporal Cauſe. The Point was not determined; Et adjornatur. 2 Roll Rep. 487. Mich. 22 Jac. B. R. Anderſon v. Cutchbert.

9. The *Chancellors of Oxford* and Cambridge may certify by Charter of the King. 8 Rep. 68. b. in Trollop's Caſe, cites F. N. B. 64. (C).

10. Biſhop certifies, and *dies* before it is receiv'd, his *Succeſſor* ought to certify it. 8 Rep. 69. a. Mich. 6 Jac. in Trollop's Caſe.

This is to be underſtood of a Biſhop confirmed, for before Confirmation he has Nothing; Per Whitlock J. but contra per the Ch. J. becauſe it is a Miniſterial Act. Lat. 247. Mich. 3 Car. in Caſe of Evans v. Aſcough.

11. Biſhop Elect may certify *before Conſecration*. F. N. B. 62. (N)

F. N. B. 62. (N)

12. *Vicar-General* in Abſence of the Biſhop Extra Regnum in the Service of the King, which muſt be certified out of the Chancery, may certify; Per Coke. 8 Rep. 69. a. Mich 6 Jac. at the End of Trollop's Caſe.

13. *Biſhop* may certify Excommunication *made by his Commiſſary* or Official. 8 Rep. 69. a. Mich. 6 Jac. in Trollop's Caſe.

14. None can certify Excommengement but only the Biſhop, unleſs the *Biſhop* be *beyond Sea*, or in remotis, or *one that has ordinary Juriſdiction, and is immediate Officer to the King's Courts, As* the *Archdeacon of Richmond*, or the *Dean and Chapter in Time of Vacation*. But in Antient Time every Official or Commiſſary might teſtify Excommengement in the King's Court, and for the Miſchief that enſued thereupon, it was ordained by Parliament, that none ſhould certify Excommengement but the Biſhop only. Co. Litt. 134. a.

(B. 2) Diſability.

1. 3 E. 1. cap. 15. *Excommunicated Perſons are not* bailable *when taken by Requeſt of the Biſhop.*

If Executors or Adminiſtators be

2. If Debt be brought by *two Executors*, and *Excommunication is alleged in* Diſability of *the one*, yet becauſe he is not to recover to his own

own Uſe, but to the Uſe of the Teſtator, therefore the Defendant ſhall be awarded to anſwer. Br. Nonability, pl. 20. cites 19 H. 6. 14.

excommunicated, they may be diſabled, becauſe they which converſe with a Perſon Excommunicate are excommunicated alſo. Co. Litt. 134. a.

3. The *Writ ſhall not abate* for Excommunication in the Plaintiff or Demandant, *but* the *Defendant* ſhall be *diſmiſs'd without Day*, and after Letters of Abſolution ſhew'd to the Court the Plaintiff ſhall have a *Reſummons* &c. upon his firſt Original. Litt. S. 201.

4. Excommunicate Perſons *cannot ſue* Action real or perſonal, and per Coke *cannot make a Will.* Roll Rep. 64. pl. 9. Mich. 12 Jac. B. R. in Caſe of Powle v. Godfrey.

Or if he makes a Will it will not be proved.

Arg. 9 Mod. 114. Mich. 11 Geo. in Caſe of Mitford v. Herbert.

5. Every Excommunication ſhall not diſable, As if a *Bailiff* and Commonalty, or any other *Body aggregate* bring their Action, Excommunication in the Bailiff ſhall not diſable them; for that they ſue and anſwer by Attorney; but it is otherwiſe of a *Sole Corporation*. Co. Litt. 133. b. 134. a.

20 E. 3. 15. b. S. P. —— S. P. as to a Mayor. Br. Corporation, pl. 63. cites 21 E. 4. 7. 12. 67. per Nele J. —— Gilb. Hiſt. of C. B. 164. S. P. for a Corporation cannot be excluded from the Communion of the viſible Church.

6. An excommunicated Perſon *muſt anſwer a Bill in Chancery.* Toth. 73. cites 37 Eliz. Tichborne v. Edmonds.

7. Excommunication is *no Plea in a Qui tam*, becauſe it is for Example, and the Statute having given the Informer an Ability to ſue, and not excepted excommunicated Perſons from the Liberty of informing, he is *enabled to ſue by the Statute notwithſtanding the Cenſures of the Church.* Gilb. Hiſt. of C. B. 164.

(B. 3) Diſability. Diſcharged.

1. BY *Excommunication the Writ does not abate, As upon* Plea of *Villeinage, Poſſeſſion, Premunire* &c. *but ſhall be ſine Die & Tempore, and it may be revived by Reſummons or Reattachment*; quod nota. Br. Excommengement, pl. 1. cites 3 H. 6. 35. 39 and 40.

Br. Nonability, pl. 1. cites S. C.

2. Whether an Excommunication may be diſcharged *by the King's General Pardon*, and the Plaintiff reſtored to his Suit *without Abſolution* and Reconciliation to the Church, Dubitatur. Cro. J. 212. pl. 5. Mich. 6 Jac. B. R. Trollop v. Richardſon.

It is diſcharged by the General Pardon of all Contempts, but the Coſts are not. 1 Jo. 227. pl. 4. Hill. 6 Car. B. R. Coddrington v. Redman. —— Cro. C. 198. S. C.

3. *Appeal* does *not ſuſpend the Excommunication* though it may ſuſpend the Sentence. Mo. 850. pl. 155. Paſch. 14 Jac. B. R. agreed in Caſe of Powell v. Harman.

(C) How

(C) How the Certificate ought to be.

Br. Excommengement, pl. 5 cites S. C. but S. P. does not appear. — Fitzh. Encommengement, pl. 21. cites S. C. —— Br. Certificat de Eveſque, pl 3. cites 3 H 4. 3. that the Certificate is good though no Cauſe be thereof certified, and if it be for the ſame Cauſe whereof the Plaintiff ſues an Attachment upon Prohibition at Common Law, he may aver that it is for the ſame Cauſe, and this will make an Iſſue, and ſhall be tried per Pais, and not by the Certification of the Biſhop. A Certificate of the Archbiſhop that the Plaintiff is excommunicated Propter diverſas Contumacius, without ſhewing any Cauſe ſpecially, ſhall not diſable the Plaintiff; for without that the Court cannot judge whether the Court Chriſtian had Conuſance of the original Cauſe for which &c. and if he Excommunication is againſt Law, the Court ought to write to them to abſolve him, which they cannot do if the Certificate be general. 8 Rep. 68. b. Mich. 6 Jac. Trollop's Caſe.

1. If the Principal Cauſe of the Action for which the Excommunication was be not comprized in the Letter of the Certificate, it ſhall not be allowed. (It ſeems it is becauſe it may appear to the Court that the Spiritual Court has Juriſdiction of the Cauſe for which he was excommunicated) 14 H. 4. 14 b.

Br. Excommengement, pl. 3 cites S. C. —— Fitzh. Excommengement, pl. 12. cites S. C. —— 8 Rep. 68. b. S. P. reſolved in Trollop's Caſe.

2. The Certificate ought to be Univerſis Eccleſiæ Filiis, or to the Juſtices of the Court where the Suit is to be ſtaid. 20 H. 6. 25.

Br. Excommengement, pl. 3 cites S. C. —— Fitzh Excommengement, pl. 12 cites S. C. —— S. P. per Cur. and thereupon that Defendant the next Day brought Letters of Excommunication Generally, with Omnibus Chriſti Fidelibus &c. Br. Excommengement, pl. 13. cites 2 E. 4. 4.

3. [So that] if the Certificate be to the King in Chancery, this is not ſufficient to ſtay a Suit in Bank. 20 H. 6. 25.

Br. Excommengement, pl. 3. cites S. C. —— S. P. agreed. Cro. J. 82, 83. pl. 6. Mich. 3 Jac. B. R. Davie v. Gough.

4. The Certificate ought to contain the Day of the Excommunication, by which it may appear to the Court whether it was before the laſt Continuance or not, otherwiſe it is not good, for this cannot be aided by Averment. 20 H. 6. 25.

Such Certificate upon another's Report is not ſufficient. Co. Litt. 134. a. —— 8 Rep. 68. b. S. P.

5. If a *Biſhop certifies in Chancery, that another Biſhop has certified him* that the Party is Excommunicate in his Dioceſe, and ſo has remained by the Space of 40 Days, the ſame Certificate is void, and a Significavit ſhall not be granted thereupon. F. N. B. 65. (A).

6. An Excommengement was pleaded in Bar, and the *Certificate* of the Biſhop of Landaff ſhewed of it, but *but does not mention by what Biſhop the Party was Excommenged*, wherefore it was adjudged void. Mo. 775. pl. 1070. Mich. 3 Jac. B. R. Ld. Abergavenny v. Edwards.

7. In Caſe of an Excommunication, the *iſſuing the Writ is no certain proof of Excommunication*, even at the Time of iſſuing the Writ, for he might be abſoiled between the Significavit and the iſſuing the Writ De Excommunicato capiendo; and therefore there muſt be a Certificate under the Seal of the Biſhop to maintain the Plea ſince it is Dilatory; And the Court, on ſhewing only the Writ De Excommunicato capiendo, have no ground to give the Defendant Time; beſides it is below the Dignity of the Court to Write to the Biſhop to ſatisfy Dilatories; and there is no way by Certiorari or Mittimus to bring it in. Gilb. Hiſt. of C. B. 161.

(D) Pleadings in Stay of Action.

By whom the Excommunication being made ſhall be a Stay of Action.

1. IF upon a Sentence in the Court of Rome a Delegacy be made to the Archbiſhop of England, **commanding him to execute the Damages recovered, if the Party upon this be excommunicated by the Archbiſhop, this Excommunication ſhall not be any Diſability of any Suit, becauſe this is in Effect the Excommunication of the Pope, and the Archbiſhop** cannot abſoil **him without Satisfaction of the Damages, and ſo the Court has not any to whom they may write to abſoil him.** 14 H. 14. Br Excommengement, pl. 5. cites S. C. but S. P. of the Damages does not appear.—— Fitzh. Excommengement, pl. 21. cites S. C.

2. **For an Excommunication** by the Pope **ſhall not be any Diſability of any Suit, becauſe the** Court cannot write to him to abſoil **him, if the Cauſe does not appertain to him.** 14 H. 4. 14. Fol. 884. Br. Excommengement, pl. 5. S. P. cites S. C.——Fitzh. Excommengement, pl. 21. cites S. C.

3. **A Man ſhall not be diſabled by any Excommunication unleſs** it be made by ſome Biſhop who is within the Realm, to whom the Court may write to abſoil **the Party if Cauſe be.** 14 H. 6. 14. b. Br. Excommengement, pl. 5. cites S. C. but S. P. does not fully appear there. But ſee (F) S. C.—— Fitzh. Excommengement, pl. 21. cites S. C.

4. **If the** Pope certifies **an Excommunication it is not ſufficient, becauſe the Court cannot write to him if Cauſe be.** 8 H. 6. 3. Nor can the King write to him to make Abſolution, nor puniſh him for the Contempt if he refuſes &c. Br. Excommengement, pl. 7 cites S. C.

5. **A Certificate** by the Archdeacon **is ſufficient** by Cuſtom. **Contra** 8 H. 6. 13. It was alledged, that he was Ordinary immediate to the Court; But it was held by ſome not to be ſufficient; For he has no Temporalties to ſeiſe in Caſe the King writes to him to make Abſolution and he refuſes; And per Chaunt, he has his Authority from the Ordinary by Indenture between them. Br. Excommengement, pl 7. cites 8 H. 6. 3.——[And the (13) in Roll ſeems to be miſprinted for (3.)]——Br. Certificat d'Eveſque, pl. 26. cites S. C.——The Commiſſary cannot certify Excommunication, but the Ordinary himſelf. Br. Officer, pl. 27 cites 7 E. 4. 14.——Br. Excommengement, pl. 14 cites S. C. that Excommunication certified by the Commiſſary the Archdeacon is not good; For he is not Officer immediate to the Court, but the Ordinary.——[This was the Caſe of **Walker v. Levers** 7 E. 4. 14. a. pl. 6. and there Fairfax ſaid, that what the Commiſſary does is all the Act of the Biſhop and as ſtrong in Law &c. to which Needham agreed, but ſaid, that then it ought to be certified in the Name of the Biſhop, For the Certificate of the Commiſſary may [not] diſable the Perſon of the Plaintiff if he be not Comiſſary of Record, but [Otherwiſe it is of] the * Archdeacon of Richmond in Time of Vacation, and the Dean and Chapter of Canterbury in Time of Vacation &c. and a Certificate by them is allowable here, but not of this Commiſſary &c. But a Teſtament proved before the Commiſſary is good enough, Quod Danby and others conceſſerunt &c.——What is added between the Crotchetts [ ] not being in the laſt or old Edition of the Year Books, and the Senſe ſeeming imperfect &c. without it I have adventured to add it; But if the Reader thinks I am wrong in this, or wherever elſe I do in the like Manner, he has it laid plainly before him, to put his own Conſtruction upon it, and take it which way he likes beſt.]

* Co. Litt. 134. a. S. P. becauſe they have ordinary Juriſdiction and are immediate Officers to the Kings Courts, and ſo of others who are ſo likewiſe.——Roll tit. Trial (U) pl. 5. cites 8 H. 6. 3. b. 17 E. 3. 23. b. S. P.——Br. Certificate de Eveſque pl. 30. cites 7 E. 4. 14. S. C.

6. *Archdeacon* nor *Sequeſtrator* cannot certify Excommunication; For they are not Officers immediate to the Court. Br. Certificate de Eveſque, pl. 34. cites Itin. Nor. Tempore E. 3.

Br. Excommengement, pl. 15. cites S. C.

7. Excommunication *by the Abbot of St. Albans exempt who is immediate to the Pope* ſhall not be allowed in Bank; For he is not Officer immediate to this Court, therefore it ſhall not ſerve but in his private Juriſdiction. Br. Nonabilitie, pl. 33. cites 12 E. 4. 15.

Br Excommengement, pl. 15 cites S. C ——

8. And Outlawry *in Durham* or *Cheſter* ſhall not ſerve in Bank; For they have only a private Juriſdiction, which does not extend but in their Precinct Per Brian quod Littleton J. Conceſſit; But the Serjeants held Contra * and that it ſhall ſerve here. But per Littleton a Man outlaw'd in Bank ſhall be by this diſabled here; For they have their Authority by Parliament in the Time of E. 3. But Cheſter and Durham *are by Preſcription*, and Excommunication certify'd by the Archdeacon is not good. Ibid.

[* All that follows is ſaid by the Serjeants and not by Littleton, according to the Year Book the Word (Bank) in Brook ſeems to be miſtaken for the Word (Lancaſter.)].

Br. Excommengement, pl. 12 cites S. C. —— Aſſiiſe againſt the Archbiſhop of York and W. P. Excommunication was ſet forth which was at the Inſtance of W. P. & non Allocatur, and the Plaintiff by this not diſabled; For they were they ſame Parties, and therefore it ſeems that it was the Excommunication of the ſame Archbiſhop; For it was brought in the County of York. Br. Excommergement, pl. 13. cites 8 Aſſ. 29. —— Et conſimilis H. 5. in Treſpaſs againſt the Biſhop of Carliſle. Ibid.

9. In Treſpaſs *againſt the Commiſſary of the Ordinary*, Excommunication *pronounced againſt the Plaintiff by the ſame Comiſſary* is no Plea in Nonability; For he ought not to do it in his own Cauſe. Br. Nonability, pl. 55. cites 9 H. 7. 21.

10. If a *Biſhop certifies an Excommengement* into the Chancery, *made in Time of his Predeceſſor, and the Contumacy* &c. he *ſhall have a Significavit* thereupon; *But upon* the *Certificate of the Commiſſary or Official* of an Excommengement in the Chancery, and of the Contumacy a Significavit ſhall *not* be granted. F. N. B. 65. in Principio.

11. If a *Biſhop* be *Defendant* an *Excommunication* by the ſame Biſhop *againſt the Plaintiff* ſhall not diſable him; and it ſhall be intended for the ſame Cauſe if another be not ſhewed. Co. Litt. 134. a.

12. *When the Plea of* Excommunication *is allowed* the *Writ ſhall not abate*, but the Entry is Quod remaneat loquela ſine Die quouſque &c. 8 Rep. 69. a. in a Nota of the Reporter cites 3 H. 6. 3. 3 E. 4. 8. 3 Aſſ. 12.

(E) Excommunicato capiendo.

Roll Rep. 434. pl. 30. S. C —— Roll Rep. 174. pl. 9. S. C but S. P. does not appear.

1. UPON an Excommunicato capiendo if it appears that the Excommunication was by an Archdeacon of a certain Place, it ought to appear either expreſly or implicitly in the Certificate that the Matter for which the Excommunication was within his Juriſdiction, otherwiſe it is not good. 9y Reports 14 Jac. *Starling's Caſe.*

2. 9 *E.* 2. *cap.* 12. Clerks *excommunicate may be taken on this Writ.*

3. *Before the Writ* de Excommunicato capiendo *ſhall be granted*, *the Contumacy* and Contempt made by the Party unto Holy Church ought to be certified into the Chancery by the Biſhop, by Letters under his Seal.

But

But this Certificate by Letters may be made into the Chancery by a Biſhop elect before he be conſecrated; And alſo the ſame may be certified by Letters from the Chancellor or Vicar-General, when the Biſhop is beyond the Seas, or out of his Dioceſe, in remotis agend' &c. And although the Biſhop be in his Dioceſe, yet the Certificate of the Vicar General by his Letters unto the Chancery, reciting that the Biſhop is in remotis agend' is good, and ſhall not be traverſed. And in Time of Vacation of the Biſhoprick, the Certificate ought to be made by the Guardians of the Spiritualties for the Time being, or by the Archbiſhop &c. if he be Guardian of the Spiritualties. F. N. B. 62. (N).

4. 5 *Eliz. cap* 23. *S.* 2. Enacts that *every Writ of Excommunicato capiendo, that ſhall be awarded out of the Court of Chancery againſt any Perſon within the Realm ſhall be made in the Term, and returnable in B. R. in the Term next after the Teſte, and the Writ ſhall contain at leaſt* 20 *Days between the Teſte and Return. And the ſaid Writ ſhall be brought into B. R. and there in the Preſence of the Juſtices opened and delivered of Record to the Sheriff or Deputy. And if the Writ be not duly returned, or any Default be in the not executing of the ſaid Writs, the Juſtices ſhall aſſeſs ſuch Amercement upon the Sheriff or other Officer as ſhall be thought meet, which Amercement ſhall be eſtreated into the Exchequer.*

5. *S.* 3. *The Sheriff ſhall not be compelled to bring the Body of ſuch Perſon named in the Writ into Court at the Day of Return, but ſhall only return the Writ with Declaration briefly how he has executed the ſame, to the Intent that the Juſtices may proceed according to this Act.*

6. *S.* 4. *On Return of* Non eſt inventus *a Capias ſhall iſſue, and* Proclamation *ſhall be made for the Party to render himſelf on Pain of* 10 *l. and after* another *Capias and Proclamation, and Pain of* 20 *l. &c.*

7. *S.* 8. *Priſoner not* bailable, *and* Sheriff *for undue Return forfeits* 40 *l.*

8. *S.* 10. *The Biſhop may accept a* Submiſſion.

9. *S.* 13. *If the Offender againſt whom ſuch Writ of Excommunicato capiendo ſhall be awarded, ſhall not in the ſame Writ have a ſufficient Addition according to the Statute* 1 *H.* 5. *cap.* 5. *or if in the Significavit it be not contained, that the Excommunication does proceed upon ſome Cauſe or Contempt of ſome original Matter of Hereſy, or refuſing to have his Child baptized, or to receive the Communion or to come to Divine Service, or Error in Matters of Religion or Doctrine, Incontinency, Uſury, Simony, Perjury in the Eccleſiaſtical Court, or Idolatry; then all Forfeitures limited againſt ſuch Perſons ſhall be void, and by Way of Plea to be allowed to the Party grieved.*

10. *S.* 14. *And if the Addition ſhall be with a Nuper of the Place, then one Writ of Proclamation, without any Pain expreſſed, ſhall be awarded into the County where the Offender ſhall be moſt commonly reſiant at the Time of the awarding of the firſt Capias with Pain, returnable the Day of the return of the Capias. And if ſuch Proclamation be not made in the County where the Offender ſhall be moſt commonly reſiant, ſuch Offender ſhall ſuſtain no Forfeiture for not yielding his Body.*

11. It was held by the Court that the Statute of 5 Eliz. cap. 23. is to be *intended not only of Excommunication for Criminal Cauſes, but* in any other Suits there *for Legacies, Probate of Wills, Tithes, or other Cauſe there.* Cro. E. 144. pl. 1. Mich. 31 & 32 Eliz. B. R. Garrets v. Fulwood.

12. The Defendant was taken upon an Excommunicatio capiendo, and becauſe it was *not mention'd in the Significavit, that he was commorant in the Dioceſe of the Biſhop at the Time* of the Excommunication it was adjudged to be uncertain, and the Party was diſcharged. Mo. 467. pl. 667. Mich. 39 & 40 Eliz. Beamont's Caſe.

2 Jo. 89. Mich. 29 Car. 2 B. R. in Caſe of Bermondſey Inhabitants, which was on S. P. but the Priſoner there was remanded.

13. They

And upon a Significavit into Chancery the Writ is iſſued of Courſe. See 10 Mod. 352. per Pratt J. in Caſe of the King v. Theed.

13. They of the *Spiritual Court* by Reaſon of Excommunication, or by Reaſon of any other Matter, *are not to meddle with the Perſon* of any Man, or to ſend any Proceſs to have the Body before them; and therefore *if any*, for any Cauſe whatſoever, *be excommunicated, and ſo continues* in Contumacy *for* 40 *Days, they ought to certify it into the Chancery, and from thence to have an Excommunicato capiendo*, but they of themſelves cannot award any Proceſs to take him; and if they might, the Writ of Excommunicato capiendo ſhould be in vain. Cro. E. 741. pl. 17. Hill. 42 Eliz. C. B. Smith v. Smith.

14. *None of the Penalties of the Statute 5 Eliz.* cap. 23. *do extend to the Proceedings upon Cauſe of Tithes, but only upon nine Cauſes* belonging to Eccleſiaſtical Juriſdiction *particularly expreſſed in that Act.* 2 Init. 661.

15. When a Plea of *Excommunication is allowed*, the Writ of the Plaintiff, againſt whom it is pleaded, ſhall not abate, but the Entry is Quod *remaneat Loquela ſine Die quouſq' &c.* 8 Rep. 69. Mich. 6 Jac. per Coke in Trollop's Caſe.

S. C. cited 2 Jo. 89. Mich. 29 Car. 2. per Cur. who ſaid that though the Cauſe was not any of thoſe mentioned in the Statute of 5 Eliz. and ſo no Penalty is incurred, yet the Excommunication may be good; and ſo tho' there be no Addition of the Miſtery, which revera is neceſſary to make the Offender to incur the Penalty according to Cro. Car. 198. Hughs's Caſe, and Jo. 226. S. C. where it is ſaid that by the Statute the Penalties there mentioned are diſcharged by ſuch Defect either of the Cauſe or Addition, yet neither the Impriſonment nor Excommunication are.

16. The Defendant was taken upon the Excommunicato capiendo, and the *Signiſicavit was, that he was excommunicated for not anſwering Articles*, and did *not ſhew what* thoſe Articles were; Per Curiam, it is not good, and he was bailed; and Coke Ch. J. cited 22 E. 4. that an Excommuuication for certain Cauſes is not good. 1 Roll Rep. 136 pl. 19. Hill. 12 Jac. B. R. Fox's Caſe.

17. Excommunicato capiendo may be *in other Caſes than what are mentioned in the Statute*, becauſe the Statute does not take away the Excom. cap. at Common Law, but adds a greater Penalty in certain Caſes mentioned in the Statute 5 Eliz. ſo that the Excom. cap. in the other Caſes ſhall be without Penalty; Per Windham J. Sid. 181. pl. 19. Hill. 15 & 16 Car. 2. B. R. Anon.

18. One Bonnefield was brought into Court upon a *Cap. Excom.* and was moved to be delivered, becauſe of a *Miſnoſmer*, the Capias being againſt one Bromfield; Per Twiſden J. you canot plead that here to a Cap. Excom. you have *no Day in Court*, and we cannot *bail* upon this, but you muſt bring your Action of falſe Impriſonment. Mod. 70. Mich. 22 Car. 2. B. R. Bonnefield's Caſe.

* Though other Writs that iſſue out of B. R. are never entered at Large upon Record before the Return, as in Strictneſs they ought, yet this Writ is always entered at Large upon Record, and the Entry is Deliberat' fuit in the Preſence of the Juſtices to the Sheriff Exequend'; Per Parker Ch. J. 10 Mod. 352. Hill. 3 Geo. 1. B. R. The King v. Theed.

19. One taken on an Excommunicato capiendo was *diſcharged*, becauſe the *Writ* Excommunicato capiendo was not delivered into this Court and * *inrolled*, as is required by the Statute. Vent. 309. Paſch. 29 Car. 2. B. R. Anon.

* Upon pleading the Party was diſcharged. Cro. J. 566. Anon. —— diſcharged.

20. The Court doubted whether they could diſcharge him on a Motion, or that he ſhould be driven to * plead this Matter; and it was ſaid the Courſe had been both Ways. Vent. 338. Paſch. 31 Car. 2. B. R. Anon. See Parker's Caſe Cro. E. 553.

—— And a Precedent was ſhewn that in 39 Eliz. upon ſuch Plea pleaded the Party was diſcharged. Ibid.

21. Defendant

21. Defendant being excommunicated for *Contumacy*, and a Writ De Excommunicato capiendo awarded, it was moved for a *Superſedeas* to the Writ, becauſe *the Significavit was general and uncertain*; but per Finch C. a Superſedeas cannot be granted on that Ground; But if the Excommunication were for any of the Offences wherein the Statute of 5 *Eliz.* and the Significavit did not expreſs the ſame, the Remedy expreſly appointed upon that Statute is a *Hab' Corpus*, and on the Return of it the Parties ſhall be diſcharged. But it being then alleged that an *Appeal* was brought, and Security given to proſecute it with Effect, a Superſedeas was awarded, the Lord Chancellor ſaying that the Appeal was a Superſedeas of itſelf. Vern 24. pl. 19. Mich. 1681. The King v. Sneller, Ruſſel & al'.

The Writ may be quaſhed before it is delivered to the Sheriff. 10 Mod. 352. The King v. Theed. —— The ſtanding 40 Days excommunicated need not be in the Writ. 10 Mod. 71.

Anon. —— But it ought to appear in the Writ that the Cauſes for which &c were of Spiritual Conuſance, and therefore In quodam Negotio concerning the Correction &c. of Manners is too general. 10 Mod 350. The King v. Theed. —— But where it expreſſes Cauſa Defamationis generally, it was held well enough. 10 Mod. 71. Anon.

22. On a Habeas Corpus the Return was, that F. was taken and in Cuſtody by a Writ of Excommunicato capiendo, and the Excommunication was in the Writ recited to be *Pro quibuſdam Cauſis ſubſtractionis decimarum ſive aliorum Jurium Eccleſiaſticorum*; The Court reſolved, that the Return was *uncertain*; for that the alia Jura might be ſuch Matters as were out of their Juriſdiction, and they ought to ſhew the Matter was within their Juriſdiction; for of that the King's Courts are to be Judges, and not they themſelves. *The Cauſe* of Excommunication *muſt be ſet forth in the Writ.* 1 Salk. 293. pl. 1. Mich. 12 W. 3. B. R. The King v. Fowler.

12 Med. 418. S. C. and the Significavit is altogether uncertain by the Sive aliorum &c. and by Holt Ch J. the Writ of Excommunication

need not ſpecify the Cauſe. but is well Generally Pro Contumacia, and cited F. N. B. 63. and Reg. Orig. 65. but the Significavit ought to expreſs the Cauſe; But ſince the Statute of 5 Eliz. by which the Writ is firſt to be brought into this Court, and to be delivered of Record to the Sheriff, who is to return it hither, the Cauſe ought to appear ſpecially in the Writ, becauſe otherwiſe the Court cannot know how to follow the Directions of the Statute. —— But the Doubt was * whether the Court could quaſh the Writ here for this Uncertainty, or whether the Party ſhould not go into Chancery, where the Significavit, which was only recited in the Writ, was, and move there to have the Writ ſuperſeded quia erronie emanavit. And as to that Northey argued, that the Statute by directing the Capias to be delivrred to the Officer of Record here, and returned here, did impliedly give the Court Power over it; and cited 2 Cro. 566, 567. Cro. Car. 196. Jo. 226. Mo. 667. Per Holt, if the Writ be bad, and by the Statute made returnable here, it is fit we ſhould have Power over it; for when a Writ is gone out of Chancery returnable in another Court, that Court wherein it is returnable are the Judges of the Validity of it, and therefore we ought to have the Writ itſelf here; and if it prove not good, to quaſh it Quia minus ſufficiens in Lege, and then ſend a Superſedeas to the Sheriff; but this ought not to be upon a Habeas Corpus, but upon the Return of the Writ by the Sheriff. And at laſt he ſaid he thought they were wrong upon the Habeas Corpus, becauſe it was a good Return to the Habeas Corpus that he was committed upon an Excommunicato capiendo, without any more; and let the Writ be quaſhed Niſi in a Week, and Superſedeas Niſi; and that was the Rule. 12 Mod 418, 419. Mich. 12 W. 3. The King v. Fowler.

* Ld. Chancellor ſaid that the Caſes of the King v. Fowler, and of the Biſhop of St. David's, 1 Salk. 293, 294. may be good Law, as they were after the Writs return'd and fil'd; and yet this Court could not be ouſted of its Juriſdiction in the mean Time, before the Return and filing of the Writ in B. R. Abr. Equ. Caſes 416. in Caſe of Barlow v. Collins.

23. *At Common Law the Writ* De Excommunicato capiendo *was always general pro Contumacia*, not containing a Special Cauſe; and the Writ was returnable in Chancery, and founded on a Significavit or Certificate of the Biſhop, which Certificate ſet forth the Cauſe before, and the Party could not be diſcharged but by Superſedeas in Chancery if the Cauſe were inſufficient; But now the Cauſe muſt be ſet forth in the Writ De Excommunicato itſelf, becauſe by the Statute 5 Eliz. the Writ is made returnable in this Court, which would be to no Purpoſe if the Cauſe were not to be ſet forth in the Writ, and this Court judge of that Cauſe. 1 Salk. 293. pl. 1. Mich. 12 W. 3. B. R. The King v. Fowler.

Ld. Raym. Rep. 618. Gould J. made a Doubt whether there was here any ſuch Uncertainty; For the Word (ſive) ſeemed to him to be accumulative But by the Opinion of Holt

24. Before the 5 Eliz. there were no Diſcharges in this Court on Excommunicato capiendo's but where a Man was Excommunicate pending a Prohibition; Now the Caſe is altered, for this Court may quaſh

and Turton J. the Writ was quaſh'd. And Holt ordered the Clerk to enter upon the Habeas Corpus that the Party was

the Writ of Excommunicato capiendo, or award a Superſedeas, becauſe this Court are Judges of the Cauſe, and have it before them, and *the Party cannot go into Chancery for a Superſedeas now, becauſe the Writ is returnable here.* Accordingly the Writ was quaſhed, and this Special Entry made on the Habeas Corpus, viz. that the Party was diſcharged, becauſe the Writ De Excommunicato capiendo was quaſhed. 1 Salk. 293, 294. Mich. 12 W. 3. B. R. The King v. Fowler.

diſcharged, becauſe the Writ was quaſhed; and ſaid that if in this Caſe the Writ had been "in Cauſa Subſtractionis quorundam Jurium eccleſiaſticorum" it had been well; And ſo if it had been "et aliorum or aliorumque". —— S. C cited by Holt Ch. J. that that Writ was quaſhed for Uncertainty. 7 Mod. 57, 58. —— Ibid. 117. Holt Ch. J. cited S. C. as thoroughly conſidered, not only as to the Proceſs with Penalty but alſo whether it was not neceſſary, ſince the Court is to award future Proceſs, to know the Cauſe of Excommunication in the Writ? and the Court thought it to be ſo, becauſe the Chancery has no Power on the Writ, but what Power they had is by the Statute 5 Eliz. given to B. R. And where the Statute ſays, That in Caſe it be one of the nine Cauſes B. R. ſhall award Proceſs with a Penalty, this Court by neceſſary Conſequence of Law is made Judges of the Writ of Significavit, and ſo the Cauſe muſt appear upon the Writ.

S. C cited by Holt Ch. J. 7 Mod. 58. Mich. 1 Ann. B. R as quaſhed accordingly.

25. In an Excommunicato capiendo, the Recital of the *Significavit* was, *that the Party was excommunicated for not paying Coſts in quodam Negotio puerorum Educationis ſive Inſtructionis without any Licence in that Part firſt had and obtained*; this was quaſhed for the Uncertainty, becauſe it might be in teaching to dance or fence, and not Letters. 1 Salk. 294. pl. 2. Hill. 13 W. 3. B. R. The King v. Hill.

26. *A. in Execution* is not chargeable with an Excommunicato capiendo. 7 Mod. 114. Mich. 1 Ann. B. R. The Queen v. Lee.

27. *But* Holt Ch. J. agreed, that *if he were taken by Excom' Cap' firſt, and brought up here by Habeas Corpus to anſwer an Action in this Court*, then he ſhould be turned over to the Marſhal, charged with Excom. Cap.; But here there is a Proceſs out of this Court, which gives him a Day here, which the Excom. Cap. does not; and the Reaſon of that is, becauſe he cannot be in two ſeveral Priſons at once. 7 Mod. 115. in S. C.

28. *Biſhops are ſubject to be excommunicated*, and if an Excommunicato Capiendo ſhould not lie againſt them, there would be a Judgment without a Power of executing it, which is abſurd. Held per tot. Cur. 2 Ld. Raym. Rep. 817. Mich. 1 Ann. The Queen v. St. David's Biſhop.

29 It was moved to *quaſh a Writ* De Excom' Cap'. Firſt *Exception* was *to the Significavit* vpon the Excom' Cap', that it did *not* therein *appear, that the Perſon was commorant in the Dioceſe* and cites Mo. 466, 467. 2dly, That it does not appear there were 40 *Days between the Excom' and the Significavit*, that ſo the Party may reconcile himſelf to the Church before the Excom. Cap. iſſues cites Cro. Car. 82. The Significavit is recited in the Excom' Cap'. This Writ is returnable in B. R. and after it is ſo returned, this Court may well quaſh it if it be a bad Writ; but before it is returned here, the Chancery upon Motion, if it be a bad Writ, is to grant a Superſedeas to it; As to which the Court ordered Precedents to be ſearched. A third Exception was, that it did *not appear*, that the Excommunication *was ſince the laſt General Pardon*, which Exception the Court ſeemed to allow. 11 Mod. 172. pl. 12. Paſch. 7 Ann. B. R. The Queen v. Digg.

30. *Alſo* it was moved to quaſh an Excom' Cap', for that it did *not appear* in the Writ *that the Crime alleged was of Eccleſiaſtical Conuſance*; It was anſwered, though that Matter does not appear in the Writ, yet it *appears throughout the Proceedings*, that this *was a Cauſe before the Delegates*, and therefore it ſhall be intended of Eccleſiaſtical Conuſance; But the Court held, it ought to have ſo appeared in the Writ, and there-

therefore held the Writ naught, and quaſhed it. 11 Mod. 173. pl. 13. Paſch. 7 Ann. B. R. The Queen v. Haynes.

31. *Alſo* it was moved to quaſh another Writ of Excom' Cap', *for that it only recited to be for a Matter of Tithes or other Things* (Matters) *of Eccleſiaſtical Juriſdiction*, and did *not ſet forth what Things* (or Matters) *particularly*; and the Writ was quaſhed for the ſaid *Uncertainty*; and for that it being laid *disjunctively*, or other Things, ſhewed that it might be ſomething elſe of Eccleſiaſtical Conuſance beſides Tithes, and what that it is does not appear. 11 Mod. 173. pl. 14. Paſch. 7 Ann. B. R. The Queen v. Blower.

32. An Excommunicato Capiendo having been awarded was on Motion *ſuperſeded before the Return of it for the Generality of the Significavit* whereon it was awarded, which was only that the Party was excommunicated *in quadam Cauſa Appellationis & Querelæ*; for the Chancellor held clearly, that *till the Return* of the Writ the Court of *B. R. cannot relieve* him, and if this Court cannot help him neither, till the Return of the Writ, he muſt in the mean Time lie in Priſon, and this he was clear in, without entering into the Queſtion which was made in this Caſe, whether, after the Writ returned and filed in B. R. according to the Stat. 5 Eliz. that Court had not the ſole Power of proceeding on it? for till the Writ returned and filed there they had nothing to do with it, either by way of Quaſhing or Superſeding it on Motion; and two Precedents were cited, 10 Geo. 1. where ſuch Writs had been *ſuperſeded quia improvide eman'* before the Return in B. R. Abr. Equ. Caſes 415, 416. Hill. 1727. Barlow v. Collins.

33. *And* Ld. Chancellor ſaid, that *at the Common Law the* Excommunicato Capiendo was *not returnable till the Pluries*, but went firſt, and then an Alias; and if that not obeyed, then a Pluries; and if not then returned, then *an Attachment to the Sheriff*. Abr. Equ. Caſes 416. Hill. 1727. Barlow v. Collins.

34. One that had been a *Priſoner in Newgate for Debt*, but ſince *removed to the Fleet, is excommunicated*; The Court of Chancery will not direct the Curſitor to make a Writ of Excom' Cap' to the Warden of the Fleet, but the *Writ may be directed to the Sheriff, who may return Non eſt Inventus, and on his Return B. R. may grant an Habeas Corpus, and thereon charge him with an Excom' Cap'*. 3 Wms's Rep. 53. Trin. 1730. Strudwicke's Caſe.

35. All Writs of Excom' Cap' *muſt be returnable in B. R.* 3 Wms's Rep. 55. in S. C.

(E. 2) Proceedings on the Capias.

1. IF the Excommunication be unjuſt, that is, if the Party be *excommunicated for a Matter which belongs not to the Eccleſiaſtical Conuſance, and taken by Force of the King's Writ*, then *the Party* grieved *ſhall have a Writ out of the Chancery to the Sheriff, to deliver him out of Priſon.* 2 Inſt. 623.

2. One taken upon an Excommunicato Capiendo was brought into B. R. by Habeas Corpus, and on Cauſe ſhewn he was *bailed by the Court De Die in Diem*, but neither the Sheriff nor Juſtices of Peace in the Country can bail ſuch a one; Cited by Yelverton J. as reſolved in one Keyſer's Caſe; and in the principal Caſe all the Court, præter Williams J. did agree that a *Perſon taken by Capias de Excommunicato Capiendo*

Capiendo upon the Stat. 5 Eliz. cap. 23. and who was *brought to the Bar by Habeas Corpus, was bailable.* Bulſt. 122. Paſch. 9 Jac. Anon.

3. If an Excommunicato Capiendo is *returned in B. R. though* it is *for none of the nine Cauſes* mentioned in the Statute 5 Eliz. yet per Coke Ch. J. *Proceſs ſhall iſſue in B. R. always till the Party is taken, and ſhall not reſort to Chancery for a new Original.* Roll Rep. 174. pl. 9. Paſch. 13 Jac. B. R. Sterling's Caſe.

4. *But* it was held per Cur. that *if Proceſs be awarded here,* where it is *not for any of the nine Cauſes,* yet *the Party ſhall not avoid the Penalty without pleading it*; becauſe it is expreſſed in the Statute that the Penalty ſhall be avoided by Plea; but the Clerks ought not to make any Proceſs with a Penalty, when it appears that it is not for any of the nine Cauſes; For this is only to vex the Subject. Roll Rep. 174. pl. 9. Paſch. 13 Jac. B. R. Sterling's Caſe.

5. *The Writ* de Excommunicato Capiendo *was not returnable by the Sheriff until the Statute 5 Eliz.* cap. 23. Per Coke Ch. J. 3 Bulſt. 92. obiter, Mich. 13 Jac.

Roll Rep. 377. pl. 32. Harman v. Powell, S. C. ſtates it, that the Abſolution in the Audience was ſpecial, viz. of this laſt Excommunication, and Coke Ch. J. ſaid, that when a Man is abſolved he is put in Gremio Eccleſiæ, and if this be ſo, why ſhould not this be an Abſolution for both Excommunications? To which the Reporter adds a Remark, that it ſeems it would be ſo if the Abſolution had not been ſpecial, viz. as to this Excommunication, as if it had been general, viz. hat he ſhould be received in Gremium Eccleſiæ.

6. A Sentence was in the Eccleſiaſtical Court, that upon a Contract the *Defendant* ſhould marry the Plaintiff. He did not do it, for which Cauſe he *was excommunicated.* The Defendant *appealed to the Delegates, which was remitted to the firſt Court, who ſentenced him again,* and there alſo he was excommunicated for Non-performance of the Sentence; whereupon he *appealed to the Audience, and then had Abſolution.* He was taken upon the firſt Excommunication by a Capias Excom', and brought an Habeas Corpus in B. R. It was reſolved, that *the Abſolution for the latter had not purged the firſt Excommunication, quia Eccleſia decepta fuit, they having no Notice of it.* 2dly, They agreed that the *Appeal does not ſuſpend the Excommunication, although it might ſuſpend the Sentence.* Mo. 849. pl. 1155. Paſch. 14 Jac. B. R. Powel v. Jarman.

7. Upon an Excommunicato Capiendo, *the Plaintiff* pleaded the Statute of 5 Eliz. and becauſe he *was not delivered by the Sheriff into B. R. being taken upon the Capias, he was therefore diſcharged,* and a Precedent ſhewn, that in 39 Eliz. upon ſuch Plea pleaded, the Party was diſcharged; for it was ſaid, that they ought to purſue the preciſe Form, that the Writ ſhould be brought and delivered openly in Court, otherwiſe it is void, and not warranted by the Statute. Cro. J. 566, 567. pl. 2. Paſch. 18 Jac. B. R. Anon.

8. B. was *ſued in Cauſa Defamationis in another Dioceſe than where he dwelt,* and not appearing *upon Citation was excommunicated,* and *upon a Significavit an Excommunicato capiendo was awarded.* Exception was taken to the Citation, being out of the Dioceſe, and it was held ill. Then it was objected that the Caſe of Defamation is not within the Statute 5 Eliz. cap. 23. and then the Statute enacts that it ſhall be void; But the Court anſwer'd that he ſhould have averred it by Way of Plea; and the Clerks ſaid that he ſhould have ſued an Habeas Corpus, and have pleaded it upon the Return. But the Plea was taken De bene eſſe and the Party bailed. Afterwards on its being moved again all the Court held the Impriſonment not diſcharged by this Statute. Lat. 174. 204. Hill. 2 Car. Brown's Caſe.

9. Upon a Certificate from the Chancellor of Norwich in the Chancery of Excommunication, he was taken upon an Excommunicato capiendo, and impriſoned; Reſolved, he was not duly impriſoned, becauſe

cauſe by the Statute of 5 Eliz. the *Writ ought to have been brought into B. R. and* to have been *inrolled and delivered of Record to the Sheriff*; which not being done he was diſcharged. Cro. C. 583. pl. 9. Paſch. 11 Car. B. R. Parker's Caſe.

10. An Excommunicato capiendo *in Durham* not being returned into Chancery here nor into B. R. here, a Habeas Corpus was moved for, but denied per Cur. becauſe in County Palatine *the Significavit ought to be returned in Chancery there, as in the Chancery of the Grand Seſſions in Wales, and not hither*; beſides *this ſhould be moved in B. R there for Habeas Corpus* who may diſcharge within the Statute. 2 Keb. 587. pl. 1. Hill. 22 Car. 2. B. R. The King v. Gower.

11. Upon a Significavit on *Excommunication for Maintenance Pendente lite in Suit for Alimony*, becauſe on a former Eſtreat it had been pleaded in the Exchequer that this Cauſe of Alimony was not within the Statute, the Court granted a Stay of Proceſs, becauſe this appeared on the Body of the Significavit; but if Proceſs had iſſued here for the Fine on the Statute, they muſt have pleaded it here, as Want of Enrolment &c. 2 Keb. 854. pl. 4. Hill. 23 & 24 Car. 2. B. R. Read v. Ux'.

12. The Defendant being taken upon an Excommunicato capiendo was *diſcharged, becauſe the Writ was not delivered into B. R. and enrolled there, as required by the Statute 5 Eliz.* Vent. 309. in a Nota, Paſch 29 Car. 2. B. R. Anon.

13. The Defendant, a Feme Covert prayed to be diſcharged of a Capias upon Excommengement returned hither *for Noupayment of Coſts on Libel againſt her for Incontinence*, for that it was *not within 5 Eliz. cap. 23. S. 12.* which the Court agreed, and the Capias was diſcharg'd. But it was ſaid by Rainsford and Jones, (the reſt being abſent) that *had ſhe been taken by an Excommunicato capiendo it had not been avoidable but by Plea* &c. 3 Keb. 836. pl. 72. Mich. 29 Car. 2. B. R. The King v. Coats.

14. In an Habeas Corpus the Return was, That the Party was taken upon an Excommunicato capiendo. It was moved, that the Party might be diſcharged, becauſe upon Search it appeared that *the Writ had not been inrolled in this Court*; for ſo it ought to be by the Statute of the 5 Eliz. though the Writ iſſues out of Chancery. The Court doubted, whether they could diſcharge him upon a Motion, or that he ſhould be driven to plead this Matter? And it was ſaid the Courſe had been both Ways; See **Parker's Caſe** 3 Cro. 553. But *the Party was afterwards diſcharged*; ut opinor. Vent. 338. Paſch. 31 Car. 2. B. R. Anon.

15. F. was brought up upon a *Habeas Corpus*, where was returned the Warrant from the Sheriff for taking him, and that was upon a Writ of Excommunicato capiendo for Subſtraction of Tithes and other Eccleſiaſtical Duties; and Holt Ch. J. and the Court held, *the Writ of Excommunicato capiendo itſelf ought to be returned*; and it is *not ſufficient to return the Warrant*, becauſe the Warrant may be wrong when the Writ is right; and though the Warrant may be wrong, yet if the Writ is right, the Party is rightfully in Cuſtody of the Sheriff; and the Writ was quaſhed. 1 Salk. 350. pl. 7. Trin. 12 W. 3. B. R. The King v. Fowler. Ld. Raym. Rep. 618. S. C. and the Writ was quaſhed for Uncertainty.

16. C. was brought upon a Habeas Corpus, and the Return was, that he was arreſted upon an Excommunicato capiendo; And there was a fatal Exception to the Writ for the Uncertainty of the Cauſe, (it being *Pro non Reparatione ſortis ſuæ munimentorum Cœmeterii de B.* which was agreed by the Court to be *uncertain* and bad) and yet they would not diſcharge him upon the Habeas Corpus, but *compelled him to procure the Writ to be returned*; And then they deferred to quaſh the Writ, becauſe the *Defendant was not preſent in Court*, as he ought to be. Ld. Raym. Rep. 620. Trin. 12 W. 3. Curſon's Caſe.

7 Mod. 82. The Queen v. Cantuel and Sangway, S. C. the Court declared that they could not discharge her, and so she was remanded. And Holt Ch. J. said that *the Reason of the Additions* being requisite by the Statute *in the nine Cases*, and none other *was in order to a Proclamation and Penalty*, but that to an Imprisonment by Virtue of an Excom' capiendo, there was no Occasion for it. And Holt would not determine in the present Case whether the Writ, being with Proclamation and Penalty, whereas it ought not to be so, made the Whole naught or only Quoad the Proclamation and Penalty.

17. The Defendant was *excommunicated Pro quadam Causa Jactitationis Maritagii*, and taken on a Capias with a Penalty, and brought up by Habeas Corpus; It was objected to the Writ, that this being not one of the nine Causes mentioned in the Statute 5 Eliz. cap. 23 there ought not to be a Penalty in the Writ; and 2dly, that the Defendant had no Addition; The Court held that *for any of the nine Causes mentioned in the Statute there ought to be a Capias with a Penalty, and an Addition in the Writ; but in other Cases there needs no Addition*; and though there was a Penalty, yet the Court would not discharge the Party of the Process but the Penalty only; But that for Want of Addition in Cases where that was necessary the Party should be discharged upon Motion. 1 Salk. 294. pl. 4. Mich. 1 Ann. B. R. The Queen v. Sangway.

7 Mod. 56. and 117. S. C. largely debated, and the Defendant was discharged.

18. The Defendant being taken upon the Capias, and in Newgate, moved for an Habeas Corpus, and being brought into Court, it appeared by the Return that *the Writ of Excom' cap' was not yet returnable*. The Court held that he should *not be allowed to plead, or move to quash the Writ before it was returnable*; and that though the Writ recites the Significavit, which is in Chancery, yet that Writ is inrolled in B. R. before it goes to the Sheriff, which Inrolment is to inform the Court that at the Return of the Excom' cap' they may award farther Process as the Case requires; and that *if by the Recital of the Significavit it appears that there was no Cause for the Writ, B. R. may quash it, but the Chancery cannot, though the Significavit is there*. 1 Salk, 294 pl 3. Mich. 1 Ann. B. R. The Queen v. the Bishop of St. David's.

(F) Absolution.

1. WHERE a Bishop here *excommunicates a Party upon a Cause which does not belong to him*, the *King may write to him to absolve him, and if* the Bishop *refuses*, the King *may seise his Temporalities*. Br. Excommengement, pl. 5. cites 14 H. 4. 14.

2. Where a Man who is *excommunicated* brings Action, and pending the Writ, and *before that the Parol be put without Day* by the pleading of the Excommunication he *obtains Absolution*, the Plea shall proceed; quod nota; And so see that a Man may be disabled and able, pending one and the same Writ. Br. Nonability, pl. 3. cites 3 H. 6. 39. 40.

3. Where a Man is *excommunicated* in a Court Spiritual *for a Cause which ought not to be in the Spiritual Court*, by which Prohibition is granted, there the *Ordinary shall be compelled by Process of Contempt to absolve him*. Br. Excommengement, pl. 17. cites 22 E. 4. 29.

4. *Prohibition is directed to the Spiritual Court*, and *notwithstanding this they suspended the Party*, Writ shall issue to the Bishop to *absolve* him, but the *first Writ shall not be with a Pain*. Br. Excommengement, pl. 22. cites 13 H. 7. 14.

5. If a Man is *excommunicated for an Offence which is pardoned*, or *for a Cause which appears to be not of Ecclesiastical Conusance*, and this being shewed to the *Bishop*, and he *refuses to absolve him*, so that he is now disabled

diſabled to ſue any Writ of the King, an Action on the *Caſe lieth* againſt him. 12 Rep. 76. Mich. 8 Jac. and cites Dr. and Student lib. 2. cap. 32. fol. 119.

6. *Abſolution* by the Archbiſhop is not ſufficient, becauſe it ought to be *by the ſame Biſhop*, unleſs it be by Appeal. Mo. 775. pl. 1070. Mich. 3 Jac. B. R. Ld. Aburgavenny v. Edwards.

Cro. J. 83. pl. 6. Mich. 3 Jac. B. R. Baker v. Gough,

held that the Abſolution under the Teſte of the Archbiſhop is not ſufficient, but it ought to be under the Teſte of the Biſhop that excommunicated him.

7. *Abſolution Eccleſia decepta* by abſolving a later Excommunication does not abſolve or purge a *former* Excommunication. Mo. 850. pl. 1155. Paſch. 14 Jac. B. R. Powell v. Hanman.

(G) Prohibition, or other Remedy.

See F. N. B. 64. (D)

1. ATtachment upon a Prohibition iſſued againſt the Ordinary of L. becauſe the Feme of the Plaintiff was excommunicated *for ſaying that the Abbot of S. would have made her his Whore*, and kept her in his Chamber for it, of which Impriſonment the Baron of the Feme had Writ of Falſe Impriſonment of his Feme, and becauſe Action thereof was at the Common Law Prohibition was granted, and *Proceſs to the Biſhop to aſſoil him, which he did not do, but* he came and *ſaid in Excuſe* of the Contempt *that he was always ready to have aſſoil'd him if he would have come to him.* And per Choke now the Contempt is confeſs'd; For *he might have aſſoil'd him by Proctor in his Abſence.* Br. Attachment ſur Prohibition, pl. 12. cites 22 E. 4. 29.

Br. Ordinary, pl. 17. cites S. C.

2. If a Man be excommunicated *where he ought not to be*, as *after a General Pardon &c.* being negligent *ſues not a Prohibition but remains excommunicate for* 40 *Days*, and upon Certificate in Chancery is taken by *Excommunicato capiendo*, no Prohibition lies becauſe he is taken by the King's Writ. And if Prohibition be granted it will not deliver the Party. But for *Remedy*, 1ſt. He *may have a Writ out of Chancery to abſolve him*, as he may in all Caſes where Excommunication is againſt Law, cites 14 H. 4. fol. 14. and 7 E. 4. 14. Secondly, If he ſhews his Cauſe to the Biſhop, and requeſts him to abſolve him, *an Action on the Caſe lies againſt the Biſhop for refuſal.* 12 Rep. 76. cites Dr. and Stud. Lib. 2. cap. 32. fol. 119.

3. If a Man be excommunicated, a *Prohibition ſhall aſſoil* him. Per Holt. Ch. J. 12 Mod. 311. Mich. 11 W. 3.

(H) Pleadings.

1. *TWO Executors brought* a Writ of *Debt* againſt one J. N. who came and ſaid that the one Executor was excommunicated, and ſhew'd forth Writ of the Biſhop which teſtified it, and becauſe the Opinion of the Court was, That the one ſhall not have Action without the other; *he who was excommunicated was demanded and* did not come, by which he was *ſever'd* by the Court, becauſe the Court would not record his Preſence, and the other was receiv'd to ſue alone. 42 E. 3. 13. b. pl 21.

Br. Excommengement, pl. 4. cites S. C.

2. Ex-

2. Excommunication was pleaded in the *Plaintiff in Attachment upon a Prohibition* at the Suit of the Defendant, and the *Plaintiff ſaid that the Excommunication was for the Cauſe contain'd in the Prohibition, and ſo to Iſſue.* Thirn ſaid this ſhall be tried per Pais, and then it is peremptory, and the Plaintiff ſhall recover his Damages upon the Iſſue found for him, which all the Juſtices denied; and yet after the *Iſſue was taken* as above, and the Niſi Prius granted, quod nota, and ſo it ſeems *Peremptory.* Br. Peremptory, pl. 7. cites 3 H. 4. 3.

S. P. For if it be tried for the Plaintiff this ſhall not diſable him, but Trial by Jury ſeems to be peremptory.

3. In *Attachment upon a Prohibition* the *Defendant pleaded Not Guilty,* and *after pleaded Excommunication to the Perſon of the Plaintiff at the Suit of the Defendant,* and ſhewed Letters of the Biſhop thereof, and the *Plaintiff ſaid that it was for the ſame Cauſe,* et non allocatur without ſaying it by Averment by which they were at *Iſſue, if it was for the ſame Cauſe.* Br. Examination, pl. 14. cites 3 H. 4. 3.

Br. Excommengement, pl. 6. cites S. C.

4. In *Detinue* the *Garniſhee who came in by Scire Facias a Latere* in Writ of Detinue *was permitted to plead an Excommunication in the Plaintiff*; quod nota per Cur. by which *he ſhewed Abſolution pending the Writ*; Weſtbury ſaid he was once diſabled pending the Writ, Judgment &c. Et non allocatur. Br. Excommengement, pl. 1. cites 3 H. 6. 35. 39, 40.

S. P. Ibid. pl. 81. cites 36 H. 6. 17.

5. He who *pleads Excommunication* in the Plaintiff *ſhall ſhew Letters of the Biſhop,* teſtifying it *preſently,* for it is dilatory. Br. Monſtrans, pl. 7. cites 20 H. 6. 1. 25.

6. In Treſpaſs Defendant pleaded Excommunication in the Plaintiff; The *Plaintiff ſaid that he had appeal'd according to the Laws of the Church to the Court of R. &c.* But Newton thought this did not make him able to ſue till the Excommunication be revers'd. Br. Excommengement, pl. 3. cites 20 H. 6. 25.

7. Excommunication *pleaded* in the Plaintiff *at the Niſi Prius,* the Defendant ſhewed thereof the Letters of the Biſhop. Br. Excommengement, pl. 8. cites 36 H. 6. 17.

8. Note, that the *Prayee to be receiv'd cannot allege Excommunication in the Demandant,* quod nota. The Reaſon ſeems to be inaſmuch as the *Tenant has admitted him able* before. Br. Excommengement, pl. 18. cites 2 E. 4. 27.

9. In Trover the *Defendant pleaded Excommunication* in the Plaintiff, and ſhew'd the Letters of the Biſhop certifying it, *but did not ſhew in the Plea nor in the Letters the Time when* he was excommunicated, and perhaps it might be before the laſt Continuance, and then the Plea was ſaid not to be good; and reſolv'd accordingly by all the Juſtices. Cro. J. 82, 83. pl. 6. Mich. 3 Jac. B. R. Baker v. Gough.

10. In pleading Excommunication the Defendant muſt *ſhew the Letters of Excommunication.* Heath's Max. 21.

Cro. C. 196. pl. 9 Hughs's Caſe S. C. but nothing mentioned of the want of Addition, but the Condemnation being in the Vice-Chancellor's Court for Coſts, and it was reſolved that though the Significavit did not mention any of the Cauſes in the Statute of 5 Eliz. but is for the other Cauſes, viz. for Coſts, yet the Excommunication is good; But if any Capias with Proclamations and Penalties therein are awarded, theſe Penalties and Forfeitures are void, unleſs the Significavit expreſs it to be for one of the Cauſes mentioned in the Statute, but the Excommunication is good enough; and cited Brown's Caſe, and Jones and Hyde ſaid

11. Sentence was given againſt the Defendant in the Chancellor's Court at Oxford, upon which he was excommunicated, and taken in London upon an Excom' Cap'. Afterwards he came into B. R. and *pleaded that there was no Addition in the Significavit,* according to the Statute 5 Eliz. and ſo he prayed to be diſcharged; But per Curiam, *the Penalties mentioned in the Statute are diſcharged, but not the Excommunication, nor Commitment* thereon. Jo. 226. pl. 3 Hill. 6 Car. B. R. Hughes v. Bendy.

ſaid they well remembred Brown's Caſe to be ſo reſolved; But none being there on the Part of Hughs, they gave further Day to be adviſed thereof.——Ld. Raym. Rep. 620. Mich. 12 W. 3. in Caſe of the King v. Fowler, Holt Ch. J. ſaid that this Statute was not well underſtood till Hughs's Caſe Cro. C. 196.

12. Note, in pleading that the Plaintiff is excommunicated, the Defendant ought to *ſhew the Letters of Excommunication* under the Seal of the Court Chriſtian. Nevertheleſs, this Plea does not abate the Writ, but upon the Plaintiff's ſhewing his Letters of *Abſolution* in Court, he ſhall have a *Re-ſummons* againſt the Defendant. Brown's Anal. 4.

13. In *Treſpaſs* the Defendant pleads, that ante Quinden' Sancti Martini præd' Jay Excommunicatus fuit & adhuc exiſtit & protulit hic in Cur' Literas * Teſtamentarias Epiſcopi Sarum quæ notum faciunt Univerſis quod *Scrutatis Regiſteriis invenitur contineri quod Excommunicatus fuit* &c. pro contumacia in non comparendo to a Suit of Tithes &c. in cujus Rei Teſtimonium præd' Epiſcopus ſigillum appoſuit. It was objected, that ſuch a kind of Certificate of Excommunication as this is, was not allowable; for it ought to be poſitive, and under the Seal of the Ordinary, whereas this is only a Relation of what is found in their Regiſter; ſed non allocatur; for though ſuch a Form of Pleading would be altogether inſufficient in our Law, yet their Courſe is ſometimes to certify Excommunication ſub Sigillo Ordinarii, and ſometimes per Literas Teſtamentarias, as here. Vent. 222. Trin. 24 Car. 2. B. R. Jay v. Bond.

3 Keb. 17. pl. 31. and ibid. 60. pl. 45 and ibid. 63 pl. 53 S. C in all which Places it is mentioned to be per Literas * Patentes, and the Court held the Plea of Excommengement per Literas of the Predeceſſor's Time; And per Cur. Judgment quod Breve caſſetur, alſo the not ſaying ſub Sigillo, and being in the third Perſon is well enough.

Patentes good enough without hæc Verba, and by way of Recital is alſo good being

14. In Treſpaſs, the Defendant pleaded that the Plaintiff was excommunicated, and the Entry was here, quod *Defendens venit & dicit* &c. Hale doubted, whether he ought not to have made ſome kind of Defence, though no full Defence is to be made when Excommengement in the Plaintiff is pleaded. Vent. 222. Trin. 24 Car. 2. Jay v. Bond.

In Debt upon Bond the Defendant per T. Attornatum ſuum venit & dicit, that the againſt him

Plaintiff ad breve ſuum reſpondere non debet, and pleads an Excommunication certified by Commiſſioners Delegates; but adjudged ill, becauſe venit & dicit without any Defence, viz. defendit Vim & Injuriam &c. and the Reſpondere for Reſponderi is not good. 3 Lev. 240. Mich. 1 Jac. 2. C. B. Hampſon v. Bill.

10. In *Debt* for Rent *by three Plaintiffs as Executors* &c. the Defendant *pleaded in Abatement by Petit Judicium de Breve &c. becauſe one of the Plaintiffs is Recuſant Convict*, and therefore quaſi excommunicated by the Statute 3 Jac. 1. But reſolved that this ought not to be pleaded in Abatement by Petit Judicium de breve, becauſe the Writ is not abated by it, but ſuſpended, and *the Pleading ought to be Suſpenderi non debet.* 3 Lev. 208. Mich. 36 Car. 2. C. B. Ld. Sturton & al' v. Pierpoint.

Ibid cites the Pleading to be Suſpenderi non debet in Hill. 32 & 33 Car. 2. Rot. 495. Mich. 33 Car. 2. Rot. 440. and Paſch. 37 Car. 2. Rot. 703. all in C. B.

16. The Party excommunicated for *not going to his Pariſh Church* upon the Return of the Significavit, may *plead* in B. R. *that he has gone to any other Church.* Skin. 176. pl. 6. Paſch. 36 Car. 2. B. R. The King v. Barnes.

17. In *Debt* upon a Bond, the Defendant *pleaded in Abatement that the Plaintiff was excommunicated by Judges Delegates, and made Profert of the Writ* of Excom' Cap'. But a Reſpondeas Ouſter was awarded, becauſe *no Certificate of the Judges Delegates was produced*; And if the Profert of the Writ had been ſufficient without Certificate, yet it *ought to have*

been ſub Pede Sigilli, becauſe it is a Writ out of another Court. Lutw. 17. 19. Trin. 2 Jac. 2. Bradley v. Glynne.

18. Excommunication in Plaintiff was pleaded in Abatement with Concluſion of *Petit Judicium &c. et quod Defendens eat inde ſine Die* abſolutely, and *Reſpondeas Ouſter* awarded for two Reaſons; 1ſt For the Concluſion ought to be *ſine Die quouſque* Plaintiff was abſolved, for upon Abſolution he ſhould have a Re-ſummons. 2dly, For not having a Certificate of the Excommunication. 12 Mod. 580. Warner v. Green, cites 9 Rep. 41. 8 Rep. 62. 67.

19. When the Plea of Excommunication is allowed the Writ does not abate, but the Entry is *quod loquela remaneat quouſque &c.* 8 Rep. 69. a. Mich. 6 Jac. at the End of Trollop's Caſe.

20. *B. R.* is now, ſince the Statute, *ſole Judge of the Writ*, and the Sufficiency thereof; Per Holt Ch. J. 12 Mod. 519. Paſch. 13 W. 3. in Caſe of The King v. Hill.

21. Caſe for Continuance of a Nuſance; The Defendant *pleaded that the Plaintiff was excommunicated*, and did *not ſhew the Certificate, nor for what Cauſe* the Excommunication was, *and concludes his Plea with a Prayer, that the Parol remaneat ſine Die, without ſaying quouſque.* The Plaintiff demurs; And for theſe Reaſons Reſpondeas Ouſter was awarded. Ld. Raym. Rep. 701. Mich. 13 W. 3. Warner v. Green.

22. It was moved to quaſh an Excommunicato Capiendo; 1ſt. it does *not appear that* there was *any Cauſe depending in the Eccleſiaſtical Court.* 2dly, It does not appear *that it was of Eccleſiaſtical Cognizance*; Raym. J. contra, as this came from the Eccleſiaſtical Delegates by Appeal, your Lordſhip will take it to be of Eccleſiaſtical Cognizance. Holt Ch. J. ſaid, tho' Eccleſiaſtical Delegates do give Sentence, and award Execution, it does not follow that it is of Eccleſiaſtical Cognizance. The Writ was quaſhed. Holt's Rep. 658. pl. 4. Paſch. 7 Ann. The Queen v. Harris.

23. Excommunication *cannot be pleaded after general Imparlance*, for thereby the Plaintiff is admitted to be a good Plaintiff, but *after a ſpecial Imparlance it may* be pleaded. Gilb. Hiſt. of C. B. 163.

24. When Excommunication is pleaded, *the Biſhop's Letter under his Seal, witneſſing the Excommunication, muſt be ſhewn*, and tho' the Plaintiff cannot deny a Plea, yet the *Writ ſhall not abate*, but Defendant eat inde ſine Die, becauſe the *Plaintiff upon producing his Letters of Abſolution ſhall have a Re-ſummons* or Re-attachment. In Appeal the Defendant pleaded Excommengement in the Plaintiff, and is let out on Mainpriſe till the *Plaintiff purchaſe Letters of Abſolution*, for then *Defendant muſt plead in Chief.* Gilb. Hiſt. of C. B. 163.

25. When Excommunication is pleaded in the *Plaintiff*, he ſhall *not reply that he has appealed from the Sentence*, for the Sentence is in Force till it is repealed, and whilſt it is in Force he cannot appear in any of the Courts of Juſtice, *but he may reply that he is abſolved*, for then his Diſability is taken away. Gilb. Hiſt. of C. B. 164, 165.

26. Where you plead Excommunication, it is not ſufficient to ſhew the Writ De Excommunicato capiendo under the Seal of the Court, for *the Writ is no Evidence of the Continuance of the Excommunication*, ſince he may be abſoiled by the Biſhop, and that will not appear in the King's Court, becauſe ſuch *Abſolment is not returned into the King's Court from whence* ſuch *Significavit is ſent.* Gilb. Hiſt. of C. B. 160, 161.

27. Northey Attorney-General moved to quaſh a Cap' Excom', the Words whereof were *in Cauſa defamationis & convitij*, becauſe it did *not appear that the defamatory Words were within the Juriſdiction of the Eccleſiaſtical Court*, a Rule was made to ſhew Cauſe, and for want of Cauſe the Writ was quaſhed. MS. Rep. Hill. 3 Geo. B. R. The King v. Smith.

28. In

28. In the *Writ* of Excom' cap' *the Special Cauſe muſt be expreſſed.* 10 Mod. 351. Hill. 3 Geo. B. R. The King v. Theed.

29. It was *moved to ſuperſede a Capias Excommunicat'* iſſued againſt the Defendant, becauſe the Words of the Writ were *in Cauſa pro reformacone morum*, which he ſaid were too General, and did not denote that the Cauſe was cognizable in the Eccleſiaſtical Court; for it might be that the Defendant was libelled for not putting off his Hat, or making a Bow when he ought, or for being a Clown, or ſuch like, or for ſome Crime not within the Juriſdiction of the Eccleſiaſtical Court; for all ſuch Cauſes may be ſaid to be pro Reformatione Morum. The Court doubted whether they could ſuperſede the Writ, becauſe they thought it was not judicially before them, and inclined that they ought to ſtay till it was returned, and then quaſh it if it was ill; however they made a Rule to ſhew Cauſe, whereupon it was inſiſted by the Proſecutor's Counſel, that the Writ ought not to be ſuperſeded, and cited 1 Sid. 181. where the Court refuſed to ſuperſede a Cap' Excom^{s} upon a Suggeſtion that the Party was excommunicated for a Cauſe not mentioned in the 5th Eliz. cap. 23. becauſe it was not judicially before them before an Habeas Corpus granted and returned; But per Cur. the Reaſon of that Caſe was, becauſe the Matter ſuggeſted was by the ſaid Statute to be pleaded, which could not be until the Party was in Court, and per tot. Cur. the Rule was made abſolute by a Superſedeas, becauſe when the Writ was brought into this Court, it is by the Officer of the Court entered of Record verbatim, (as all other Writs which iſſue out of this Court are, or are ſuppoſed to be) and then delivered to the Sheriff &c. which is the Delivery of Record to the Sheriff &c. mentioned in the ſaid Statute; therefore *when any ill Capias Excom' improvide emanavit, this Court may upon Information thereof as well have Recourſe to, and rely upon their own Record of that Writ, as they do upon their Records of their other Writs, and ſuperſede it as they do others*, and per Cur. for the Reaſons firſt mentioned there is *no Colour to ſupport the Writ.* MS. Rep. Hill. 3 Geo. B. R. The King v. Thede.

30. Darnel Serjeant moved to quaſh an Excom' capiend', 1ſt, becauſe *in the Recital of the Significavit the Excommunication was ſaid to be by J. S. Commiſſarium Archidiaconatus Suffolkiæ legitime conſtitut'*, and did *not ſhew whether he was Commiſſary of the Biſhop or* Commiſſary *of a Peculiar to whom the Right of Excommunication did belong*, and cited 11 H. 4. 64. pl. 16. Cro. E. 431. 791. Het. 68. to prove that the Authority of him who acts as an Officer muſt appear. 2dly, Becauſe the *Defendant was only ſaid to be of ſuch Place infra Archidiaconat'*, which Words do not imply that he was Commorant at the ſaid Place, therefore it does not appear that the Defendant was within the Juriſdiction. 3dly, Becauſe *the Proceeding was for not paying a Church-Rate, and it did not appear that the Church was within the Archdeaconry.* 4thly, Becauſe it was *not ſet forth that the Excommunication was denounced in the Defendant's Pariſh Church in the Time of Divine Service*, which the Canon Law requires. Per tot. Cur. all the Exceptions were over-ruled; The 1ſt, Becauſe the Biſhop being the Perſon who certifies, and he having of Common Right a general Juriſdiction over all his Dioceſe, and according to **Starling's Caſe** 1 Roll 434, Power to appoint a Commiſſary in every Archdeaconry if he pleaſes; the Commiſſary in this Caſe is to be intended the Biſhop's Commiſſary, and his Authority is undoubtedly well ſhewn by ſaying that he was Legitime conſtitut'; for it is the Biſhop that certifies, and Credit is to be given to him, and in the Caſe of **Denham and Stephenſon** 1 Salk. 40. the Authority of a Commiſſary of a Peculiar is ſet forth in the like Manner, and adjudged well. The 2d becauſe the Words of ſuch a Place Ex vi Termini imply a Commorancy in that Place

Place, beſides *if he was not Commorant within the Juriſdiction he might have had a Prohibition before Sentence, but after Sentence it is too late* to make that Objection. The 3d and 4th, becauſe it is not neceſſary to ſet forth every particular Fact and Step of Proceeding, If there appears a ſufficient Authority, and what was done be ſet forth in General, it is well enough; beſides if the Court had been irregular in any of thoſe Particulars, the Defendant might appeal to the ſuperior Eccleſiaſtical Courts. It was objected that the Words in the Concluſion of the Significavit, as they appeared by the Recital, were Sigillum quo in hac Parte utimur apponi fecimus, whereas the Significavit ought to be under the Biſhop's Seal, and all the Precedents are Sigillnm meum or Officii; but per tot. Cur. the Writ was adjudged good. MS. Rep. Mich. 5 Geo. B. R. The King v. Burward.

(I) Plea.

In what Actions.

Excommunication was pleaded in the Plaintiff in Appeal, and was in Doubt;

1. EXcommunication *in Appeal* does not loſe the Suit of the Plaintiff, nor by this ſhall the King have the Suit, but the *Defendant was let by Mainpriſe de Die in Diem quouſque abſolvatur*; quod nota. Br. Excommengement, pl. 9. cites 3 Aſſ. 12.

for the Defendant cannot be upon this arraigned at the Suit of the King; for the Plaintiff may be abſolved, and the Defendant ſhall anſwer to the Appeal, and if the Defendant ſhall be impriſoned it may be that the Plaintiff will not be aſſoiled for Covin to hold the Defendant in Priſon, and if he ſhall be diſmiſſed the King may be defrauded, ſo that the Defendant ſhall not be arraigned at his Suit, and at laſt the Defendant was let to Mainpriſe, and went ſine Die till a certain Day, that the Court in the mean Time may be adviſed, M. 3 E. 3. he went to Mainpriſe from Day to Day till the Plaintiff was abſolved. Br. Excommengement, pl. 16. cites 13 E. 4. 8.

2. Excommunication is no Plea in an Action brought by *Qui Tam*, becauſe it is the Suit of the King for Contempt to his Law. 12 Rep. 61. in a Nota there.

(K) Writ de Cautione admittenda.

1. IF the Party excommunicated, who is taken and in Priſon, *offers ſufficient Caution* or Surety *to abide the Ordinances* and Rules *of the Holy Church, and the Judges there and the Ordinary do refuſe* for to take ſuch Caution or Surety, then *he may have another Writ unto the Biſhop to admit of his Caution.* F. N. B. 63. (C)

2. When a Man is juſtly excommunicated, and taken by Force of the King's Writ De Excommunicato cap. *if the Biſhop, upon the King's Writ De Cautione admittenda* &c. *do not deliver him*, then *ſhall a Writ out of the Chancery go to the Sheriff* upon the Refuſal of the Biſhop *to deliver him.* 2 Inſt. 623.

Raym. 225. Mich. 25 Car. 2. B. R. the S. C. adjornatur. —

3. In *Debt upon a Bond*, the *Condition* recited, That *whereas the Obligor was excommunicated* for not coming to Church, *and that the now Plaintiff at his Inſtance and Requeſt had abſolved him, that if he ſhould obey all the lawful Commands of the Church, that then &c.* The Defendant

fendant demurred, ſuppoſing the Condition to be againſt Law, and ſo the Bond void. Hale ſaid, If a Man were excommunicated, there was a Writ De Catione admittenda; and ſometimes they took an Oath of the Party Ad Parendum omnibus Eccleſiæ mandatis licitis & honeſtis; and that was called Cautio Juratoris; and ſometimes Cautio Pignoratitia was given; adjornatur. Vent. 166. Mich. 23 Car. 2. B. R. Exeter (Biſhop) v. Starr.

2 Lev. 36. S. C. ſays tha Hale Ch. J. doubted if the Bond was good or not, but that Wild J. held it good. But

that it being moved again iu the following Term the Court would not proceed in the Caſe, becauſe the Excommunication and Offence were pardoned by the General Pardon; but then Hale Ch. J. ſaid that upon Writ De Cautione admittenda the Biſhop may take a Bond, becauſe the Writ enables him to do it, but not otherwiſe; And now Wild J. held that the Biſhop cannot take the Bond in his own Name, and ſo to make the Forfeiture due to himſelf which ought to go to the King, and cited Roll Rep. 110. —— Debt was upon a Bond, conditioned for the Obligor's Submiſſion to the Church; The Bond was given in the Year 1693, and there being a General Act of Pardon ſince that Time, the Queſtion was, Whether ſince that Act took away the Offence and Excommunication, it would not likewiſe diſcharge the Bond? And the Caſe of the Biſhop of Exeter and Sterling in my Lord Hales's Time, now in Levinz's Reports, was remembered, and ſaid, That there never was any Judgment upon the Roll; and it went over to be ſpoke to this Term. Mich. 2 Ann. C. B. Biſhop of Durham v. Ladler.

4. It was moved for a *Superſedeas* to a Writ De Cautione admittenda, *for that they had taken a Writ* to the Sheriff *without any Affidavit* filed, *that the Biſhop refuſed* to admit of Caution, and for that Reaſon a Superſedeas was awarded. Vern. 119. pl. 107. Hill. 1682. Archbiſhop of York v. . . . .

5. *And* the Lord Keeper declared, that finding this Court often troubled with Writs De Cautione admittenda, he thought the Right of it was, that *if there was a Sentence* for a Man to pay Money, or *to do any* other *Thing in the Spiritual Court, a Man ought firſt to perform that* before he is admitted to his Writ De Cautione admittenda; for it is in vain to take Security Parere Mandatis Eccleſiæ, where a Man refuſes to obey the Sentence. Vern. 119. pl. 107. Hill. 1682. Archbiſhop of York v. . . . .

6. *Sed* Quære; for ſuppoſe a Man be excommunicated *for not coming to Church or not receiving the Sacrament*, How can he do that till his Caution is admitted and he abſolved? Vern. 119. in S. C. ſeems to be a Quære of the Reporter.

(L) Superſedeas of the Writ, in what Caſes; And by what Court.

1. THE Court diſcharged the Defendant becauſe the Excommunication on which he was taken (being on a Quarrel with the Regiſter) was *not before recorded in Court*; And ſo, by Windham, is *the conſtant Rule of the Books where he is not taken for any of the Cauſes in the Statute for which particular Penalties are annexed*; bur per Cur. the Party ſtands ſtill excommunicated. Keb. 632. pl. 116. Mich. 15 Car. 2. B. R. The King v. Aylet.

2. A Superſedeas to an Excommunicato capiendo was moved for on a *Suggeſtion that the Party was not excommunicated for any of the Cauſes mentioned in the Statute 5 Eliz.* But per Cur. the Cauſe is not judicially in Court till Hab. Corp. be granted and returned; And Windham J. ſaid, that one may be taken on an Excom. cap. upon a Cauſe not mentioned

tioned in the Statute, becauſe *the Statute does not take away the Excom. cap. at Common Law, but gives it with greater Penalty in certain Caſes mentioned in the Statute*, So that the Excom. cap. in the other Caſes ſhall be without a Penalty. Sid. 181. pl. 19. Hill. 15 & 16 Car. 2. B. R. Anon.

3. Reynolds J. ſaid that he remembred a Caſe, where it was determined, that a Writ of Excommunicato Capiendo might be *ſuperſeded before the Return*, [and the Court in the principal Caſe ſeemed directed by it.] Barnard Rep. in B. R. 38. Hill. 1 Geo. 2. in Caſe of the King v. Blagrave.

4. It was moved to ſuperſede a Writ of Excommunication, becauſe it was *not ſhewn that the Defendant was commorant within the Dioceſe at the Time of the Excommunication* pronounced, but this was diſallowed; Per Ld. C. Parker. Wms's. Rep. 435. Paſch. 1718. The King v. Burrard.

5. *And* another Objection was, that there *was no Addition* to the Defendant *in the Writ*; But it was anſwered on the other Side that Addition was only requiſite in the *Cauſes* of Excommunicaton *mentioned in the Statute of 5 Eliz.* 23. for which reaſon it was true, that for want of Addition there *could be no Proceeding* againſt him *by way of Proclamations with Pains and Penalties for not appearing*, but as the Matter was plainly of Eccleſiaſtical Conuſance, viz. the Repairing of a Church, the Excommunication was good; And the Court likewiſe diſallowed this Exception. Ibid.

6. *But the Writ* Iſſuing out of Chancery, and returnable in B. R. according to the Statute, *though not actually returned, but* having been *brought into B. R. and by that Court delivered to the Sheriff*, his Lordſhip doubted * whether Chancery could ſuperſede this Writ, B. R. having been poſſeſſed of it, but afterwards ſeemed to think it might becauſe of the great Miſchief which might follow if ſuch Writ ſhould iſſue † in the long Vacation when B. R. does not ſit, and ſo might be a Failure of Juſtice, and the Party continue long in Priſon, and without Remedy. Ibid. 436.

* Writ was for not paying Coſts in a Cauſe the Spiritual Court for Non-payment of Tythes, and other Eccleſiaſtical Duties, which being ill for Uncertainty, though the Writ was inrolled in B. R. yet being not returned there, to prevent a Failure of Juſtice, it was ſuperſeded in Chancery by Ld. C. King, Trin. 1727. Wms's. Rep. 436. in a Note there, cites Trin. 1727. Barlow v. Collins.

† In a Nota, Wms's Rep. 436. at the Bottom, is added a Quære, whether the Words (in the long Vacation) ſhould not have been (a little before the long Vacation.) For that the Statute 5 Eliz. S 2. expreſsly ſays, that every Writ of Excommunicato Capiendo ſhall be made out in Term Time.

For more of Excommunication in General, See other proper Titles.

Execution.

Execution.

* Execution of Fine or Recovery.

* This is misplaced here, but is so in Roll.

Fol. 884.

(A) In what Court Execution may be sued.

1. If a * Record comes into B. Regis by Writ of Error, **Execution may be sued there.** 12 H. 4. 23. Br. Faux Judgment, pl. 6. cites S. C.——Fitzh. Execution, pl. 27. cites S. C.——* S. P. And it shall never be remanded, nor Execution cannot be awarded in a Franchise without the Record, but B. R. shall award Execution. Br. Parol ou ple Remaund, pl. 1. cites 44 E. 3. 37.——S. P. that he may have Execution in B. R. by Scire Facias. Br. Executions, pl. 112. cites S. C.

2. If a Record comes into Bank upon a Writ of false Judgment, **Execution may be sued there.** 12 H. 4. 23. Br. Faux Judgment, pl. 6. cites S. C.——Fitzh. Execution, pl. 27. cites S. C.——Where Record of a base Court is removed into B. R. by Writ of false Judgment, there by this it is not of Record to have Execution upon it, but if the Court affirm the first Judgment, or reverses it, then Execution lies; or Writ of Error when they have meddled with it, and not before; quod nota. Br. Executions, pl. 75. cites 39 H. 6. 3. 4.—S. P. For there lies the Record. Br. Executions, pl. 112. cites S. C.

3. *Sci. Fac. to have Execution in Writ of Annuity*, and the Case was, that *after Judgment in C. B. the Defendant removed it by Writ of Error into B. R.* and after *the Record among other Records was removed into the Treasury* or Receit, and after the *Plaintiff brought Certiorari* out of the Chancery directed to the Chamberlain and Treasurer *to certify it in Chancery*, and *from thence he came by Mittimus into C. B.* and the *Plaintiff prayed Execution*; Prisot said, it seems that C. B. shall award Execution notwithstanding that it was removed from hence into B. R. by Writ of Error, and thence the Record came into the Receit; Yet *if nothing was done upon it in B. R. C. B. may award Execution notwithstanding the Record was once in B. R.* and in this Case it is at the Election of the Party to sue Execution in the one Court or in the other, and if Judgment was affirmed in B. R. and after the Record came into the Receit, the Party may yet sue Execution in C. B. upon the Record removed. Brook says, Quære inde; For it seems to him, that if they meddle with the Record, that then Execution shall be in B. R. But per Prisot, if the Judgment was reversed in B. R. and the Defendant removed the Record out of the Receit into C. B. and sued Execution, the other may say that the Judgment was reversed in B. R. in Bar of Execution. Br. Executions, pl. 71. cites 37 H. 6. 16. S. C. continued. 37 H. 6. 28. b. 29. a. pl. 8.

* At what Time.

* This is so in Roll, but misplaced here.

(B) Upon whom it may be executed by Entry.

1. If a Judgment be reversed in Writ of Error against the Heir of the Recoveror, **the Demandant may enter without more** upon him, **though he be in by Descent.** 9 H. 6. 49. Br. Error, pl. 9. cites S. C. But where the Heir has his Age the Demandant shall have Scire Facias against him at his full Age; Per June.——Fitzh. Error, pl. 20. cites S. C.——Br. Entre Congeable, pl. 105. cites S. C.

2. If

Br. Error, pl. 9 cites S. C. —— Fitzh. Error, pl. 20 cites S. C. — D. 376. b. Marg. pl. 26. cites 49 E 3 21. and 48 E. 3. 20 and Mich. 1 Jac. B. R. per Cur. that where one has Judgment to recover if his Entry be lawful he may enter without Sci. Fa. and without ſuing of Execution.

2. If in Writ of Error againſt the Heir of the Recoveror the Judgment be reverſed, yet he cannot enter upon the Tertenant without a Scire Facias 9 H. 6. 49.

† Br. Barr. pl. 26. cites S. C. —— Br. Entre Congeable, pl. 34. cites S. C. & S. P. per Newton.

3. If a Man recovers in Real Action, and Tenant dies after before Execution, yet Demandant may enter upon the Heir. 10 H. 6. 5. b. 16 H. 7. 8 b. 3 H. 4. 7. † 21 H. 6. 17. b. becauſe the Record binds his Title.

If Judgment be given against a Tenant in Tail upon a faint or falſe Action, and Tenant in Tail dies before Execution, no Execution can be ſued againſt the Iſſue in Tail. Co. Litt. 361. b.

4. So though it be of Land in Tail. 10 H. 6. 5. b.

* Br. Deſcent, pl. 37. cites S. C. —— Fitzh. Mort-danceſtor, pl. 3. cites S. C.—— Br. Entre Congeable, pl. 116. cites S. C. and conſequently upon the Heir of the Alienee of him who loſt by the Recovery. For he cannot be in better plight than the Tenant who loſt; Per Neale Serjeant; quod non negatur.——Ibid. pl. 18. cites 2 H 4. 16. 17. S. P. per Thirning and Tirwhit.

5. So if a Man recover in Real Action, though there are 2, 3, or 4 Deſcents before his Entry, yet he may enter upon thoſe to whom it deſcended becauſe the Recovery binds the Blood and diſproves the Title. * 6 E. 4. 11. b. 3 E. 4. 7.

Fol. 885. After Recovery the Entry is lawful upon him who is in as Heir to the Tenant who loſes; For this title is bound, Contrary if Diſſeiſor enters and dies ſeiſed, Nota Diverſitatem, for he is not in properly as Heir. Br. Entre Congeable, pl. 104. a Remark of Brook on the 5 H. 7. 2. 29.——Ibid. pl. 133. cites S. C. and Brook adds the like Diverſity.

6. If a Man recovers in Real Action, and after before Execution a Stranger enters and dies ſeiſed, yet the Recoveror may enter upon his Heir. 16 H. 7. 8. b.

7 If a Man recovers in Writ of Right of Advowſon, and after at the Voidance a Stranger preſents, yet when the Church voids again the Recoveror may preſent. 16 H. 7. 8. b.

8. If the Demandant *recovers in an Aſſiſe of Mortdanceſtor*, he may enter and *execute the Judgment without being put in Seiſin by the View of the Jurors, but if* he be *diſſeiſed again*, he ſhall not have Rediſſeiſin, but *is put to his Writ of Poſt Diſſeiſin*; Per Dyer and Welſh. Mo. 54. pl. 157. Paſch. 5 Eliz. Anon.

(C) At what Time a Recovery may be executed by Entry.

Fitzh. Entre Congeable, pl. 35. cites S. C.

1. HE who recovers may as well enter after the Year as within the Year upon him againſt whom the Recovery was had. 49 E. 3. 23. b.

Fitzh. Entre Congeable, pl. 35 cites S. C.

2. But he cannot enter upon a Stranger to the Recovery after the Year. 49 E. 3. 23. b.

Fitzh. Entre Congeable, pl. 35. cites S. C.

3. He cannot enter after a Deſcent caſt. 49 E. 3. 23. b.

——But ſee (B) pl. 5. 6. ſupra.

(D)

(D) What ſhall be ſaid Execution in Law to ouſt Action executory.

1. UPON a Fine ſur Conuſans de Droit come ceo which he has of his Gift there ſhall not be any Execution. For it is executed. 43 E. 3. 15. b.

Seiſin of the Eſtate.

2. If Baron and Feme are Tenants Special Tail by Fine in Remainder, and the one dies, and the other enters after the Determination of the particular Eſtate and dies, their Iſſue ſhall not have any new Execution though he claims as Heir of the Body of both. * 50 E. 3. 6. † 49 E. 3. 22.

* Fitzh. Scire Facias, pl. 2. cites S. C. —— † Br. Scire Facias pl. 51 cites S. C.

3. If he was ſeiſed of the Land but not by Force of the Fine he ſhall have Execution. 25 E. 3. 48. b.

(E) Conjunction of Eſtates.

1. IF Fine be levied to one Remainder to his right Heirs this is executed, and therefore his Son ſhall not have Execution. 42 E. 3. 9. b.

Br. Scire Facias, pl. cites S. C. —— Fitzh. Scire Facias, pl. 82. cites S. C.

2. If by Fine there be Leſſee for Life Remainder in Tail, Remainder in Fee, and Leſſee ſurrenders to Remainder in Tail, and after Remainder dies without Iſſue, and all deſcends to the Leſſee who enters, by which he is ſeiſed in Fee, and ſo the Fine executed, and dies, his Heir ſhall not have Execution. Contra 42 E. 3. 9. b. Becauſe during the Life of the Leſſee it is not executed. But Brook Scire Facias 21. ſays it is great Error.

Fitzh. Scire Facias, pl. 82. cites S. C.

3. But in this Caſe if after the Surrender the Remainder in Tail had died without Iſſue, he in Remainder in Fee might ſue Execution for his Remainder, for it was not executed. 42 E. 3. 10.

Br. Scire Facias, pl. 21. cites S. C. —— Fitzh. Scire Facias, pl. 82. cites S. C.

4. If Tenant in Tail Remainder to his right Heirs dies without Iſſue, his collateral Heir ſhall have Scire Facias for the Remainder in Fee. 7 H. 4. 16. b.

Br. Fines levies de terres, pl. 32 cites S. C.

5. If Eſtate be to two, and the Heirs of one, and he who has for Life ſurvives; The Heir of him who has the Fee may ſue Execution after his Death, or Mordanceſtor at Election. 42 E. 3. 9. b. But Brook Scire Facias 21 ſays quod Mirum that it ſhall be executed at Election.

Fitzh. Scire Facias, pl. 82. cites S. C. —— If in ſuch Caſe a Stranger abates, in this Caſe the Heir may either ſuppoſe the Fee-Simple executed, and have an Aſſiſe of Mordanceſtor,

danceſtor, the Words of which Writ be, Si R. pater fuit ſeiſitus Die quo obiit in Dominico ſuo ut de feodo, which cannot be ſaid of him that has but a Remainder expectant upon an Eſtate for Life, but in reſpect that he is ſeiſed of a Fee-Simple, and of a Joint Eſtate in Poſſeſſion the Words in the Writ are true, That he was ſeiſed in Dominico ſuo ut de feodo. Likewiſe the Heir may have a Writ of Right, which alſo in ſome Sort proves the Fee-Simple executed, or the Heir may have a Scire Facias to execute the Fine, by which the Heir ſuppoſes that the Fee was not executed, or he may maintain a Writ of Inſtruſion where the Heir makes the like Suppoſition, and ſhall term it a Remainder. Co. Litt. 184. a. b.

Br. Scire Facias, pl. 77. cites S. C.—— Br. Mort-danceſtor, pl. 7. cites S. C.

6. If an Eſtate be given to the Baron and Feme, and the Heirs of the Baron, if the Baron ſurvives and dies, his Heir ſhall not have a new Execution. 11 H. 4. 55. b.

Br. Scire Facias, pl. 77 cites S. C. —— Br. Mortdanceſtor, pl. 7. cites S. C.

7. So it ſhall be if the Feme ſurvive. 11 H. 55. b.

* Fol. 886. Fitzh. Scire Facias, pl. 2. cites S. C.

8. If Leſſee for Life Remainder in Tail are by Fine, and Leſſee infeoffs the Remainder in Fee and dies, and then he in Remainder dies, his Iſſue ſhall have * Scire Facias, for it is not executed. Yet it is there objected that this Feoffment enures but as a Surrender. 50 E. 3. 6.

Br. Scire Facias, pl. 60 cites 7 H. 4. 22. S. C.——Fitzh. Scire Facias, pl. 65. cites S. C.

9. If Tenant after Poſſibility has a Remainder in Tail to his Heirs the Remainder is executed. Contra 7 H. 4. 23. b. adjudged.

10. If Tenant in Tail be, the Remainder to a Stranger in Tail, the Remainder to the Right Heirs of the Donee in Fee, this is not any Execution of the Remainder in Fee; But after the Determination of both Eſtates Tail, the collateral Heir of the Donee ſhall have Execution. 38 E. 3. 17. b.

(F) In what Caſes the Execution of one ſhall ſerve for others.

1. If a Man be once ſeiſed of the Eſtate, no Execution may be ſued after by any who claim the ſame Eſtate ſo executed.

* Br. Scire Facias, pl. 51. cites S C. † Fitzh. Scire Facias, pl. 2. cites S. C.

2. If Leaſe be made for Life, Remainder to the Baron and Feme in ſpecial Tail, and Baron dies, and Leſſee dies, and the Feme enters, by which ſhe is ſeiſed in Tail, after her Death the Iſſue, though he claims as Iſſue of both, ſhall not have new Execution, for he claims the ſame Eſtate. * 49 E. 3. 22. † 50 E. 3. 6.

Fitzh. Scire Facias, pl. 8. cites S. C.

3. If a Fee be executed in the Anceſtor, it ſhall never be executed again by his Heir. 17 E. 3. 29.

* Fitzh. Scire Facias, pl. 8. cites S. C.

4. If a Fee Tail be executed in the Anceſtor, it ſhall not ever be executed again by his Iſſue in Tail. 29 E. 3. 16. b. adjudged. Contra * 17 E. 3. 29.

(G)

(G) Of what Eſtate it ſhall be ſued.

1. IF Remainder be limited to one in Tail with divers Remainders over for Life the Remainder in Fee to the Remainder-man in Tail, if the Remainders die, ſo that the Fee and Tail come together to the Heir, if he ſues Execution, he may ſue it but only for the Tail. 43 E. 3. 12. b. Br. Scire Facias, pl. 24. cites 43 E 3. 11. S. C. ——Fitzh. Scire Facias, pl. 83. cites S. C.

2. Upon a Scire Facias *quare Executio non*, the Plaintiff in Error may *aſſign Error*; but *if he does not*, the Judgment is only *that Execution be awarded*, and not that Judgment be affirmed. 12 Mod. 231. Mich. 10 W. 3. Anon.

(H) How it is to be made.

1. IF a Recovery be of divers Meſſuages, the Sheriff upon the Writ of Execution may make Execution in one in the Name of all, without going to every one in particular. By Reports 14 Ja. per Haughton. Paſch. 15 Ja. B. R. in the ſame Caſe ſo held per Cur. Roll Rep. 421. in pl. 8 S. P. by Haughton, in Caſe of Floyd v. Bethel.

2. But if a Man be to be put into Poſſeſſion of divers Meſſuages upon a Writ of Execution, and the Houſes are in the Poſſeſſion of ſeveral Men, he ought to go to every Houſe particularly and thereof deliver Seiſin and Delivery of Seiſin of one in the Name of all is not ſufficient. Paſch. 15 Ja. B. R. per Cur. between *Floyd and Bethel*; For the Sheriff ought to give Plenariam Seiſinam.

3. If a Man brings Ejectment of 40 Acres of Land, and recovers 30 and not the Reſidue, upon the Writ of Execution the Sheriff may deliver to him ſome, viz. three or more Acres in the Name of the whole, without ſetting out the Land recovered by Metes and Bounds, though the Plaintiff has not recovered all the Acres whereof he has brought his Action, and of which he has ſuppoſed the Defendant Tenant. Trin. 15 Ja. B. R. adjudged. Where ſeveral Acres are demanded, and but Part recovered, and Hab. Facias comes to him to give Execution of the whole of the Acres recovered, it is not ſufficient to give Poſſeſſion of one Acre in the Name that are recovered, but he muſt ſet forth all the Acres in particular, ſo that the Recoverors ſhall have the Benefit of the Judgment by Certainty, and the ſeveral Profits, without Interruption or Diſturbance; Per Ley Ch. J. Palm. 289. Trin. 20 Jac. B. R. Molineux v. Fulgam.

4. If a Writ of Execution goes to the Sheriff to put a Man in Poſſeſſion of 20 Acres of Land, the Sheriff ought to give him 20 Acres in Quantity, according to the Uſage of the Country where it is, and not according to the Statute. By Reports 14 Ja. adjudged, *Floyd v. Bethel.* Roll Rep. 420. pl. 8. S. C. ruled accordingly. —— Bridgm. 56. S. C but S. P. does not appear.

5. If

Br. Seiſin, pl. 36. cites S. C. but * Fol. 887. Brooke ſays, Quære bene.

5. If a Man recovers Rent or Common, upon which a Writ iſſues to the Sheriff to put him in Poſſeſſion, and the Sheriff comes upon the Land, and delivers to him Seiſin of the Rent or Common by Parol, this is well made, and the * Recoveror is in actual Poſſeſſion by it. 22 Aſſ. 24. per Thorpe.

—— Fitzh. Aſſiſe, pl. 228. cites S. C.

Dal 34 pl. 27. S. C. in totidem Verbis. —— D. 205. b. 206. a. pl. 8, 9. Gery v. Smart, S. P. and ſeems to be S. C.

6. If a Man ſeiſed of a *Rent-charge* enters into a *Statute-Merchant*, and afterwards Execution is ſued upon it, this Rent ſhall be extended in Execution, though the *Statute de Mercatoribus ſays only* that the *Goods and Lands* of the Debtor ſhall be delivered by a reaſonable Extent, but *ſays nothing of Tenements or other Things*; and it was held, that after Execution thus taken, the *Cogniſee may avow* for the Rent *without any Attornment* made by the Tenant of the Lands, becauſe his Eſtate is by Act of Law. Mo. 32. pl. 104. Trin. 3 Eliz. Anon.

7. In an Information of Intruſion in the Exchequer for intruding into 200 Acres of Land, and 40 Acres of Wood &c. upon Not Guilty pleaded the Jury find the Defendant Guilty in 20 Acres of Land, and 12 Acres of Wood, and as to the reſt Not Guilty; It was moved in Arreſt of Judgment, that the Lands in which &c. are not aſcertained, ſo that the Court knew not into which to put the Queen in Poſſeſſion; But per Manwood Ch. B. this ſhall be by the Appointment of him that proſecutes for the Queen; and if he enters on any other Lands or Woods than thoſe in which the Queen has an Intereſt, it ſhall be at his Peril; And this he ſaid was the Opinion of the Juſtices in the Star-Chamber. Sav. 28. pl. 67. Trin. 24 Eliz. The Attorney General v. Aylworth.

8. Upon an *Elegit* the *Jury ſhall extend all the Land*, and the *Bailiff* (where there is a Franchiſe) and the *Sheriff*, where no Franchiſe is, *ſhall deliver the Moieties*, and not the Jury; and ſo are all the Precedents. Cro. C. 319 pl. 13. Trin. 9 Car. B. R. Sparrow v. Matterſock.

9. A *Seiſure of Part* of the Goods in a Houſe *by Virtue of a Fieri Facias in the Name of the Whole* is a good Seiſure of all; Per Holt Ch. J. at Guild-Hall. Hill 10 W. 3. Ld. Raym. Rep. 724, 725. in Caſe of Cole v. Davis & al' Aſſignees of Maul a Bankrupt.

(I) Upon a Fine or Recovery.

Againſt whom it ſhall be ſued.

1. If a Man recovers in an Ejectment againſt J. S. who after dies, he may ſue Execution againſt his Heir; For by Intendment J. S. his Anceſtor the Ejector was a Diſſeiſor. P. 3 Jac. B. R. agreed between *Carter and Cleypool.*

Mo. 137. 141. pl. 281. Paſch 23 Eliz. Shelley's Caſe. S. P. reſolv'd by all, Præter Meade J.

2. If in a Common Recovery *Judgment* be had *againſt Tenant in Tail* where *he vouches, and has Judgment to recover over in Value*, although the *Tenant in Tail dies before Execution*, yet the Recoveror ſhall execute the Judgment againſt the Iſſue in Tail in reſpect of the intended Recompence, and for that it is the common Aſſurance of the Realm. Co. Litt. 361. b.

——Pig. of Recov. 154. S. P. cites Plowd. 55. 375. and 1 R. 6. if Lands be conveyed to

to A. and his Heirs with Warranty, and the Grantee ſuffers a Common Recovery to the Uſe of him and his Heirs, it is but the old Eſtate in Degree and Privity as before. So if Land be convey'd to A. in Fee, with Warranty to him his Heirs and Aſſigns, and A. ſuffers a Common Recovery to the Uſe of a Stranger, the Recoveror may vouch as Affignee, cites Hob. 27. And when ever a Common Recovery is ſuffered by a Man to his own Uſe, he is in the Eſtate as he was before.

(K) Execution of a Fine.

Which want Execution, and which are executed.

1. NO Execution ſhall be ſued of a Fine Come ceo que il ad de ſon done, becauſe the Fine proves a Gift precedent and Poſſeſſion, and therefore againſt the Suppoſal he ſhall not have new Execution. 41 E. 3. 14. Br. Scire Facias, pl. 18. cites 41 E. 3. 13. S. C.——Fitzh. Scire Facias, pl. 80. cites S. C.——2 Inſt. 513. S. P.——Weſt's Symb. 6. S. 20. S. P.——Wood's Inſt. 240 S. P.

2. But if ſuch Fine be levied in Tail, the Remainder over, he in Remainder may ſue Execution after the Tail ended. 41 E. 3. 14 b. Br. Scire Facias, pl. 18. cites 41 E. 3. 13 S. C.——Fitzh. Scire Facias, pl. 80. cites S. C.

3. But a Fine upon Grant and Render is not executed before Execution ſued. 41 E. 3. 14 b. *So* of Fines *Sur Cogni-zance de Droit tantum*, and of Fines *Sur Releaſe* or *Confirmation*. Weſt Symb. 6. S. 20.——But 2 Inſt. 213. contra as to Fines Sur Releaſe and Confirmation.

How.

4. In Scire Facias if he makes his Title as Couſin to another he need not count How Couſin. 41 E. 3. 14. Br. Scire Facias, pl. 18. cites 41 E. 3. 13. S. C.——Fitzh. Briefe, pl. 535. cites S. C.

5. But if he ſhews How Couſin it is good. 41 E. 3. 14. Br. Scire Facias, pl. 18. cites S. C.——Fitzh. Brief, pl. 535. cites S. C.

6. *Attornment* by the Termor is an Execution of a Fine. Arg. 2 Jo. 71. cites 8 E. 3. 44. For a Fine may be executed *in Pais* as by *Entry* cites 1 Rep. 106. Shelly's Caſe, and D. 17. b.

(L) For Debts or Damages.

What Court may award Execution.

1. IF a Recovery be in a Court Baron they have not Power to make Execution to the Plaintiff of the Goods of the Defendant, but they may diſtrain the Defendant and retain the Diſtreſs in their Br. Court Baron, pl. 6. cites S. C.—The

Officer in ſuch Caſe cannot *ſell the Goods* and raiſe the Money, but may retain them in Pound as Diſtreſs Quouſque an Agreement be made &c. but it ſeems that *where the Uſage is otherwiſe it is good*, as *by Levari Facias*. Br. Execution, pl. 80. cites 22 Aſſ. 72.——*Debt in Court Baron*, the Plaintiff recovered by Judgment and had Execution, and *the Beaſts of the Defendant were delivered to him in Execution*.——Br. Executions, pl. 133. cites 38 E. 3. 3.——See tit. Court Baron (F. a) pl. 1. S. C. and the Notes there.

their Hands in Safeguard, till he has ſatisfied the Condemnation. 4 H. 6. 17. b.

Cro. E. 371, 372. pl. 15. S. C. held accordingly. But if the firſt Verdict had been diſaffirmed, and Execution on the firſt Verdict had been had before; The Court of C. B. might have awarded Reſtitution very well; and afterwards Execution was awarded accordingly.

2. If a Man recovers in Banco Regis, and upon this an Attaint is brought in Bank where the firſt Verdict is affirm'd, no Execution may be awarded in Bank, becauſe they have but tenorem Recordi there. H. 37 El. B. Per Cur. between *York and Allen*.

Cro. E. 371. 372. S. C. adjudged.

3. But in this Caſe Execution may be awarded in Banco Regis, for there the Record itſelf continues. H. 37 El. B. R. adjudged between *York and Allen*.

It ſhall not be executed in B. R. to make this Court ſubſervient to an Inferior Court. But upon ſuch Judgment remov'd hither by Certiorari Debt may be brought in B. R. Lev. 134. Herbert & al' Menucaptors of Merry v. Alcock.——Sid. 213. S. C.

4. If a Man recovers in an Inferiour Court of Record Debt or Damage, and after removes the Record into the King's Bench by Certiorari, Whether the Court of King's Bench be bound in this Caſe to grant Execution upon this Judgment dubitatur. Mich. 11 Car. B. R. between *Pechy and Foſter*, the Court appointed it to be argued, ſcilicet, Whether the Court of B. R. be bound to aid by ſuch Way Inferior Courts. Intratur H. 10 Car. Rot. 74.

5. It was ſaid that *in falſe Judgment* the Parties have Day in Court, and in Writ of Error not, and in Debt before the Sheriff in the County the Plaintiff recover'd his Debt and his Damages, and the Defendant brought Writ of Falſe Judgment, by which the Record was remov'd by Recordare out of the County into Bank, and in the ſame Court the Plaintiff in the firſt Action may pray Execution if the Defendant will not aſſign his Errors, and after the Plaintiff in the Writ of Falſe Judgment was Nonſuited; Per Aſcough the Original is determin'd, and therefore Per Paſton Execution ſhall be awarded in Bank immediately. And ſo to ſee that the Record ſhall not be remanded into Pais, but Execution ſhall be made in Bank. Br. Faux Judgment, pl. 15. cites 20 H. 6. 18.

6. If a Record comes into a more High Court as *as out of C. B. into B. R.* Execution ſhall be awarded in B. R. and the *Record ſhall not be remanded*. Br. Faux Judgment, pl. 9. cites 21 H. 6. 34. and ſays that this appears by that Caſe.

7. *Juſtices of Aſſiſe upon Diſſeiſin with Force* may award Capias pro fine, quod nota; *and if any Juſtices of Aſſiſe die, or be removed, and others made*, there *they may award Execution as well as the firſt* Juſtices; and where *Juſtices in Eyre* come into the County, they ſhall ſend for all the Records in the County, as well of Juſtices of Aſſiſe as others, and award Execution, Prout alii facerent. Br. Executions, pl. 59. cites 14 H. 7. 15. 15 H. 7. 5.

8. If a Man *recovers Debt* or Damages *before Juſtices of Oyer* and Terminer, and has not Execution, he may *remove the Record and the Proceſs into B. R* and there ſue Execution, and have a Scire Facias upon the Record &c. F. N. B. 246. (B.)

9. When

9. When *Judgment* is *given before the Sheriff*, and the *Tenant has no Goods &c. in that County*, he may have a Certiorari to remove the Record into B. R. and there have Execution, for that is not Placitum. 2 Inſt. 23.

10. Judgment was given *in Debt at the Grand Seſſions in Wales* againſt a Defendant inhabiting in one of theſe Counties, and the *Defendant dies Inteſtate*, and *one who inhabits in London takes Letters of Adminiſtration*, the Queſtion was whether any Execution may be in Wales, becauſe he neither inhabits nor has any Thing there? and if not, then whether that Record may be removed into the Chancery by Certiorari, and ſent by Mittimus into B. R. or C. B. to the Intent to take forth a Scire Facias upon it, to have Lands out of Wales (or Goods in the Hands of the Adminiſtrator liable to it there.) And all the Juſtices and Barons conceived that it ſhould not; For he may not have a Scire Facias in any Court, but where the Judgment is given, and if ſuch Courſe ſhould be uſed, all Judgments in the Courts of London, or in Inferior Corporations, would be removed and executed here, which would be a great Inconvenience to the Subject to make Lands or Perſons liable to ſuch Judgments in other Manner than they were at the Time of the Judgments; Wherefore there is no Remedy, but to execute ſuch Judgments in their peculiar Juriſdictions. Cro. C. 34. pl. 7. Paſch. 2 Car. C. B. Anon.

Litt. Rep. 357. Riſam v. Goodwin, Hill. 6 Car. C. B. S. C. adjornatur.—— Ibid. 360. S. C. adjornatur.—— Ibid. 363. S. C. adjudged for the Defendant.—— Hut. 117. S. C. and Judgment againſt the Plaintiff; But it was ſaid, that upon this Judgment ſo ſent to this Court the Plaintiff might bring an Action of Debt, and ſo have Execution; But to make this Court an Inſtrument to ſerve an Inferior Court, and to extend their Juriſdiction by this Way, as it were by a Windlace, is not lawful——S. C. cited by Vaughan Ch. J. Vaugh. 398. concerning Proceſs into Wales ——Hardr. 119. cites S. C. but ſays that Hill. 7 Car. in Price's Caſe the Judge cited Authority, that if a Judgment in Wales were removed hither, an Action of Debt would not lie upon it, nor was any ſuch Evidence ever offered ſince 34 H 8. and that a Law diſuſed is as it were become Nul.——Sid. 213. pl. 13. Trin. 16 Car. 2 Herbert v. Alcock, S. P. of a Judgment in the Palace Court and a Diverſity was taken per Cur. between a Writ of Error on which a Judgment is affirmed, and Certiorari to remove a Record; For when Judgment is affirmed in Writ of Error, this adds Strength to the former Judgment, ſo that Execution may be ſued upon it throughout all England; But when a Record is removed out an Inferior Court by Certiorari and is ſent into one of the Benches by Mittimus, there no Execution may be ſued in another Place than in that from whence it was removed; and cites this Difference taken in the Caſe of Riſam v. Goodwin, Hetl. 117, 118. But they did not ſay whether Action of Debt lay in the Courts here on a Record ſo removed from an Inferior Court by Certiorari as is affirmed in Hutt. that it does.——Lev. 134. S. C. held accordingly as to the principal Point, and further held that on ſuch Judgment removed hither by Certiorari Debt may be brought according to Hutt. 117.

11. Upon Record removed out of an Inferior Court into B. R. by Writ of Error, a Diverſity was taken per Cur. upon Affirmance of Judgment between a *Writ of Error upon which Judgment is affirmed*, and *Certiorari to remove a Record*; For when Judgment is affirmed upon Writ of Error it adds Strength to the former Judgment; ſo that Execution may be ſued upon it *any where in England*; But when a Record is removed out of an Inferior Court by Certiorari, and is ſent into C. B. by *Mittimus*, there no Execution can be ſued in other Place than from whence it was removed. Sid. 213, 214. pl. 13. Trin. 16 Car. 2 B. R. Herbert v. Alcock.

(M) Of what Thing it may be.

Like head post. 560.

1. LAND which a Man has in Extent upon a Statute Merchant may be extended upon an Elegit. * 38 Aſſ. 4. admitted. 31 Aſſ. 6. admitted.

* Br Aſſiſe pl. 348. cites S. C.—— Land was extended by Statute Merchant and put in Execution to A. the Conuſee, and afterwards A. was condemned to

J N. in 100 l. who brought an Elegit, and this Land which was put in Execution to A. was put in Execution to J. N upon the Elegit as a Chattle. Brook ſays, and ſo ſee that Leaſe for Years, Lands in Ward, or in Execution by Statute, may be put in Execution as Chattel. Br. Executions, pl. 84. cites 31 Aſſ 6.——Br. Aſſiſe, pl. 319. cites S. C.——Br. Extinguiſhment, pl. 61. cites S. C.——3 Le. 156. pl. 61. cites S. C.

Fol 883.

2. A Copyhold **is not extendible, upon an Elegit. P. 8 Ja. B. per Cur.** 3 **Rep.** 9. *Heydon's Caſe.*

Sav. 66, 67. pl. 138. S. C. & S. P. by Manwood Ch. B.——See tit. Copyhold (O. d) pl. 34.

S. P. cited by Hendon Serjeant to have been adjudged 4 Jac. but denied by Hutton J. and others. Poph. 188. Mich. 2 Car. B. R.

3. **If a** Copyholder Leaſe for Years by Licence **of the Lord, this is not extendible in the Hands of the Leſſee. P. 8 Jac B. per Cur.** *Pitfoe's Caſe.*

* Hob. 47. pl. 53 S. C. accordingly but by Hobart Ch. J. perhaps if it were relievable, the way to relieve it were by Aud' Quer' becauſe there was no Time to plead it before——Brownl. 235 Coke v. Barnſley S. C. and held that though Ancient Demeſne is a good Plea where the Freehold is to be recovered or brought in Queſtion, yet it is no Plea in Treſpaſs.——S. C. cited as adjudged Mo 211. pl. 351.

4. **Land** in Ancient Demeaſne **may be put in Execution upon an Elegit. P. 13 Ja. B. between** * *Cockes and Barnſley,* **adjudged 5 Rep. 105. b.** *Alden's Caſe.* **Contra 22 Aſſ. 45. Contra 22 & 23 El. Dy. 373 13.**

S. P. but ſee Tit. Ancient Demeſne in Fitzh. 24. that Land may be put in Execution upon Statute Merchant; For it covers no Frank-tenement; and Brook ſays the reaſon ſeems to be, becauſe the one Execution is by Statute, which does not except the Ancient Demeſne, and the other is by the Common Law by Elegit, in which Ancient Demeſne is acquitted from ſuch Execution, but ſee that that the Elegit is by Stat. W. 2. cap. 18. Br. Executions, pl. 89. cites 2 E. 2.

In Aſſiſe; It appears by the Argument of the Caſe that the Sheriff cannot put Lands in Ancient Demeſne in Execution by Elegit; For the iſſue was averr'd that the Land was Frank Fee, and not Ancient Demeſne; and Brook ſays it ſeems good Law; For he may execute Capias there for Treſpaſs &c. but if he meddles with the Land, as to extend it by Writ of Common Law, that would make this Land to be Frank Fee. Br. Executions, pl. 120. cites 22 Aſſ. 45.——Br. Elegit, pl. 18. cites S. C. accordingly.

A. was bound in a Statute Merchant to B. and B. ſued Execution of Land in Ancient Demeſne, and had it; quod nota, and after W. C. bought the Land of the Conuſor, and brought Recovery by Sufferance upon Voucher againſt the Conuſor, and recovered, and entred and ouſted B. by which B. brought Subpœna; and ſo it is admitted that Land in Ancient Demeſne may be put in Execution by Statute Merchant; For if this had not been taken for clear Law, W. C. who was a great Merchant, would have took Remedy for this Reaſon, which he did not, but by Recovery againſt the Conuſor to ouſt the Conuſee; quod nota. Br. Auncien Demeſne, pl. 37. cites 7 H. 7. 10.——But Elegit does not lie in Ancieht Demeſne. Ibid.——Br. Execution, pl. 91. cites S. C.

5. **If a Man recovers Debt or Damages** againſt a Diſſeiſee **of certain Land, and an Elegit is awarded, yet this** Land in the Hands of the Diſſeiſor **ſhall not be extended. Tr. 4 Ja. B. R. per Cur. in Caſe of** *Stamere v. Amone.*

If Ceſtuy que Uſe be bound in a Statute, or condemned in Damage, Executions, pl. 90. cites 7 H. 7. 6——S. P. Br. Elegit, pl. 11. cites 21 H. 7. 19.

6. **If a Man recovers** againſt **J. S. who is** Ceſtuy que Uſe of a Leaſe for Years, **this Term cannot be extended upon this Judgment. Paſch. 32 Eliz. B. E. cited it to have been adjudged.**

Execution may be made of the Lands by the Statute 1 R. 3. of Uſes; Per Cur. Br.

See tit Heir (C) pl. 19. &c Smith v. Angel.

7. **In** Debt againſt an Heir **upon an Obligation who has nothing by Deſcent but** a Dry Reverſion (expectant upon an Eſtate for Life **as I underſtand) the Plaintiff ſhall have Judgment to have Execution of it** quando accideret. **Trin. 12 Ja. B. R. adjudged.**

8. **If a Man recovers Damages** againſt B. who has a Villein who is poſſeſſed of Goods, **thoſe Goods cannot be taken in Execution, For thoſe are the Chattles of Villein till the Lord ſeiles them. 3 E. 3. Iter North. Execution** 108.

9. *Rent*

9. *Rent may be delivered in Execution upon Recognizance*, viz. Rent *reſerved upon a Leaſe for Term of Life, and the Recoveror may diſtrain, and yet he has not the Reverſion.* Br. Executions, pl. 143. cites 13 H. 4. and Fitzh. Avowry, 237.

10. He who *recovers Land by Judgment ſhall take it as it is at the Time of the Execution*, viz. if it be ſow'd with *Grain*, and not ſevered, or *Graſs be growing* ready to be Cut. Br. Judgment, pl. 104. cites 19 H. 6. 46.

11. Execution was awarded of *Lands in Durham againſt him who was Surety for the Peace in England*, and the King ſhall ſend to the Biſhop of Durham, or to his Chancellor, to do Execution. Br. Executions, pl. 94. cites 1 E. 4. 10.

12. *Treſpaſs of ſix Oxen taken*; The *Defendant ſaid that A. leaſed the Oxen with certain Land to the Plaintiff for* 12 *Years, and* after *A. was condemned to N. in* 10 *l.* and the *Defendant as Sheriff by Fieri Facias took the Oxen in Execution*; And per Brian and Choke, it is no Plea; For the Leſſor himſelf cannot take them during the Years. But per Brian, for Debt of the King due by the Leſſor, the Sheriff may diſtrain the Leſſee and ſell the Diſtreſs; but this ſhall be ſaid of Lands and Tenements, and not of Goods and Chattels; tamen quære inde. Br. Executions, pl. 107. cites 22 E. 4. 10, 11.

13. *Annuity* ſhall not be put in Execution, for it *is only a Choſe en Action*; Quod nota rationem inde bene. Br. Executions, pl. 144. cites Doct. and Stud. fol. 53.

14. *Nothing* ſhall be extended on an Execution *but what may be granted and aſſigned over*, and therefore becauſe the *Office of Filacer* cannot be granted, he being an Officer to the Court, and doing the Buſineſs of the Court, and not his own Buſineſs, and this is an Office of Truſt, and cannot be extended, becauſe it is not aſſignable; Per Shelley. Dy. 7. b. pl. 10. Paſch. 28 H. 8. Anon.

S. C. cited by Vaughan Ch. J. Vaugh. 181. becauſe it is an Office of Perſonal Truſt —

Decreed that *an Office* is extendable in Law or Equity. Chan. Caſes 39. Trin. 15 Car. 2. Jones v. Done.

15. In Debt on Bond the Heir confeſſes the Action by Nient Dedire, but that nothing deſcended to her in Fee-ſimple but a *Reverſion* of 30 Acres of Moore in S. The Plaintiff may pray ſpecial Judgment upon this Confeſſion, viz. Quod recuperet debitum & Damna de prædicta reverſione *levand' quando acciderit*, and ſpecial Writ ſhall iſſue to extend the whole 30 Acres; And it ſeems that this was the Law before the Statute of Weſtm. 2. 18. D. 373. a. pl. 14. Mich. 22 & 23 Eliz. Anon.

A Reverſion upon Eſtate Tail is not extendable. Cro E. 350. pl. 1. Mich. 36 & 37 Eliz. C. B. Apharry v. Bodingham.

16. Upon an *Elegit*, if there are *Goods ſufficient* the Sheriff is not to meddle with the Lands, and if there be not ſufficient Goods, yet he is not to meddle with the *Beaſts of the Plough*; Arg. Godb. 84. pl. 96. Mich. 28 & 29 Eliz. B. R.

17. Where Rent iſſues out of Land, if the Sheriff delivers the *Rent without the Land*, ſo as there is not any Reverſion, it is but a Rent-Seck, and a bare Rent cannot be delivered ut liberum Tenementum. Cro. E. 656. pl. 20. Hill. 41 Eliz. B. R. Walſall v. Heath.

Fee-Farm Rents are extendable upon an Elegit, and yet the

Words of the Statute, which gives the Sheriff Authority, are only Land, Medietatem Terræ; Arg. 10 Mod. 526.

Since the Statute of Quia Emptores Terrarum, if a Man gives Land in Fee reſerving a Rent, it is a Rent-Seck in a Subject, becauſe a Tenure cannot be created at this Day, and every Fee-Farm Rent, when granted by the King, becomes Rent-Seck, and therefore not to be extended; Arg. 9 Mod. 72. cites Cro. E. 656.

18. A Statute was acknowledged by Tenant in Tail in *Remainder*, who afterwards granted his Remainder to J. S. *Tenant for Life died*,

and J. S. entered. Decreed per Ld. Egerton, that a Liberate be made to the Conuſee. Goldsb. 120. pl. 5. Hill. 43 Eliz. Bull v. James.

19. An *Annuity granted under the Great Seal for* 21 *Years* of 40 l. per Ann. to be paid by the Receiver of the Court of Wards, was extended on a Judgment and ſold, and held good; for being an Annuity certain for Years certain, and payable by the Receiver, it is in Nature of a *Rent-charge* for 21 Years, and not to an *Annuity charging the Perſon only*. Cro. J. 78. pl. 10. Trin. 3 Jac. B. R. York v. Twine and Allen.

20. If a Debt be recovered againſt one who *dies before Execution* ſued, *leaving Goods ſufficient* to ſatisfy, in ſuch Caſe the *Land deſcended* to the Heir ſhall not be charged therewith, nor by like Reaſon any *Land conveyed after Judgment*. Went. Off. Ex. 93.

21. *At Common Law Land* could not be taken in Execution for a *Perſonal Duty* but in two Caſes, the one of the King by his Prerogative, the other of the Heir, where otherwiſe the Debt would be loſt; For this Execution is grounded on the *Stat. Weſtm.* 2. 18. Cro. J. 450. Mich. 15 Jac. B. R. in Caſe of Baskervill v. Brocket.

22. An *Advowſon* is not extendable upon the Statute of Acton Burnet, and De Mercatoribus; for thoſe ſpeak only of Lands, and not of an Advowſon, and the Statute Weſtm. 2. of Elegit ſpeaks alſo de Medietate Terræ, but if the Words had been (all Hereditaments) it perhaps had been otherwiſe. Jo. 24. Hill. 20 Jac. C. B.

23. In Debt on Bond for Performance of Covenants, and Iſſue joined, the Defendant fearing the Iſſue would be found againſt him, *conveys Land to the Uſe of his Wife, himſelf and Children* &c. The Plaintiff had Judgment, and prays, non obſtante this Conveyance, an *Elegit*, and extends the Land; Per Doderidge J. 2 Roll 293. Paſch. 21 Jac. B. R.

24. Of *Glebe Lands* of Parſon or Vicar, they cannot be taken in Execution any more than a *Church-Yard can*; It is Solum Deo Conſecratum. Jenk. 207. pl. 36. cites 29 E. 3. 44. and 21 E. 4. 45.

25. *Choſes en Action* cannot be taken in Execution; Arg. Chan. Caſe, 91. Mich. 19 Car. 2. in Caſe of Hide v. Petit.

Bank-Notes cannot be taken in execution. Annaly Rep. 53.

26. Plaintiff had a Judgment againſt H. and brought his *Bill againſt* his *Heir to ſubject certain Lands* which he had a Decree of this Court for upon a *Truſt* for his Father and his Heirs to ſatisfy his Debt. Defendant demurred, and this Demurrer allowed i And Ld. Keeper conceived it all one with **Bennet and Box's Caſe.** Chan. Caſes 128. Paſch. 21 Car. 2. Prat v. Colt.

27. Lands were *purchaſed by A. in the Name of B.* in Truſt for A. The Lands are not liable to a Judgment obtained againſt B. but it appearing that a Moiety only was in Truſt, the other *Moiety* was decreed to be ſubject. Fin. R. 63. Hill. 25 Car. 2. Medley v. Martin.

Whether the Truſt of an Eſtate in Fee deſcended upon the Heir is liable in Equity to the Satisfaction of a Debt by Bond wherein the Heir is bound? Vern. 172. pl. 167. Trin. 1683. Creed v. Covile.

28. 29 *Car.* 2. *cap.* 3. *S.* 10. *Sheriffs, and other Officers to whom any Writ or Precept is directed at the Suit of any Perſon upon any Statute, Judgment or Recognizance, hereafter to be had or made, may deliver Execution of all the Lands, &c. Rectories, Tithes, Rents &c. whereof others ſhall be ſeiſed or poſſeſſed in Truſt for him againſt whom Execution is ſued. Truſts in Fee ſhall be Aſſets to Heirs.*

29. 29 *Car.* 2. *cap* 3. *S.* 11. *Provided, that no Heir, chargeable by reaſon of any Truſt made Aſſets by this Law, ſhall by reaſon of any Plea, or Confeſſion of the Action, or ſuffering Judgment by Nient Dedire, or any other Matter, pay the Condemnation of his own Eſtate.*

30. If

30. If a Copyholder in Fee, with Licence of the Lord, makes a *Leaſe for Years of the Copyhold*, the Term is not liable to Execution by a Fieri Facias for his Debts, becauſe the Copyhold Lands themſelves are not liable ; Arg. N. Ch. R. 167. Mich. 1690.

31. Note, by a Clauſe in the 29 *Car.* 2. *cap.* 3. the Truſt of an Inheritance is made Aſſets at Law, but the Truſt of a Term is not ; And by a Clauſe, where Judgment is obtained againſt the *Teſtator*, the Sheriff may take the *Truſt-Eſtate* in Execution. 2 Vern. 248. pl. 232. Mich. 1691. The King v. Ballet.

32. Where a Man *articled to ſell* Land, and after A. got Judgment againſt him, and A. having Notice of the Articles for Sale executed his Judgment, this Court has *relieved* againſt ſuch Execution, and this was in a Suffolk Cauſe ; Arg. N. Ch. R. 184. Anno 1691.

(N) How it ſhall be made.

Where Joint, and where Several.

1. **If a Man recovers** in Aſſiſe againſt three of Land and Damages, **he cannot have Execution** by Capias **againſt one only** for the Damages, **but it ought to go againſt all, becauſe the Execution** ought to be according to the Original. 15 H. 7. 6. **per Curiam.**

2. **If a Man recovers** againſt three jointly, **the Execution ought to be joint againſt all together. Tr.** 39 **Eliz. B. R. per Cur. in Caſe of** *Adam v. Dixon.*

3. **If a Man recovers** jointly againſt two **in an Action of Debt, the Execution ought to be joint againſt both, and not againſt one only. Hill.** 41 **Eliz. B. R. between** *Beverley and Beverley* **adjudged in a Writ of Error.** * **Tr.** 8 **Ja. B. per Cur. he cannot have Elegit againſt one, and Capias againſt the other, but** ought to have one Proceſs againſt both.

In Debt againſt A. and B. upon an Obligation, Judgment was given againſt both. A Ca. Sa. iſſued only againſt A. whereupon he was outlawed ; but upon its being aſſigned for Error, and that it ought to have been awarded againſt both according to the 34 H. 6. 33. the Court reverſed the Outlawry. Cro. E 648 pl. 3. Hill. 41 Eliz. B. R. Beverley v. Beverley.

* S. P. though the Plaintiff ſued them by ſeveral Actions ; And if he ſues ſeveral Executions an Audita Querela will lie. Godb. 181. pl. 256. Trin. 8 Jac. C. B. Anon. but ſeems to be S. C. —— Ibid. 208. pl. 296. Roſſer v. Welch, S. P. he cannot have a Capias ad Satisfaciendum againſt one, and Fi. Fa. againſt the other ; But it was agreed, that he might have a Capias againſt them both ; As if a Man has one Judgment againſt ſeven Perſons, he may take all their Bodies in Execution, becauſe the Body is no Satisfaction, but only a Gage for the Debt ; and therewith agrees 4 H. 7. 8. 5 E. 4. 4. and 5 Rep. Bamfield's Caſe. —— Win. 110. Mich. 22 Jac. C B. Holt v. Holt, S. P. held accordingly.

4. **In an Action of Debt againſt J. S. if** two become Bail **for him after the** Plaintiff recovers, **and after Proceſs continues till** Judgment is given againſt the Bail, **the Execution may be** againſt any **of the Bail without naming the other, for every one of the Bail** is bound ſeverally. **Trin.** 39 **Eliz. B. R. between** *Dixon and Adams.*

If two are Bail, and one is taken in Execution, yet the Plaintiff may take the other alſo. Cro. J. 320. pl. 2. Paſch. 10 Jac. B. R. Higgens's Caſe. —— 2 Bulſt. 68. Higgens v. Sommerland, S. C. & S. P. agreed. —— Brownl. 121. S. C. & S. P.

5. *Partition* was made *between three Coparceners in Chancery*, and becauſe *one had more than any of the others*, that *ſhe ſhould give 50 s. per Annum to the other two, viz. 25 s. to the one, and 25 s. to the other*, and *bound*

bound herſelf and her Heirs to Warranty, and the Tenor thereof was removed into B. R. and *Execution ſued there jointly* by the two notwithſtanding the ſeveral Words above, Br. Scire Facias, pl. 214. cites 29 Aſſ. 23.

6. In Detinue of Charters the *Plaintiff ſhall recover Damages*, yet the *Plaintiff may have Elegit, Fi. Fa. or Ca. Sa.* for *it was of a Bag of Charters*, in which Action Capias lies; *Contra* in Detinue *of a Charter certain*, there Capias does not lie, and then it ſeems that he ſhall not have Ca. Sa. for the Execution. Br. Execution, pl. 108. cites 40 E. 3. 25.

7. In *Treſpaſs againſt two*, and *each pleads ſeverally*, and are *convicted by two Judgments*, yet the *Plaintiff ſhall have only one Execution*, by the beſt Opinion; Quod non negatur; For it is all upon one and the ſame Original; *Otherwiſe* it ſeems *upon two Originals*; For a Man may join or ſever them in Action at his Pleaſure. Br. Treſpaſs, pl. 20. cites 20 H. 6. 11. and 40 E. 3. 27, 39.

8. In Scire Facias it was agreed, that a Man may have *Execution upon Recognizance* by Scire Facias *againſt the Heir and the Executor all at one Time*; Quod nota. Br. Executions, pl 21. cites 46 E. 3. 29.

9. *Maihem againſt ſeveral*; *one* came and *confeſſed* the Maihem, *and was committed* to the Marſhal, and the Plaintiff prayed Judgment againſt him. Per Cur. *if you will have Judgment againſt him, you cannot ſue againſt the others unleſs you will ſuffer this to go at large*; For if you have Judgment, and his Body remains in Priſon, this ſhall be ſaid Execution to you. Br. Executions, pl. 27. cites 7 H. 4. 30.

10. *As* in *Treſpaſs againſt three who are found Guilty*, and the *one is taken by Ca. Sa.* the Plaintiff ſhall never have Execution againſt the others; For this ſhall be adjudged an Election of his Execution. Ibid.

11. *But* Brook ſays *this ſeems to be where he takes Ca. Sa. againſt the one only, but* that if he takes it *againſt all*, and the one is taken, yet it ſeems that the Sheriff may take the other &c. by which he who confeſſed the Maihem here remained in Priſon, *and Judgment againſt him was reſpited till the Inqueſt was taken againſt the others.* Ibid.

12. *Two did a Treſpaſs*, the *Party brought Writ of Treſpaſs againſt the one*, and *recovered*, *and* after *brought other Writ againſt the other, and had Execution againſt both*; and no Reaſon to the contrary. Br. Execution, pl. 113. cites 14 H. 4. 22.

Br. Judgment, pl. 97. cites S. C. thus, viz. Debt againſt two of 10 l. by ſeveral Præcipes; the Demandant recover'd the 10 l. For the Action was againſt each for 5 l. upon Obligation, in which they were bound jointly and ſeverally, but had only one Execution, which was of 5 l. only. And ſo ſee Judgment of 10 l. and Execution only of 5 l. Br. Judgment, pl. 97. cites 14 H. 4. 19. ——— S. P. Ibid. pl. 111. cites 7 H. 4. 6. ——— As in Debt againſt four by ſeveral Præcipes upon one and the ſame Obligation, and upon one and the ſame Writ; Two were at Iſſue, and the other two were there condemned by Default, and the one of them was taken in Execution where no Execution ought to have been made before that all were condemned, and then Entry ſhould be made in this Caſe that it was only one Execution, and therefore upon the Information of the Prothonotaries that all was upon one Writ and Obligation, Superſedeas for Error was awarded; quod nota; Per Cur. Br. Executions, pl. 123. cites 5 E. 4. 4. ——— Br. Executions, pl. 145. cites S. C. & S. P.

13. In *Debt by ſeveral Præcipes againſt two upon one Obligation* the Plaintiff ſhall have ſeveral Judgments and ſeveral Damages, and but *one Execution at his Peril. Br. Execution, pl. 40. cites 14 H. 4. 19.

* Ibid. pl. 132. cites 29 H. 8. ſays, that this Order that the Plaintiff upon one Obligation ſhall have but one Execution, is intended ſuch Execution which is a Satisfaction and where both are impleaded by one Original by ſeveral Præcipes &c.

14. *And* it ſeems by 14 H. 4. 14. that where a Man brings *ſeveral Writs of Debt againſt two upon one and the ſame Obligation, in which each are bound in Toto et in Solido*, there *Execution againſt the one is not Execution againſt the other*; and *contra in one and the ſame Writ of Debt againſt the two by ſeveral Præcipes.* Ibid.

15. *Treſpaſs*

15. *Treſpaſs for hunting in his Park againſt two*, the *one appeared and pleaded, and was convicted*, and the *other made Default*, there if the *Plaintiff will releaſe his Suit againſt him who made Default*, he may have Judgment and *Execution againſt him who is convicted*; and ſo he did, and had it; quod nota. Br. Executions, pl. 113. cites 5 H. 5. 1.

16. In *Treſpaſs againſt two* who plead ſeverally, *and are convicted by ſeveral Judgments*, yet the Plaintiff cannot have but one Execution. Br. Executions, pl. 5. cites 20 H. 6. 11, 12.

17. Note per Needham for Law, that if a Man *recovers Damages in Treſpaſs, Conſpiracy* &c. *againſt two*, the Court will not award Ca. Sa. Sci. Fa. Fi. Fa. nor other Execution againſt the one only, but againſt both, becauſe the *Judgment is intire*; and yet the *Sheriff may do Execution of the Goods of the one only*; but the Court ſhall not intend ſo, but that the Execution is made according to Judgment, and therefore the one cannot have Attaint alone, and aſſign the falſe Oath in omnibus quæ verſus ipſum dixerunt, but in Treſpaſs upon Not Guilty by them, the one may have Attaint alone of the Principal, and abridge his Demand of the Damages. Br. Executions, pl. 10. cites 34 H. 6. 33.

18. *Debt againſt three by ſeveral Præcipes upon one and the ſame Obligation Unde quilibet tenet' in Toto*, and *all pleaded*, and *found for the Plaintiff*, and Judgment was given for him, and *he ſued Ca. Sa. againſt one of them only, and thereupon Exigent*; by which Nele prayed Superſedeas, becauſe it was not againſt all, quia erronice emanavit; and Copley Prothonotary ſaid, that the Judgment ſhall be againſt the one and againſt either of them, and that he ſhall have Execution againſt the one and againſt either of them, and therefore may have Execution againſt every one by himſelf; But per Danby J. where he *ſues Execution againſt all*, there though one be taken, he ſhall be awarded to Priſon till the others are taken, and all ſhall be in Execution. But as here, where he elected his Execution againſt the one only, he ſhall not have Execution againſt the others, and if he be taken, the Plaintiff ſhall not have other Execution. Br. Executions, pl. 96. cites 4 E. 4. 38, 39.

19. *And if two are condemned* in Debt, and the *one is taken*, and the *other is returned Non eſt inventus*, yet he ſhall have *new Action againſt him, unleſs Action were by ſeveral Præcipes*. Ibid.

20. *Treſpaſs againſt two*, the *one was found Guilty*, and *againſt the other they were not at Iſſue, or the Jury not yet appeared*, and the *Plaintiff had Judgment immediately againſt him who is convicted*; but Priſot would not permit *Execution till the Plaintiff had releaſed his Suit againſt the other, nor* ſuffer *Capias pro fine Regis till the other be convicted or releaſed*, as Littleton J. ſaid. Br. Exigent, pl 31. cites 15 E 4. 27.

21. *Quare Impedit by the Queen* againſt others, and *one is condemned by her, and Execution taken againſt him*, this ſhall abate all the Writ againſt the other. Br. Executions, pl. 146. cites 20 E. 4. 1.

22. A Man may have *two Judgments againſt Executors of one and the ſame Debt, but* he ſhall have *but one Execution*; quod nota. Br. Executions, pl. 63. cites 14 H. 7. 28.

Br. Judgment; pl. 14. cites 14 H. 7. 29. S. C.

23. If an Action of *Debt* be brought *on a Bond againſt two upon one Præcipe*, and the Plaintiff has Judgment to recover, there muſt one joint Execution iſſue againſt both; but if the Suit was by Original and ſeveral Præcipes, Execution may be againſt any of them. 4 Le. 198. pl. 315. Paſch. 26 Eliz. C B. Anon.

He cannot have ſeveral Executions, viz. a Ca. Sa. againſt one and an Elegit againſt the other, for he ought to have but Unicam Executionem, though he ſue them by ſeveral Actions. And if he ſues forth ſeveral Executions an Audita Querela will lie. Godb. 181. pl. 256. Trin. 8 Jac. C. B. Anon.

S. P. but Ca. Sa. may be againſt all be they ever ſo many, becauſe the Body is no Satisfaction but only a Gage for the Debt. Godb. 208. pl. 296. Mich. 11 Jac. C. B. Roſſer v. Welch and Keymiſh. —— But he cannot have Execution by Elegit both; Per Doderidge J. Godb. 258. pl. 355. Paſch. 12 Jac. B. R. Cowley v. Legat.

24. Execution *muſt follow the Nature of the Action.* Le. 68. pl. 89. Mich. 29 & 30 Eliz. Barker v. Piggot.

25. If there are two *Jointenants* and *one makes a Statute*, and afterwards joins with his Companion in a Feoffment of the Land, now the *Moiety* of the Land may be extended upon this Statute; Agreed. Goldsb. 161. pl. 92. Hill. 43 Eliz. in Caſe of Greſham v. Man.

If two acknowledge a Recognizance of 100 l. quilibet eorum in ſolido, that is jointly and ſeverally, the Conuſee may ſue ſeveral Sci. Fac. againſt the Conuſors upon this Recognizance. 2 Inſt. 395.——If three are bound in a Recognizance jointly, there ſhall be no Execution againſt one or two of them, but againſt all. 2 Sid. 12. Mich. 1657. Anon.

26. If a Man has *Judgment againſt two upon a Joint Bond*, it was the Opinion of the whole Court that he cannot have ſeveral Executions viz. a Cap. ad Satisf.' againſt the one, and an Elegit againſt the others; For he ought to have but Unicam Satisfactionem, although he ſue them by ſeveral Actions; And *if he ſues forth ſeveral Executions an Audita Querela will lie.* Godb. 181. pl. 256. Trin. 8 Jac. C. B. Anon.

If two are bound jointly and ſeverally, and both are ſued, and a joint Judgment obtained, the Execution ought to be accordingly, for by the Judgment the Lien of the Obligation is altered and changed; Per Curiam. Sid. 339, 340. Mich. 19 Car. 2. Gee. v. Fane.

Sid. 339. pl. 3. S. C. held accordingly. —— 2 Keb. 269. pl 28. S. C. adjornatur. ——Ibid. 274. pl. 33. S.C. a Superſedeas was pray'd becauſe the Scire Facias is taken againſt Both, and cites 20 H. 7. 3. in which Caſe Execution cannot go againſt one; Sed non allocatur, the Scire Facias being only to ſhew Cauſe why Execution ſhould not be awarded which follows the firſt Judgment, and not the Judgment on the Scire Facias, and 20 H. 7. 3 does not prove this Caſe being only for Appearance, and the Money levied in Execution was held good, and per Cur. a Scire Facias never goes out againſt one.

27. If *two became Bail* for one *in B. R.* and according to the Courſe of that Court, they and *each of them are bound in a Recognizance, if he be condemned to bring him in or Anſwer the Condemnation, or otherwiſe that the Debt ſhall be levied of their Lands and Chattles*, and after Judgment and Capias againſt the Principal, and Non eſt Inventus returned, a Scire Facias iſſues againſt the Bail, and thereupon Judgment is had, that the Plaintiff ſhall have Execution according to the Form of the Recognizance, he *may have a Capias againſt one of the Bail only*, for the Judgment in the Scire Facias is not to recover, but quod habeat Executionem, and the Recognizance upon which it muſt be had was joint and ſeveral, and ſo remains not altered by the Judgment. Adjudged, and though the Recognizance was to levy the Money de Terris & Catallis, yet Execution of the Body is good by the Courſe of the Court. Lev. 225. Mich. 19 Car. 2. Gee v. Fane.

Ibid. ſays that the ſame Point was reſolved in the Court the Day before per Holt Ch. J. and not denied by any of the Judges in the Caſe of Ftkins v. Weſterne.——C. and H. were Copartners, and a Judgment was againſt C. and all the Goods both of C. and H. were taken in Execution; And it was held by Holt Ch. J. and the Court, that the Sheriff muſt ſeize all, becauſe the Moieties are undivided; For if he ſeize but a Moiety, and ſell that, the other will have a Right to a Moiety of that Moiety; but he muſt ſeize the whole, and ſell a Moiety thereof undivided, and the Vendee will be Tenant in Common with the other Partner. 1 Salk. 392. pl. 1. Mich. 5 W. & M. in B. R. Heydon v. Heydon.

28. A. and B. were *Partners of Goods.* It was held that upon an Execution againſt either, though their Intereſts are joint and undivided, yet *only the Share of him againſt whom the Execution is*, and no more can be ſeiſed than his Goods only, ſo that if an Execution be afterwards taken out againſt the other, and the Sheriff as to the ſecond returns Nulla Bona, ſuch Return is falſe, and an Action on the Caſe being brought againſt the Sheriff the Plaintiff had Judgment. Show. 173. Mich. 2 W. & M. Bachurſt v. Clinkard.

(O) How to be made.

[*For the King and for the Informer*]

1. IF an Information upon the Statute of Recuſancy, if Judgment be given for 100l. though the King is to have two Parts, and the Informer the third Part, yet there ſhall not be ſeveral Executions, viz. one for the King, and the other for the Informer, but one Execution for all. M. 13 Ja. B. per Cur. between *St. Johns v. Greviæll.*

(P) Who ſhall have Execution.

1. IF an Adminiſtrator Durante Minori ætate of an Executor recovers in * Debt, and after the Executor comes to full Age, he ſhall have a Scire Facias upon this Recovery, becauſe he is privy to the Judgment. M. 9 Ja. B. per Cur. adjudged. *Mrrgaret Wright's Caſe.* * Fol. 889. Cro. C. 227. pl. 4. cites 9 Jac. Preſt's Caſe S. P.

held accordingly.——2 Brownl 83. S. P. that the Executor may ſua a ſpecial Scire Facias upon the Record in his own Name.—— Cro. C. 227 the Court doubted of the Caſe of 9 Jac.——S. C. cited per Cur. Lutw. 342. —— Wms's Rep. 578. Arg. cites S. C. as adjudged.

But for more of this See tit. Executor.

2. If a Man makes A. his Executor upon Condition that if he does ſuch an Act that B. ſhall be his Executor, and after dies and after A. recovers in Debt, and then does the Act, it ſeems B. ſhall have a Scire Facias upon this Recovery. M. 9 Ja. B. demurrer. Contra M. 13 Car. B. R. between *Walwin and Herbert*, per Jones and Crook, but Berkley e contra.

3. If a Feme Executrix of J. S. takes Baron, and after the Baron and Feme bring Action of Debt upon an Obligation in Right of the Feme as Executrix to J. S. againſt J. D. and have Judgment againſt him to recover the Debt with Damages and Coſts, and after the Feme dies before Execution ſued, the Baron ſhall not have Execution upon this Judgment, becauſe he (though he be privy to the Judgment) yet he ſhall not have the Thing recovered, but it belongs to the ſucceeding Executor or Adminiſtrator of J. S. Mich. 7 Car. B. R. between *Beaumont and Long* adjudged upon a Demurrer, I myſelf being of the Plaintiff's Counſel. Intratur Tr. 6 Car. Rot. 799. Tr. 11 Car. B. R. between *Jeffery and Treffery* per Cur. upon ſuch Writ brought. Intratur Hill. 11 Rot. 679. Cro C. 208. pl. 2. S. C. and all the Court (Præter Hide Ch. J. who doubted thereof) conceived that Scire Facias lay not for the Baron, the Debt demanded being en Auter Droit.——Ibid. 227. pl. 4. S. C. the Court (Hide Ch. J. beieg dead) conceived accordingly. And though it was objected that the Judgment is for Coſts and Damages, which belong to the Baron, although the ſaid Debt did not belong unto him, and therefore the Scire Facias ſhould be maintained for the Damages, yet the Court held, that the Scire Facias to have Execution of the Judgment for the Debt, and alſo for the Damages, is not maintainable, and whether he might maintain a Scire Facias for the Damages and Coſts they would not deliver their Opinion. And gave Judgment for the Defendant; And this Caſe being moved at the Table at Serjeants-Inn to the Chief Baron and other Barons, and to Juſtice Harvey, they all agreed in the ſame Opinion.

4. Where *three Executors bring Writ of Debt*, and *two are ſummoned and ſevered*, and *the third recovers and dies*, the two who were ſummon'd and

and ſevered ſhall have Execution, and if the third lives, all the three may ſue Execution. Br. Executions, pl. 137. cites 11 R. 2.

Adminiſtrator had Judgment upon an obligation made to his Inteſtate &c.

5. If an *Adminiſtrator has Judgment and dies*, his Executors cannot ſue out Execution on this Judgment; for none ſhall have Execution thereupon but he that will be ſubject to the Payment of the Debts for the firſt Inteſtate, which the Executors will not. 5 Rep. 9. b. Trin. 43 Eliz. Brudenal's Caſe.

and then the Adminiſtrator dies Inteſtate. The Adminiſtrator of the Adminiſtrator ought not to ſue Execution of the Judgment, but the Adminiſtrator of the Obligee. Lat. 140. Trin. 2 Car. Paſtal v. Ward.——Palm 443. Paſchall v. Ware, S. C. in totidem Verbis.——Noy 81. Paſchall v. Warren, S. C. & S. P. admitted ——*By 17 Car. 2. cap 8. S. 2. and made perpetual by 1 Jac. 7. cap. 17. it is enacted, that where any Judgment after a Verdict ſhall be had by any Executor or Adminiſtrator, an Adminiſtrator de Bonis Non may ſue a Scire Facias and take Execution upon ſuch Judgment.*

6. If *Tenant in Tail*, the *Remainder in Tail with Warranty*, *has Judgment to recover in Value and dies* before Execution *without Iſſue*, he in *Remainder ſhall ſue Execution*, for he has Right thereunto, and is Privy in Eſtate. Co Litt. 252. a.

7. If *Baron and Feme bring* an Action of *Debt for Debt due to the Feme*, *and recover*, and the *Feme dies*, the Baron may bring a Scire Facias to execute this Judgment; for the Debt being recovered, the Baron after the Death of the Feme ſhall have it. Cro. C. 208. pl. 2. Hill. 6 Car. B. R. in Caſe of Beaumond v. Long.

8. He who ought to have the Scire Facias *may have Privity and Property to have the Debt*, otherwiſe it is a vain Suit; Per three Juſtices. Cro. C. 208. Hill. 6 Car. B. R. in Caſe of Beamond v. Long.

1 Salk. 116. pl. 7. S. C. & S. P. accordingly by Holt Ch. J.—— Comb. 455. S. C. adjornatur.—— Carth. 415. S. C. adjudged.——And though the Judgment in the Scire

9. Error upon a Judgment in C. B. in Scire Facias, where a *Feme ſole recovered* in C. B. and *took Husband*, and after *they joined in a Scire Facias* to have Execution, and *had Judgment* in the Scire Facias; the *Wife died*, and the Husband ſued Execution without taking out Letters of Adminiſtration, and ruled that the Judgment in Scire Facias attached a joint Intereſt in Baron and Feme, and if the Husband died, it would ſurvive to the Wife, and e contra. A Scire Facias is an Action, and is in the Nature of an Original, and if they had recovered in an Original there could be no Queſtion in the Caſe; and by the Judgment in the Scire Facias in this Caſe the Debt veſts, and of ſuch Opinion was the Court. Skin. 682. pl. 2. Mich. 9 W. 3. B. R. Woodyeer v. Greſham.

Facias does not alter the Nature, yet it changes the Property of the Debt, and Debt may be brought on an award of Execution; Per Holt Ch. J. Skin. 683. S. C.——S C. cited by Holt Ch. J. 2 Ld. Raym. Rep. 1050. Mich. 3 Ann. at the Bottom.

(Q) What Perſons may [have Executions.]

Executor, [*or Adminiſtrator, or the Heir.*]

1. IF a Man recovers Arrearages of Rent all in Damages, his Executor ſhall have Execution of it, and not the Heir, for by the Recovery it is a Chattle veſted. 46 E. 3. 25. b.

Both [*Executor and Heir.*]

* Br. Execution pl. 102. cites 19 E. 4 5. 6. S. C.—— Br. Scire Facias, pl. 190. cites S. C.——† Br. Execution pl. 17. cites S. C.

2. If Demandant recovers in Writ of Coſinage or other Action Real in which he ſhall recover Damages, his Heir ſhall have Execution of the Land, and the Executors of the Damages. * 19. E. 4. 5. b. † 43 E. 3. 2.

3. So

3. So **upon Recovery** in Waſte **the Heir ſhall have Execution of the Land, and the Executors of the Damages.** 43 E. 3. 2. Br. Execution, pl. 17. cites S. C.

Feme.

4. So **if** Statute **be acknowledged** to Baron and Feme, **Feme ſhall have Execution of it after the Death.** 48 E. 3. 12. b. But the Baron alone may make Defeaſance, and it ſhall ſerve for both. Per Opinionem. Br. Baron and Feme, pl. 24. cites S. C.

5. A *Dean and Chapter* may have *Elegit of Damages, or Penalty recovered in the Ceſſavit*, though they are a *Corporation*. Br. Elegit, pl. 9. cites 21 E. 3. 23, 24.

6. *Tenant in Tail Remainder over recovered Damages in* Action of *Waſte and died without Iſſue*, yet his Executors ſhall have Execution of the Damages, though the Tail be extinct; For the Judgment veſted the Execution in him who recover'd to have it by Suit by him or by his Executor, quod nota. Br. Execution, pl. 130. cites 50 E. 3. 3.

7. A Man *recovers Deed concerning Inheritance by Writ of Detinue, and Damages of 5 l. if the Deed be re-delivered, and if the Deed be not re-deliver'd then 20 l. Damages*, and died, and by the Opinion of the Court *the Executors ſhall not have Execution of Damages before the Heir has Scire Facias for the Deed*, and Diſtringas ad Deliberandum factum, and if the Sheriff returns Quod Charta perdita vel combuſta eſt, then the Executors ſhall have Scire Facias of the Damages, and not before, quod nota. And in Plea real the Heir ſhall have Execution of the Land recover'd by his Anceſtor, and the Executors ſhall have Scire Facias of the Damages and Coſts, quod nota. Br. Scire Facias, pl. 190. cites 19 E. 4. 5. 6.

8. *Demandant in Dower had Judgment in C. B. and* afterwards the *Judgment was affirm'd in B. R.* and a *Writ of Inquiry was brought for the Damages, Coſts &c. but before that Writ was executed ſhe died.* Her Adminiſtrator brought a Scire Facias, but reſolv'd that it would not lie; For ſhe dying before the final Judgment, and when the Damages were due to her only by way of Satisfaction for an Injury which is in Nature of a Treſpaſs, and the Writ of Inquiry being in Nature of a Perſonal Action for them it dies with the Perſon, and a *Scire Facias lies not for the Executor or Adminiſtrator.* 1 Salk. 252. pl. 1. Trin. 2 W. & M. in B. R. Mordant v. Thorold. 3 Mod. 281. S. C. and mentions that Damages are given in Dower by the Statute of Merton; But per Cur. when a Statute which gives a Remedy for mean Profits is expounded it ought to be according to the Common Law. Now where intire Damages are to be recovered, and the Demandant dies before a Writ of Inquiry executed, the Executor cannot have a Remedy by a Scire Facias upon that Judgment, becauſe *Damages are no Duty till they are aſſeſſed.* Sed adjornatur.——Show. 97. S. C. that the Scire Facias was brought on a Recognizance according to the Stat. of 17 Car. 2. to pay the mean Profits, if Judgment be affirm'd; but per Holt Ch. J. There can be no Suit upon this Recognizance till there be a Judgment for theſe Damages, and conſequently the Recognizance doth not any Ways alter it; and Judgment for Defendant.——3 Lev. 275. S. C. Curia adviſare vult.——Carth. 153. S. C. adjudg'd Quod Querens nil capiat &c. And per Holt Ch. J. an *Adminiſtrator cannot have any Execution of any Judgment but only in the Perſonalty.*

(R) Who ſhall ſue Execution.

Feme of the Baron, and not the Executors.

Br. Attaint, pl. 18. cites S. C.—Br. Damages, pl. 174. cites S. C.—Fitzh. Damages, pl. 78. cites S. C.

1. IF Damages are recover'd againſt Baron and Feme in Quare Impedit by them in Right of the Feme and the Baron dies, and the Feme recovers in Attaint, ſhe ſhall have Execution of the Damages recover'd, and not the Executor of the Baron, though the Damages were paid by the Baron in his Life. 46 E. 3. 23. adjudged.

2. If Baron and Feme join in Quare Impedit in Right of the Feme, and recover, and Baron dies, the Feme ſhall have Writ to the Biſhop, and not the Executor of the Baron. 14 H. 4. 12.

3. But otherwiſe had it been if the Baron alone had brought the Action and recovered. 14 H. 4. 12.

* Fol. 890. See Tit. Baron and Feme, (D) pl. 3. S. C. and the Notes there.

4. If Baron and Feme recover Land and Damages, and the Baron dies the * Feme ſhall have Execution of the Damages, and not the Executors of the Baron. 48 E. 3. 13. 28 Aſſ. 45. granted to the Feme, but ſays, Valeat quantum valere poteſt.

Br. Execution, pl. 83. S. P. cites 28 Aſſ. 45. But the Year Book of pl. 45. is, That upon the Feme's praying to have Execution, Greene J. told her ſhe ſhould have her Will Valeat quantum valere poteſt; as much as to ſay, That the Writ lay better for the Executor.——28 Aſſ. 13. is a different Point, and it ſeems that it ſhould be as in the Plea 4 above 48 E. 3. 13. where it is ſo ſaid by Finch, who gave for Reaſon, That the Thing is prov'd to them two by Matter of Record.

5. In Aſſiſe by Baron and Feme, if they recover Damages, and after the Baron dies, the Feme ſhall have Execution of the Damages, and not the Executors. 28 Aſſ. 13.

(S) Againſt whom it lies.

1. IF a Man recovers Damages againſt two, and ſues a Scire Facias againſt them to ſhew why he ſhall not have Execution againſt them, if one be returned ſummoned who makes Default, and that the other has nothing &c. he ſhall have Execution againſt him who is returned ſummoned of the Whole. 1 E. 3. 13 b.

2. So if one be return'd dead, and the other ſummon'd who makes Default, Execution ſhall be awarded againſt him alone of the Whole. 1 E. 3. 13. b.

3. If A. acknowledges a Recognizance to B. and after acknowledges another Recognizance to C. and C. extends his Recognizance firſt, yet B. ſhall have Execution againſt him and ouſt him. 19 E. 2. Execution 250.

4. If a Man recovers Damages againſt A. againſt whom Part of the Damages are levied by Fieri Facias, but not all and after A. dies, he may have a Scire Facias againſt the Heir at his Election to have Execution. 19 E. 2. Execution 163. granted at his Peril.

5. Scire

5. Judgment in Debt was had againſt two. The one dies. The Plaintiff brought Sci. Fa. againſt the Survivor only. Adjudged that the Plaintiff has Election to purſue in the Perſonalty only if he will, and take Execution againſt the Survivor; But if he will take Execution upon the Lien Real, there the Charge ought to be equally againſt both the Survivor and the Heir of the Deceaſed, and Sci. Fa. againſt both. Lev. 30. Paſch. 13 Car. 2. B. R. Smarte v. Edſun. Raym. 26. Edſar v. Smart, S. C. and by Windham J the Reaſon why this Execution ſhall be againſt the Survivor is,

becauſe the Plaintiff may take a Fi. Fa. if he will, and perhaps he will not charge the Land; and Twiſden of the ſame Opinion.

6. Where the *Lands of ſeveral are charged* with a Debt, it ſhall not lie wholly upon the Survivor, As if a *Recognizance is acknowledged by ſeveral*, the Lands of all are thereby become chargeable, and *Execution ſhall be equally made*; and if one ſhould die, the Creditor muſt bring a Scire Facias *againſt his Heir and Tertenants*, for they being all in æquali jure, the Charge does not ſurvive. 4 Mod. 315, 316. Mich. 6 W. & M. in B. R. Arg. in Caſe of Lampton v. Collingwood, and Judgment accordingly.

7. *But* it is otherwiſe where the Lands are not bound by Judgment; As *if two enter into a Bond*, and one dies before Judgment, the Survivor ſhall be charged alone. And Judgment was given accordingly. Ibid. If Judgment in Debt be againſt two, and after one dies, Execution

in the Perſonalty may be againſt the Survivor; But if he takes Execution in the Realty, it ſhall not be againſt the Survivor only, but againſt him and the Heir of the other Lev. 30. Paſch. 13 Car. 2. Smarte v. Edſon. ——— Raym. 26. Edſar v. Smart, S. C. adjudged for the Plaintiff.

(T) Againſt whom it may be ſued.

Againſt the Feme of the Baron.

1. IN Quare Impedit, if Damages are recovered to two Years againſt Baron and Feme, and Baron dies, the Damages may be levied upon the Feme. 46 E. 3. 23. Fitzh. Damages, pl. 78. cites S.C.

2. If Recovery be in Treſpaſs againſt Baron and Feme, Execution may be ſued againſt the Feme after the Death of the Baron. 47 E. 3. 10.

(T. 2) *Againſt others.*

3. If A. recovers by Judgment in Debt againſt B. the Executor of C. and after B dies inteſtate, upon which Adminiſtration of the Goods of C. is granted to E. in this Caſe E. is liable (upon a Scire Facias) to this Judgment; for he comes under the Judgment, and there is great Diverſity between a Judgment had by an Executor; For there the Adminiſtrator of the firſt Man comes Paramount the Judgment, and where the Judgment is had againſt an Executor &c. Mich. 5 Car. B. R. per Cur. adjudged between *Norgate and Snape*. Cro. C. 167. pl. 13. Snape v. Norgate, S. C. adjudged. —— Jo. 214. S. C. and three Juſtices held it good enough, becauſe

there is a Difference between a Recovery againſt Executor, and by an Executor; but Hyde doubted; And Judgment given according to the Opinion of the three Juſtices.

4. If a Man recovers in Treſpaſs againſt J. S. where there are divers of the ſame Name, the Plaintiff cannot take any of them at his Election, but he ought to take him againſt whom he recovered. 17 E. 3. 9. 16. b. Fitzh. Averment, pl. 28. cites S. C.

5. So if the Recovery be of Land, if he ſues Execution upon another than him who was Party to the Judgment, though he has the ſame Name, an Aſſiſe lies. 17 E. 3. 9. Fitzh. Averment, pl. 28. cites S. C.

6. If

Cro. J. 482. pl. 15. Forteſcue v. Markham, S. C. adjudged. — Roll Rep. 450. pl. 12. S. C. adjudged.

6. If a Man recovers againſt Sir Francis Forteſcue Knight and Baronet, and the Writ of Execution is ſo alſo, the Sheriff may take Sir Francis Forteſcue Knight, againſt whom the Judgment was, though he be not a Baronet, becauſe he is eſtopped by the Judgment to ſay that he is not a Baronet. My Reports 14 Ja.

7. In a Scire Facias to have Execution of Damages recovered in Aſſiſe againſt three who were Parties to the Recovery, if the Sheriff returns two warned, and that the third has nothing, Execution ſhall be granted againſt the two of the whole. 1 E. 3. 13. Execution 106.

* Fol 891. Fitzh. Scire Facias, pl. 128. cites S. C.

8. If an Execution of Debt or Damage be ſued againſt two, and the one is returned * warned, and that the other has nothing whereby to be warned, the Plaintiff may have Execution againſt him who has nothing at his Peril. 24 E. 3. 25.

9. But otherwiſe it is where the Execution is of Land; (For this will be a Prejudice to the other who appears). 24 E. 3 25.

10. A Man ſhall not have Execution *upon Statute Merchant* againſt the Heir of the Obligor within Age, nor againſt the Feme of the Conuſor of a *Recognizance made after the Coverture*, but the Heir and the Feme ſhall recover by two Aſſiſes; Quod Nota; For ſhe was endowed. Br. Aſſiſe, pl. 452. cites 8 E. 1. and Fitzh. Aſſiſe, 417.

11. *Fieri Facias* upon a Recovery of Debt, the *Sheriff returned Quod Def' eſt Clericus Benefic' non habens laicum feodum*, and thereupon *iſſued Writ to the Biſhop to levy the Money de Bonis Eccleſiaſticis*, by which the *Biſhop ſequeſtered all the Fruits of his Benefice*, and *before the Sum levied the Defendant reſigned*, and the *Patron preſented another*, who was inſtituted, who obtained Inhibition of the Archbiſhop to the Biſhop to ceaſe to levy any more, and Levari Facias ſicut alias was awarded to the Biſhop, and if he returns this Matter, then ſhall come in Queſtion, whether the levying ſhall ceaſe by the Reſignation or not? But per Hull, it ſhall ceaſe; Quod nota. Br. Execution, pl. 38. cites 12 H 4. 24. and 13 H. 4. 17.

12. *A. recovered in Debt againſt B. and had Execution. B. dies.* The *Sheriff levies the Money upon the Executors of B.* But the Court held it ill; For *the Writ was Fi. Fac. de Bonis & Catallis B.* which cannot be after his Death. Noy 73. Trin. 40 Eliz. Thoroughgood's Caſe.

13. *But if after Execution awarded the Plaintiff dies*, yet per Curiam the Sheriff ſhall levy the Money; And if he made no Executors, nor any Adminiſtrators are as yet made, the Money ſhall be brought into Court, and be there depoſited until &c. Noy 73. Trin. 40 Eliz. C. B. Thoroughgood's Caſe.

15. *Conuſee of a Statute* died, and upon an Extent *was return'd dead.* A *new Extent iſſued* of the Goods of the Deceaſed; And it was *return'd that the Widow who was Adminiſtratrix had ſold them*, and thereupon an *Extent iſſued of the Goods of the ſecond Baron.* Mo. 761. pl. 1056. Trin. 3 Jac. in Canc. Heyward's Caſe.

Comb. 103. S. C. and Judgment affirmed. — 3 Mod. Hill. 3 Jac. B. R. the S. C. atgued but adjornatur; but ſays

14. *Judgment in Debt* was had *againſt a Feme Sole*, who afterwards married, and then the Plaintiff brought a *Scire Facias againſt the Husband and Wife* to have Execution; and after two Nihils returned, *Judgment was againſt them* to have Execution. *A Year and a Day expired before any Execution was executed.* The *Wife died.* The Plaintiff brought a new Scire Facias againſt the Husband alone to have Execution of the ſaid Judgment. The Court held, That the Judgment on the Scire Facias againſt the Husband and Wife, made the Husband liable; and

ſo

ſo a Judgment given in C. B. in Ireland, and affirmed in B. R. there, was affirmed here. Carth. 30. Paſch. 1 W. & M. in B. R. Obrian v. Ram. that it was afterwards in 1 W. & M. affirmed.—S. C. cited by Holt Ch. J. 1 Salk. 116. pl. 7. Mich. 9 W. 3. and 3 Salk. 63, pl. 2.—S. C. cited by Holt. Ch. J. 6 Mod. 257. Mich. 3 Ann. B. R.—Skin. 683. pl. 2. S. C. cited by Holt Ch. J.

(U) For Land.

Againſt whom the Execution may be of Land.

1. AN Elegit does not lie againſt a Prior or other Man of Religion. 21 E. 3. 11. But Quære Cauſam. Fitzh. Execution, pl. 125 cites S. C.—Br. Elegit, pl. 8. cites S. C. Becauſe the Defendant was a Man Religious. Quod Nota.—But Ibid. pl. 23. cites 19 E. 3. and 20 E. 3. and Fitzh. Execution 80. and 83. Contra. That Elegit was granted againſt an *Abbot*.—*So* againſt a *Biſhop*. Ibid. cites Fitzh. Execution 159. and 29 E. 3. 42.

2. *Debt againſt the Heir upon Obligation of his Father*, who *pleaded Riens per deſcent*, and *found againſt him*, by which the Plaintiff had Writ of *Elegit as well of the Moiety of his Land purchaſed, as of his Land by Deſcent*, by Reaſon of his *Falſe Plea*; and ſhall not have the whole Land deſcended in Execution, but the Moiety by Elegit. Br. Elegit, pl. 24. cites 21 E. 3. 9. 10.

3. In *Replevin againſt three Capias iſſued againſt two*, and the *Third was by Protection*, and after *the Exigent was awarded againſt the two*, quod nota. Br. Exigent, pl. 23. cites 38 E. 3. 12.

4. *In* Action of *Debt againſt an Heir upon the Bond of his Anceſtor*, the *Plaintiff* by the Common Law *ſhall have all the Land in Execution* againſt him, *which he had by Deſcent from his Father*, and *yet he ſhould not have Execution of any Part of the Land againſt the Father himſelf*; and if he ſhould not have Execution of the Land againſt the Heir, he ſhould have no Fruit of his Action; For the Goods and Chattels of the Debtor belong to his Executors or Adminiſtrators, and ſo of neceſſary Conſequence the Land only was liable to the Execution of a Debt of a Common Perſon at the Common Law. 3 Rep. 12. a. Mich. 26 & 27 Eliz. in Scacc. in Sir Wm. Herbert's Caſe.

(U. 2) Againſt whom it may be in reſpect of the Eſtate. Seiſin.

1. IF there be *Grandfather*, *Father and Son*, and the *Grandfather is diſſeiſed and dies*, and the *Father dies*, and the *Son enters*, this Land ſhall not be put in Execution by the *Warranty of the Father*, though the Son conveys by the Father, becauſe *it was never in the Seiſin of the Father*, and ſo not liable. Br. Execution, pl. 143. cites 24 E. 3. 47. Fitzh. Recovery in Value, pl. 14.

2. *So* if the *Father had the Reverſion and was never ſeiſed in Poſſeſſion*, and dies, this ſhall not be extended againſt the Son. Ibid.

3. *So* Execution ſhall be made *of the Rent which the Vouchee has by Reverſion in Tail*, and yet the *Reverſion itſelf* cannot be put in Execution, and there when the Vouchee dies, the Execution is diſcharged for ever, and the Heir in Tail ſhall avoid it. Ibid. cites 17 E. 3. 11, 12.

4. *Quære, If* he who recovers the Rent ſhall have *other Execution*. Ibid.

Br. Error, pl. 130. cites S C. accordingly.

5. Execution of Damages of the Father was awarded *againſt the Heir upon Land tailed*; but this was *becauſe* the Heir *was warned and made Default*. Br. Execution, pl. 149. cites 39 Aſſ. 18.

(X) To what Place it ſhall be awarded.

In what County Scire Facias may be brought. See tit. Scire Facias (B)

1. IF a Man recovers Damages in Action of Waſte in one County, the Writ to levy this ſhall Iſſue to the Sheriff of the ſame County where the Action was brought firſt, and not to any other. 29 E. 3. 9. b.

2. But if the Sheriff returns that he has nothing, he ſhall have Execution in any other County where the Recoveror will. 29 E. 3. 9. b.

See tit. Scire Facias (B) pl. 5. and the Notes there.

3. If a Recognizance of Bail be taken by a Judge of C. B. at Serjeants Inn in London upon an Original brought in London, and certifies it in Court of C. B. and there inroll'd. But it appears of Record that it was taken as before. A Scire Facias may be awarded upon this Recognizance to the Sheriff of London where the Capias was, for there was the Commencement of it. Mich. 19 Car. B. Rot. 141. * cum Farmer between *Johns* Plaintiff, againſt *Lee and Pomeroy* Manucaptors for *Rice Edward*, upon a Recognizance of Bail. 5 Ma. Brook Lieu and County 85. per Brook and all the Prothonotaries of the Common Pleas. Alſo in the Caſe aforeſaid the Scire Facias may be awarded to the Sheriff of Middleſex, where the Recognizance was inroll'd. P. 23 Car. B. R. adjudged upon a Demurrer between *Andrews and Harborne*. Intratur.

* Quære the Meaning of this.

See tit. Scire Facias, (B) pl. 5. and the Notes there.

4 Middleſex Paſch. 20 Car. B. R. Rot. 210. adjudged between *Pultney and Forbench* to be well brought, and this upon Debate upon my Motion. Middleſex Hill. 17 Car. B. R. Rot. 745. between *Goddard and Vouchers*. Middleſex. Trin. 18 Car. B. R. Rot. 785 between *Gutch v. Dayntrie*. Middleſex Paſch. 19 Car. R. R. Rot. 77. between *Smith and Norton*. Tr. 19 Car. B. R. Rot. 388. between *Felgate and Gardener*. Note, theſe Preſidents were ſhew'd in the ſaid Caſe between *Pultney and Forbench*. And note, that in the Caſe of *Andrews and Harborne* upon my Motion to have the Opinion of the Prothonotaries touching the Courſe in ſuch Caſe, they certified that it may be well brought in London or in Middleſex, and that it had uſed to be brought either in London or Middleſex. Contra * 5 Ma. Brook Lieu and County per Brook and all the Prothonotaries of Bank that it ought to be brought in London and not in Middleſex.

* Br. Lieu &c. pl. 85. cites Mich. 5 M. 1.

If a Recognizance was taken at a Judge's Chamber in London, and after filed in Court, the Scire Facias upon it ſhall go firſt into Middleſex; Per Twiſden. Vent. 183. Hill. 23 & 24 Car. 2. in Maynard's Caſe.

5. If a Man *recovers at Weſtminſter in* Action of *Debt upon a Contract at York*, yet he *may have* Action of *Debt upon it in Middleſex, but he ſhall not have Scire Facias upon it but to the Sheriff of the County of York*; Note the Diverſity. Br. Lieu, pl. 88. cites 20 H. 7. 3. per Cur.

6. If

6. If a Man has Judgment to recover Debt or Damages, and the *Defendant has Lands or Goods in ſeveral Counties*, the Plaintiff may pray ſeveral Writs of Execution of all the Goods and of the Moiety of all the Lands of the Defendant in every County, and not for Parcel of this Debt &c. in one County, and for Parcel of it in another County; but if the Goods or Lands in one of the Counties are ſufficient to pay him, he ſhall be ſatisfied with one Execution only. Bendl. 59. pl. 101. Trin. 4 & 5 Ph. & Ma. Anon. in a Nota.

D. 162. b. pl. 51. S. P. and ſeems to be S. C. —— He may have an Elegit into as many Counties as he pleaſe; Per Cur.

Cro. J. 246. pl. 4. Trin. 8 Jac. B. R. in Caſe of Goodyere v. Ince. —— Yelv. 179. S. C. & S. P. admitted. —— Brownl. 107. S. C. & S. P. admitted.

7. If a Man has *Judgment in B. for* 100 *l.* he may immediately upon his Prayer have an *Elegit into as many Counties as he pleaſes*; but in this Caſe the Plaintiff taking an Elegit into the County of Lancaſter, with a Teſtatum, that another had been before directed to the Sheriff of London, who had before returned a Nihil, and it appearing there had been no ſuch Return, it was held to be Error; Admitted per Curiam. Cro. J. 246. Trin. 8 Jac. Goodier v. Ince.

Yelv. 179. Goodyer v. Junce, S. C. adjudged Error; for though according to the Prayer of the Plaintiff in C. B. he might have taken his Elegit immediately both into London and Lancaſter, yet when he waives the Benefit thereof, and grounded his Execution upon a Teſtatum which is falſe, this makes Error in the Execution. —— Brownl. 107. S. C. but ſeems only a Tranſlation of Yelv. —— 2 Brownl. 208. S. C. argued, but no Reſolution.

8. *Debt* was *brought in Herefordſhire*, and Judgment for the Plaintiff. A *Writ of Execution was directed to the Sheriff of Radnorſhire* in Wales, and the whole Court clearly held it well, and that ſo it may well be *into the County Palatine of Durham.* 2 Bulſt. 156. Mich. 11 Jac. Bedo v. Piper.

9. The *firſt Scire Facias upon a Recognizance* to have Execution *ought to be in the County where it was acknowledged*; *But when it was ſued there, and the Party returned dead*, it *may be ſued againſt the Heir or Tertenant in any County* where the Party ſurmiſes he has Land. Cro. C. 313. pl. 4. Paſch. 9 Car. B. R. Eyres v. Taunton.

10. *Bail was taken by Commiſſioners in the County of York.* It was reſolved that a *Scire Facias* brought in the County of Middleſex was well brought, and that it *lies againſt them either in the County of York or Middleſex.* 2 Lutw. 1282. 1287. Mich. 10 W. 3. Redman v. Idle.

11. In C. B. if a *Recognizance* be *taken at a Judge's Chamber* it is a Record immediately upon the firſt Caption, and binds the Lands before it is filed at Weſtminſter, and when it is filed then it is a Record in Court, and a *Scire Facias or Debt lies* upon it, *either in Middleſex where filed, or in London where taken.* 2 Salk. 564. pl. 4. Mich. 2 Ann. B. R. Shuttle v. Wood.

6 Mod. 42. Chetley v. Wood, S. C. accordingly.

12. On a *Recognizance taken in B. R.* the *Scire Facias muſt be brought in Middleſex*; for the Recognizances there are not obligatory by the Caption, but by their being entered of Record in the Court; So it is of Debt; *But on a Recognizance in C. B.* the *Scire Facias may be laid in the County where the Caption was, or in Middleſex where it is filed*; for it is a Record by the Caption, and become immediately obligatory, and therefore may be brought there; and it is alſo filed at Weſtminſter in C. B. and there remains of Record. 2 Salk. 600. pl. 10. Mich. 2 Ann. B. R. Shuttle v. Wood.

(Y) What

(Y) What Things may be put in Execution.

See like head Ant. M. p. 543.

A Dyer's Fatt is not to be taken on an Attachment if fixed to the Walls of the Houſe.

1. A Sheriff upon a Writ of Execution cannot ſell to the Party a Furnace annexed to the Franktenement; for it ſeems this would be Waſte, he who had the Land being a Leſſee; Dubitatur. H. 37 Eliz. B. *Day v. Auſton and Biſbich.*

Cro. E. 374. Day v. Bisbitch. —— Ow. 70, 71. 37 Eliz. C. B. the S. C. accordingly. —— Fatts, Coppers, Tables and Partitions were ſet up by a Soap-boiler for the Convenience of his Trade, and who alſo paved the Backſide &c. and theſe were all taken in Execution by the Sheriff on a Fieri Facias, and it was held good by Holt Ch. J. 1 Salk. 368. Mich. 2 Ann. Poole's Caſe.

S C. cited by Doderidge J. 3 Bulſt. 17.

2. *Rent reſerved upon a Leaſe for* Term of *Life may* be taken in Execution by Elegit, and the Plaintiff who recovered may diſtrain for the Rent, and yet he has not the Reverſion. Br. Diſtreſs, pl. 71. cites 13 H. 4. Fitzh. Avowry 237.

3. *Goods taken for Diſtreſs* cannot be taken in Execution. Br. Pledges, pl. 28. cites 35 H 6. 25.

* S. P. Br. Treſpaſs, pl. 364. cites 22 E. 4. 10. for the Leſſor himſelf cannot take them during the Years, and yet they demurred & adjornatur. —— S. P. and yet the Debtor has Property in Reverſion. Br. Property, pl. 33. cites S. C.

4. * *Beaſts leaſed for Years* cannot be taken in Execution for Debt of Leſſee after Recovery againſt Leſſee. D. 67. b. 28. Marg. cites 22 E. 4. 10. Br. Execution 107. — Not till after the Leaſe is determined; Per Doderidge J. 3 Bulſt. 17. cites 35 H. 6. 25.

5. Not of the Profits of Office of *Filazer*, for Execution cannot be of what he *cannot grant* and aſſign over. D. 7. b. pl. 10. Trin. 28 H. 8.

6. A. is *bound in a Statute* to B. *and ſows the Land.* B. extends the Lands which are delivered to him in Execution. It was adjudged that the *Conuſee ſhall have the Corn ſown.* And the ſame Law in Caſe of a Recognizance. 2 Le. 54. pl. 75. Trin. 29 Eliz. C. B. Barden v. Withington.

7. A *Chain of Gold* not anſwerable to the Quality of the Perſon that has it on, though it be *on his Body*, ſhall be taken in Execution; Arg. Mo 214. pl. 354. Mich. 27 & 28 Eliz. in the Exchequer.

Le 220. pl. 303. Byne v. Playne, S C. adjudged —— If the Defendant has Goods by lawful Means, viz. by Bailment or otherwiſe, neither the Party himſelf nor the Sheriff can come into the Houſe to ſeize them; Per three Juſtices. Cro. E. 909. pl. 20. Mich. 44 & 45 Eliz. B. R. in Caſe of Leyman v. Greyſham.

8. A. long Time before a Recovery had againſt him by B. *ſold Goods* to C. but with this *Proviſo, that A. ſhould have Poſſeſſion of them for four Years*, which are not yet expired, and *if A. then pay* ſuch a Sum of Money the Sale ſhould be void. A. having only a Specifick Property the Goods are not liable to this Debt. Cro. E. 218. pl. 5. Hill. 33 Eliz. B. R. Bind v. Plain.

9. *Term in Right of the Wife as Adminiſtratrix* is not extendable for the Debt of the Husband, and if the Husband had himſelf the Term as Executor, it was not extendable for his proper Debt. Cro. E. 292. pl. 2. Hill. 35 Eliz B. R. Ridley v. Punter.

10. *Goods pawned* prior to the Execution ſhall not be taken in Execution till the Money is paid for which they were pawned; For the Property is only in the Pawnee, and the Judgment Creditor has only the Intereſt

Intereſt in them. 3 Bulſt. 17. Hill. 12 Jac. B. R. in Caſe of Waller v. Hanger.

11. Upon a Levari Fac. the Sheriff may take *ready Money*. 2 Show. 166. pl. 157. Mich. 33 Car. 2. B. R. The King v. Webb.

12. *Goods in Execution*, tho' wrongfully, being once ſeized and in Cuſtody of Law, cannot be ſeized again by the ſame or any other Sheriff, and if they are ſold thereon ſuch Bargain is void; Per Holt Ch. J. Show. 174. Mich. 2 W. & M. Backhurſt v. Clinkard.

In a Fieri Facias the Sheriff returns Nulla Bona on Security given him by Defendant, by this the Property of the Goods is not in the Sheriff, but may be taken upon another Execution. 2 Vern. 238 pl. 221. Mich. 1691. Underwood v. Mordant.

13. *Goods and Plate of the Wife aſſigned to Truſtees before Marriage*, of which the Husband was only to have the Uſe for his Life, and after to the Wife, her Executors and Adminiſtrators; but if the Husband ſurvived her then he to have the abſolute Property. Per Cur. this is a Matter purely at Law, whether the Property is well veſted in the Truſtees, or whether the Aſſignment is fraudulent as to Creditors, and that having been tried at Law, there is no room for Equity to interpoſe; for then we muſt declare that to be no Fraud in Equity which was found ſo at Law. 2 Vern. 238. pl. 221. Mich. 1691. Underwood v. Mordant.

Nelſ. Chan. Rep. 181. S. C. mentions it as the Houſehold Goods of the Husband, but that there was no Schedule to thoſe Articles, and therefore defective, and being taken in Execution on a Judgment after the Death of the Husband, a Bill was filed in Equity to be relieved againſt the Judgment, but was diſmiſſed with Coſts.

14. If the Bailiffs take *another Man's Goods* in Execution, (tho' otherwiſe in Replevin) an Action of Treſpaſs will lie; Per Holt Ch. J. Carth. 381. Trin. 8 W. 3. B. R. in Caſe of Hallet v. Byrt.

15. In Treſpaſs for taking Goods the Defendant juſtifies by a Judgment in Court Baron, and that the *Goods* were *taken by a Levari*, and delivered to him, being Plaintiff, in Execution. Demurrer, Judgment pro Quer'; for that Goods ſo taken cannot be delivered in Execution, but perhaps they might ſell them, and ſo raiſe the Money, or have appraiſed them. 12 Mod 494. Paſch. 13 W. 3. Holm v, Hunter.

16. A. has a Judgment for a juſt Debt againſt B. and takes out a Fieri Facias, and gets the Sheriff to ſeize the Goods, but would not let him proceed farther, but let *the Goods ſeized remain in Cuſtody of B. the Defendant*. C. who had alſo a Judgment againſt B. for a juſt Debt takes out a Fieri Facias, and per Curiam he may ſeize the ſame Goods, for the former was a *fraudulent* Execution, and the Sheriff might very well return Nulla Bona upon the firſt Execution. 7 Mod. 37. Trin. 1 Ann. B. R. Rice v. Serjeant.

A. ſeized B's Goods for Rent, and ſold them to C. the Son of B. Afterwards J. S. got Judgment againſt B. and the Sheriff levied 24 lb. of thoſe Goods in the Poſſeſſion of B—C. brought Trover, but on Evidence the Sale was proved fraudulent, and B. was in Poſſeſſion of them all along, and paid Taxes for the Farm and Goods &c. and therefore the Judge directed the Jury to find for the Defendant; but for want of proving a Copy of the Judgment as he ought, the Jury for that Reaſon only found againſt him; but by the Judge's after Direction on a Bill by the Bailiff, and proving the Matter as above, a perpetual Injunction was granted againſt the Judgment, and C. to pay Coſts. Chan. Prec. 233. Mich. 1704. Kent v. Bridgman.

17. If there be an Execution againſt *Tenant for Years without Impeachment of Waſte*, tho' ſuch Tenant may cut down and ſell, yet the Sheriff cannot, becauſe the Tenant in ſuch Caſe *has only a bare Power with an Intereſt*; Per Holt Ch. J. at Niſi in Middleſex. 1 Salk. 368. Mich. 2 Ann. Poole's Caſe.

18. *But where* the Tenant *has an Intereſt as well as a Power*, as Tenant for Years has in *ſtanding Corn*, in ſuch Caſe the *Sheriff may cut down*

down and ſell; Per Holt Ch. J. Mich. 2 Ann. at Niſi Prius in Middleſex. 1 Salk. 368. Poole's Caſe.

19. Things *ſet up* by Leſſee for Years for the Conveniency of Trade, as *Coppers &c.* are ſeizable on a Fi. Fa. but *Hearths and Chimney-Pieces to compleat the Houſe* are not. 1 Salk. 368. Mich. 2 Ann. coram Holt Ch. J. at Niſi Prius in Middleſex. Poole's Caſe.

20. 8 *Ann. cap* 14. *S.* 1. *No Goods upon any Tenements leaſed ſhall be taken upon any Execution, unleſs the Party, at whoſe Suit the Execution is ſued out, ſhall before the Removal of ſuch Goods pay to the Landlord of the Premiſſes, or his Deputy, all Money due for Rent for the Premiſſes; provided the Arrears do not amount to more than one Years Rent, and in Caſe the Arrears ſhall exceed one Year's Rent, then the Party at whoſe Suit &c. paying the ſaid Landlord or his Bailiff one Year's Rent, may proceed to execute his Judgment, and the Sheriff is required to levy and pay to the Plaintiff, as well the Money paid for Rent as the Execution Money.*

ſee further post. 566.

(Z) To what Time it ſhall relate for Land.

‡ Fol. 892.

1. IF Judgment for Debt or Damage be given in Bank upon Trial by ‡ Niſi Prius, **the Plaintiff ſhall have Execution of the Land which the Defendant** had the Day of the Niſi Prius, **for this and the Day in Bank are but one Day in the Law.** * D. 3 & 4 Ma. 149. 80. 17 E. 3 5. b. 18 E. 3. 14. b. † 18 E. 3. 38. b.

* This was Debt brought againſt the Heir upon the Obligation of the Anceſtor, and the Defendant aliened the Aſſets pending the Writ, and yet pleaded Riens per Deſcent, and this being found againſt him, a general Judgment was given. Ibid.

† Fitzh. Execution, pl 58. cites S. C. as to an Action of Waſte tried at Niſi Prius.

* Fitzh. Execution, pl. 68 cites S. C.

2. So **he ſhall have Execution of the Land which he had** the Day of the Inqueſt taken. * 21 E. 3. 51. b. 30 E. 3. 30. **adjudged.** 15 E. 3. **Execution** 64. 31 E. 3. **Execution** 66. † 18 E. 3. 38. b.

† Fitzh. Execution, pl. 58. cites S. C. as to an Action of Waſte tried at Niſi Prius.

Fitzh. Execution, pl. 68. cites S. C.

3. **In** Aſſiſe, **if after the Aſſiſe taken it is** adjourned for Difficulty, **and after** Judgment **is given for the Plaintiff, he ſhall not have Execution** for Damages **of the Land which he had the** Day of the Inqueſt **taken.** 21 E. 3. 51. b.

* Fitzh. Execution, pl. 58. cites S. C.

4. **If a Man** recovers Debt or Damages by Trial by Inqueſt in Bank, **he ſhall have Execution of the Land which the Recoveree had the** Day of the Inqueſt **taken.** * 18 E. 3. 38. b. **Contra** 19 E. 2. **Execution** 249.

* Fitzh. Execution, pl. 157. cites S. C.

† Fitzh. Execution, pl 58. cites S. C.

5. **If a Man** recovers Damages **againſt another he ſhall not have Execution of the Land which he had the** Day of the Writ purchaſed. * 29 E. 3. 27. † 18 E. 3. 38. b. 30 E. 3. 26. 31 E. 3. **Execution** 66. **though averred that he had granted his Chattels and Lands** two Days before the Inqueſt taken **to toll him of Execution.**

—— In Treſpaſs the Defendant recovered Damages, and prayed Elegit of the Land which the Defendant had the Day of the Writ, and could not have it, but of the Land which he had the Day of the Judgment. Br. Elegit, pl. 19. cites the Regiſter fol. 93.

Br. Elegit, pl 17. cites S. C. ——

6. Nor **of the Land which he had** when he firſt came to anſwer if **it was** in another Term than that in which the Judgment was. 42 Aſſ. 17. **adjudged.**

Br. Execution, pl. 87. cites S. C. —— See pl. 12, 13. the Notes there.

7. If

7. If a Man recovers a Manor he ſhall have all the Arrearages incurred meſne between the Recovery and Execution. 48 E. 3. 16. b. Though he did not ſue Execution in two Years after. Br. Relation, pl. 5. cites 48 E. 3. 15. per Hunimer, which was denied, for the Execution ſhall not have Relation. ——— Br Arrearages, pl. 5. cites S. C. and Brook ſays, ſo it ſeems that Tenant ſhall have it till Execution.

8. If an Inqueſt be taken by Niſi Prius in Action of Debt, and Plaintiff recovers, and the Defendant, to prevent the Plaintiff of his Execution, the third Day after the Inqueſt was returned had alienened the Land, yet the Plaintiff ſhall not have Execution of the Land which he had at the Time of the Inqueſt returned. 14 E. 3. 72. adjudged.

9. If a Man ſues Execution out of a Recognizance he ſhall not now have Execution of his Land which he had the Day of the Recognizance made. 29 E. 3. 32. Curia contra 1 E. 3. 12.

10. But if upon this the Sheriff returns a Nihil then Execution ſhall be of the Land which he had the Day of the Recognizance made. 29 E. 3. 32. Curia.

11. If a Man acknowledges a Recognizance before a Judge of Bank or King's Bench out of the Court as at Serjeant's Inn out of the Term, and after it is entered upon the Roll of Record in the ſame Court where he is Judge, this ſhall bind the Perſon and Land of the Conuſor from the Time of the Conuſance of the Recognizance, for it is a Recognizance from this Time. Hobart's Rep. 264. per Curiam between *Hall and Winkfield.* See ſupra (X) the Caſe of Shuttle v. Wood.

12. If a Man recovers Debt or Damages he may ſue Execution of any Land which he had at the Time of the Judgment. 30 E. 3. 24. * 42 Aſſ. 17. 28 Aſſ. 41. 6 E. 3. 13. and not of the Land which he had the Day of the firſt Writ purchaſed. * Br. Execution, pl. 87. cites S. C. ——

13. If a Man recovers Debt or Damages he ſhall have Execution of the Land which he had the firſt Day of the Term in which he recovers; for the Term is but one Day in Law. 42 Aſſ. 17. adjudged. Action againſt an Hoſtler, the Plaintiff recovered upon Demurrer upon the Plea of the Defendant, and prayed Elegit of the Land which the Defendant had the Day he was brought in to anſwer and could not have it, bnt the Day of the Plea pleaded, which was the ſame Term that Judgment was given, which is all one and the ſame Day, and ſo in Effect this is the Day of the Judgment. Br Elegit, pl. 17. cites 42 Aſſ. 17. ——— But 42 E 3. 11. it is expreſſed plainly the Day of the Judgment rendered. Ibid. —— But per Knivet, if it had paſſed by Verdict upon Iſſue, he ſhall have Elegit of the Land which he had the Day of the Inqueſt for it, and Judgment rendered; quod nota. Ibid. ——— Br. Execution, pl. 87. cites S. C. accordingly. ——— Ibid. pl. 16. cites 42 E. 3. 11. accordingly. ——— Ibid. pl. 127. cites S. C. accordingly.

14. If a Man recovers Debt Execution may be ſued of any Land which he hath purchaſed after the Judgment. 30 E. 3. 24.

15. If a Man recovers Debt he may ſue Execution of any Land which he had at the Time of the Judgment, though he had alienened it before the Execution. 30 E. 3. 24. So of a Reverſion, per Dyer; but Weſton contra. Mo. 36. pl. 118.

16. So it may be ſued of any Land which he had by Purchaſe after the Judgment, though he had alienened it before the Execution. 33 E. 3. 24.

17. *Aſſiſe of Rent* brought *by a Prior*, who *recovered the Arrearages as well in the Time of his Predeceſſor as of his own Time, and the Arrearages for a Term pending the Aſſiſe*, viz. incurred *after the Adjournment* of Aſſiſe in Bank. Br. Arrearages, pl. 9. cites 29 Aſſ. 59. In Aſſiſe of Rent the Plaintiff recovered the Rent by Award, and the Arrears incurred after the Verdict; quod nota. Br. Arrearages, pl. 10. cites 31 E 3. 31. ——— So in Aſſiſe of Land, the Plaintiff recover'd, and becauſe the Land was worth 20s. per Ann. and a Quarter

Quarter was paſſed after the Adjournment, it was awarded that he recover the Rent of this Quarter with his Damages. Ibid. cites 31 E. 3. 33.

In Aſſiſe of Rent the Plaintiff recovered and prayed Judgment of the Rent and Damages, and of Arrearages incurred pending the Writ; Per Cur he ſhall not have it but only of the Rent and Damages, and of no Arrearages; But in Writ of * Annuity the Plaintiff may recover the Annuity and Damages, and the Arrearages incurred pending the Writ; but e contra in Aſſiſe. Brook ſays Quære diverſitatem. Br. Arrearages, pl. 7. cites 37 H. 6. 38.

* Note, that in Scire Facias upon a Recovery in Writ of Annuity, the Plaintiff cannot recover the Arrearages and Damages incurred pending the Scire Facias, but pending the firſt Writ; quod nota per Judicium. Br. Arrearages, pl. 16. cites 9 H. 5. 7.

18. In *Debt on a Bond* the *Defendant before the Trial conveyed his Lands to another* &c. *but he himſelf took the Profits*; notwithſtanding this Conveyance a Moiety of his Lands are extendable. D. 295. a. pl. 9. cites 22 Aſſ. 44.

Br. Warrantia Carte pl. 8. cites S. C.

19. Note, per tot Cur. in a Queſtion &c. that if a Man makes a *Feoffment with Warranty*, his *other Lands ſhall not be bound without Judgment* in any Action, and that if a Man *recovers Debt*, he ſhall not have Execution of the Land of the Defendant, but ſuch Land which he had at the Day of the Judgment, and not of that which he ſold pending the Writ. Br. Execution, pl. 23. cites 2 H. 4. 14.

20. In Debt againſt the Heir, for that the *Father had a Man in his Cuſtody in Execution, and ſuffered him to eſcape, and died*; Adjudged that the *Land which the Father had at the Time of the Judgment, may be extended* by Elegit upon a Scire Facias brought *againſt him as Tertenant* of Land liable to the Execution. Dyer 271. a. pl. 25. Hill. 10 Eliz. Anon.

And ſuch Execution was admitted 12 E. 4. 43. 44. Ibid.

21. If a Man *recovers Annuity againſt a Vicar*, and *before Execution the Vicaridge is United to the Parſonage*, yet the Plaintiff may have Execution againſt the Succeſſor by *ſhewing of the ſpecial Matter*; Per Brian Ch. J. Br. Variance, pl. 102. cites 20 E. 4. 6.

S. P. Br. Execution, pl. 125. cites S. C.

22. If a Man *recovers Annuity againſt Bailiffs and Commonalty*, and *before Execution the Corporation is altered to Mayor and Commonalty*, yet he may have Execution againſt the New Corporation by ſhewing the ſpecial Matter. Br. Variance, pl. 102. cites 20 E. 4. 6. per Brian Ch. J.

Mo 21. pl. 72. Hill. 2 Eliz S. P. by Dyer and Weſton, For the Tenant continues Tenant to the Action.

23. If a Man brings a *Præcipe*, and the *Tenant aliens Pendente lite*, yet the *Recovery is good againſt him, and* ſhall alſo bind *every one under him*; Per Anderſon, and agreed by Periam. Gouldsb. 105. in pl. 9. Mich. 30 & 31 Eliz. obiter.

24. *Debt* was brought *againſt the Heir, who pleaded Riens per Deſcent the Day of the Writ.* It was found, that *before the Writ brought he had aliened the Aſſets by Covin to defraud this Debt*; And Judgment was given for the Plaintiff, and that this is well found for him upon Office of Aſſets per Deſcent. D. 149. a. Marg. pl. 80. cites Trin. 33 Eliz. B. R. Rouſe v. B.

Cro. E. 216. pl. 12. S. C. the Plaintiff had Elegit granted him de Bonis Executoris.——2 Le. 188. pl. 235. S. C. a Precedent was ſhewn to the Court of 17 Eliz. and thereupon the Elegit was granted.——But as to its being of the Lands which the Executor had the Day of the firſt Judgment is not mention'd in either of the ſaid Books.

25. Debt againſt Executor *or Adminiſtrator*; Recovery is had by Verdict, and on this Judgment given, and Fi. Fa. De bonis Inteſtati, on which *Devaſtavit returned*, and *Elegit* iſſues *De Terris propriis* of the Adminiſtrator *which he had the Day of the firſt Judgment*. Mo. 299. pl. 446. Mich. 32 & 33 Eliz. Mead v. Cheyny.

26. Land

26. Land whereof the *Bail* was ſeiſed at the Time of entring into it ſhall be liable after Judgment, though aliened before; Per Clench J. Cro. E. 580. Mich. 39 & 40 Eliz. B. R. Hoe v. Marſhall.

And a Releaſe by the Plaintiff in the Action to the Bail of all Actions Duties and Demands before any Judgment given, and after upon Default of the Defendant Scire Facias iſſues againſt the Bail, adjudged that this Releaſe ſhall not bar the Plaintiffs, becauſe the Judgment was a meer Poſſibility, and therefore cannot be releaſed. 10 Rep. 48. cites 5 Rep. 70, 71. Hoe's Caſe. ——See tit. Releaſe (U) pl. 33. S.C. and the Notes.

27. Upon a *Judgment in Debt*, the Plaintiff ſhall not have *Execution* but *only on that Land which the Defendant had at the Time of the Judgment*, for that the Action was brought in reſpect of the Perſon, and not in reſpect of the Land. Co. Litt. 102. a. ad finem.

28. *But* if an Action of *Debt* be *brought againſt the Heir, and he aliens hanging the Writ*, yet ſhall the Land which he had at the Time of the original Purchaſe be charged, for that the Action was brought againſt the Heir in reſpect of the Land. Co. Litt. 102. a. b.

29. If a *Man is Nonſuit*, the *Land* only *which he had at the* Time of the *Amercement aſſeſſed ſhall be charged, and not that which he had at the finding the Pledges*; For the Amercement is not in reſpect of the Land, but of his want of Proſecution, which was a Default in his Perſon. Co. Litt. 102. b.

30. But the *Iſſues of a Juror ſhall be levied upon the Feoffee although* they were *not loſt before the Feoffment*, becauſe he was returned and ſworn in reſpect of the Land. Co. Litt. 102. b.

31. If the *Land* be *firſt executed upon a Statute, and afterwards an Elegit upon a Judgment* obtained *before the Acknowledging of the Statute comes alſo to the Sheriff*, the *Moiety of the Land extended ſhall be delivered to the Plaintiff* upon the Judgment. Brownl. 38. Freeman's Caſe.

32. 29 *Car.* 2. *Cap.* 3. *S.* 14. *Every Judge or Officer of the Courts at Weſtminſter who ſhall ſign Judgments, ſhall ſet down the Day of the Month, and the Year he ſigns them, upon the Paper Record &c. which he ſhall ſo ſign, which Day of the Month &c. ſhall be entered upon the Margin of the Roll of the Record of the ſaid Judgment; And they ſhall be accounted Judgments only from the Time of ſuch ſigning againſt Purchaſers bona fide, and for valuable Conſideration.*

This Statute enacting that Judgments ſhall bind Lands but only from the Signing, relates only to Purchaſors; ſo that as to Credi- this remains as it was at the Com-

33. *S.* 18. *The Day of the Month and Year of the Enrolment of Recognizances, ſhall be written in the Margin of the Roll, and Lands in the Hands of Purchaſers for valuable Conſideration ſhall not be bound but from the Time of ſuch Inrolments.*

mon Law; Per Ld. Chancellor Talbot. 3 Wms's. Rep. 398. pl. 111. Mich. 1735. Robinſon v. Tonge & al.'——So that as between Creditors a Judgment entred in the Vacation relates to the firſt Day of the preceding Term. Ibid. Marg.

34. If *Judgment* be ſigned *in Hillary Term*, and in the ſubſequent Vacation the Defendant *ſells* Land, and before the Eſſoins of Eaſter Term the Plaintiff enters Judgment, it ſhall affect the Lands in the Hands of the Purchaſor, and if one enters Judgment ſo *in Vacation*, when indeed the *Party was dead*, if he was living in the precedent Term the Judgment is good by Relation. 6 Mod. 191. Trin. 3 Ann. B. R. Hodges v. Templer.

35. *Judgment againſt an Heir on Aſſets confeſſed* ſhall have relation to, and bind from, the filing the original Writ or Bill, and ſhall be preferred to a *general Judgment* againſt the Heir tho' obtained prior, and tho' the Original whereon &c. was filed prior, and ſuch general Judgment will not relate to the Original, but binds only in common Caſes from the Time of the Judgment given; Per Holt Ch. J. Carth. 245. Trin. 4 W. & M. in B. R. Gree v. Oliver.

36. If *Plaintiff be* alive on the Continuance-Day, Judgment may be given tho' he be *dead* afterwards; If he dies before the *firſt Day of the Term*, the Court cannot take Notice of it without it be *pleaded* as Puis Darreigne Continuance, and if he were alive the firſt Day of Term Judgment ſhall relate to that. 6 Mod. 225. Mich. 3 Ann. B. R. in Caſe of Fox v. Tilly.

Fol. 893.

(A. a) To what Time it ſhall relate for Chattles. What Goods ſhall be put in Execution.

But he ſhall be charged De Bonis Propriis, but it ſeems there that a Sale after Judgment is not good, and if an Elongata ſunt be returned the Plaintiff ſhall have Execution De Bonis Propriis. Br. Executors, pl. 14. cites S. C. —— Fitzh. Executors, pl. 7. cites S. C.

1. If an Executor ſells any Goods to another pending an Action againſt him and before Judgment, thoſe Goods ſhall not be taken in Execution, for they were lawfully bought. 9 H. 6. 57. b. Curia.

By the Common Law an Eſtate made by Fraud was avoidable only by him who had a former Right, Title, Intereſt, Debt or Demand. 3 Rep. 83. a. cites it as adjudged Trin. 37 Eliz. C. B. in Caſe of Upton v. Baſſet.

2. If a Man after Judgment, and before Execution taken out, ſells his Chattles by Fraud to avoid Execution, thoſe Goods at the Common Law could not be put in Execution. 3 E. 3. Itinere North Execution 108.

Mo. 873. pl. 1216. Comyn v. Brandlyn, S. C & S P. held clearly. —— Brownl. 38, 39. S. C. held by all the Judges.

3. If a Man recovers againſt J. S. and ſues Execution by Fieri Facias, the Chattles which J. S. had at the Time of the Execution awarded are liable to the Execution. Hill. 11 Ja. B. adjudged by Admittance between *Cummin and Brandlin.*

Le. 144, 145. pl. 200. Trin. 31 Eliz. B. R. in Caſe of Park v. Moſs, S. P. held accordingly, and S. C. cited per Curiam. —— Mod. Rep. 188. pl. 20. Mich. 26 Car. 2. C. B. Farrer v. Brooks, S. P. held accordingly.

4. As if after the Execution awarded againſt J. S.—J. S. dies, yet the Sheriff may after execute the Writ upon the Goods in the Hands of his Executors or Adminiſtrators, inaſmuch as the Goods were bound by the Award of Execution 16 H. 7. 6. b. per Brian in Execution upon Statute Staple.

Le. 144. pl. 200. S. C. adjudged. —— Mo. 352. pl. 473. Moſſe v. Packe, S. C. adjudged. — Cro. E. 181. pl. 16. S. C. held accordingly. —— S. C. cited 8 Mod. 225. per Cur. Hill. 10 Geo.

5. So if a Man recovers againſt J. S. as Executor of W. S. of the Goods of the Deceaſed if he has &c. and if not, De Bonis Propriis, and ſues Execution accordingly by Fieri Facias, and after before Execution made by the Sheriff J. S. dies, if the Sheriff does not find any Goods of W. S. the firſt Teſtator, he may execute the Writ upon the proper Goods of J. S. which he had at the Time of the Execution awarded, though they are now in the Hands of his Executor or Adminiſtrator, without ſuing a Scire Facias, inaſmuch as they were bound by the Award of the Execution. Mich. 31 & 32 Eliz. B. R. but adjudged Hill. 32 Eliz. between *Parks* Plaintiff, *and Moſſe and Howe* Defendants.

6. If

6. If an Elegit be erroneous, upon which an Alias Elegit is granted, all the Goods which he had at the Time of the Execution granted are liable. B. R. *Humphrie's* Caſe, cited Hill. 11 Jac.

7. If a Man recovers Damages, and the Defendant aliens his Goods *by Fraud*, the other may *take Iſſue upon it*, and if it be found the other ſhall have Execution of the Goods aliened by Fraud; Quod Nota per Belk. quod non negatur. Br. Execution, pl. 17. cites 43 E. 3. 2.

8. If one recovers in Debt he ſhall not have Execution but of thoſe *Goods which the Defendant had at the Day of the Execution made*; Quod Nota. Br. Execution, pl. 23. cites 2 H. 4. 14.

Bnt per Babb. if a Man be condemned in Debt, or bound in a Statute, the Goods which he had at the Day of the Judgment, or acknowledging of the Recognizance, ſhall be bound to the Execution in whoſeſoever Hands they come; Quod non negatur. Ibid. pl. 116. cites 7 H. 6. 2.

9. *Ca. Sa.* awarded *and an Extent*, and between the Date of the Writ, and before the Sheriff took the Inquiſition, *Defendant ſells the Goods*; Per two Juſtices the Sheriff may extend the Goods ſo ſold, (for it is the Act of the Party) and the Goods he had at the Time of the Writ awarded. Mo. 21. pl. 72. Hill. 2 Eliz. Anon.

10. On Recovery in Debt the Plaintiff had Execution, and the *Defendant after the Teſte of the Fi. Fa. and before the Sheriff had executed it, ſold the Goods bona fide*, and delivered them to the Buyers. Adjudged that the Sheriff might take them in Execution in the Hands of the Buyers, becauſe when ſuch Execution is made, it ſhall have Relation to the Teſte of the Writ. 1 Leon. 304. pl. 423. Mich. 22 Eliz. C. B. Wangford v. Sexton.

S. P. held accordidgly, for by the Award of Execution the Goods were bound, ſo that they may be taken in Execution into whoſe Hands ſoever they come; And Walmſley ſaid, ſo it was ruled in a Caſe at Hertford Term, wherein he was of Counſel Cro. E 174. pl. 4. Hill. 32 Eliz. B. R. Anon. —— Per Curiam, no Gift or Deed of the ſaid Goods the Day of the Date of the Writ or afterwards can ſtop the Execution; Wherefore they reſolved the Jury accordingly, without inquiring of the Fraud, and they found for the Plaintiff. Cro. E. 440. pl. 1. Mich. 37 & 38 Eliz. C. B. Boucher v. Wiſeman.

11. If a Judgment in Debt be given againſt Leſſee for Years, and afterwards he ſells the Term, and after the Year the Plaintiff brings a Sci. Fa. and has Execution, the Term is not liable to the Execution if it was aſſigned Bona Fide. Godb. 161. pl. 226. Paſch. 6 Jac. C. B. Wilſon v. Wormall.

12. And if Leſſee for Years aſſigns over his Term by Fraud to defeat Creditors, and the Aſſignee aſſigns it over to another Bona Fide, it is not liable in the Hands of the ſecond Aſſignee to Execution; Per Coke Ch. J. Ibid. in S. C.

13. The *Sale of Chattels bona fide after Judgment*, but *not after Execution awarded*, is Good; Per Curiam. 8 Rep. 171. a. Paſch. 8 Jac. in Sir Gerard Fleetwood's Caſe cites 2 H. 4. 14. 9 H. 6. 58. 11 H. 4. 7.

14. 29 *Car.* 2. *cap.* 3. *S.* 16. *No Writ of Execution ſhall bind the Property of Goods but from the Time of its Delivery to the Sheriff or Coroner, who upon receipt thereof (without Fee) ſhall endorſe on the Back thereof the Day of the Month or Year when they received it.*

The Statute of Frauds and Perjuries binds the Property of Goods taken in Execution from the *Delivery of the Writ to the Sheriff* with reſpect to *Purchaſors only*. But in reſpect of Executors where the Party *after the Teſte and before Execution* it binds the Property *from the Teſte*. Per Ch J. and Dobben, obiter. Comb 145. Mich. 1 W. & M. in B. R. Anon.

The Fieri Facias bore *Teſte* before the *Party's Death*, but the *Delivery and Indorſement was after*. The Court held the Execution good at Common Law, and rather inclined that it was good ſince the Statute, and that it was made for the Benefit of Strangers, who might have a Title to the Goods between the Teſte and the Time of Delivery to the Sheriff, but as to the Party himſelf the Goods were bound from the Teſte ever ſince the Statute. But it was ordered to be further ſpoken to. 2 Vent. 218. Mich. 2 W. & M. in C. B. Anon.

15. The

2 Show. 485. pl. 449 Haughton v. Rugby. S. C. held accordingly.—Skin. 257.

15. The Statute of *Frauds and Perjuries* intended only to remedy an Inconvenience of *selling Good* after the Teſte of the Writ; ſo that the Writ binds now only from the Delivery quoad a *Purchaſor*, but the Statute was not made for the Benefit of the Party or his Executors, ſo that quoad them it binds from the Teſte, and there is no Fraud in the Caſe. Comb. 33. Mich. 2 Jac. 2. B. R. Horton v. Ruesby.

pl. 4. Houghton v. Ruſhby S. C. held accordingly.——This Clauſe is to be *underſtood* of the *Goods of a Purchaſor, pnrchaſed by* him *before delivery of the Writ*; but as to the Party, it ſhall bind as before from the Teſte as it was before the Statute. Per Cur. 12 Mod. 5. Paſch. 3 W. & M. Dr. Needham's Caſe.——S. C. cited Skinn. 258.——S. C. cited 8 Mod. 225.

S. P *But if after Seiſure A. becomes Bankrupt*, the Act of Bankruptcy cannot affect the Goods

16. If a *Writ of Execution* be *deliver'd* to the Sheriff *againſt A. and A. becomes a Bankrupt before it is executed*, the Execution is ſuperſeded, and conſequently the Property of the Goods is not abſolutely bound by the Delivery of the Writ to the Sheriff. But the Teſte of the Writ binds againſt all Sales and Acts of the Party himſelf; Per Holt Ch. J. Ld. Raym. Rep. 252. Mich. 9 W. 3.

levied in Execution as aforeſaid; Ruled by Holt Ch. J. at Guild-hall. Hill. 10 W. 3. in Caſe of Cole v. Davis & al' Aſſignees of Maul, a Bankrupt.

Cro E. 181. Parkes v. Moſſe.—1 Salk 320 Smallcomb v. Buckingham——But now as

17. *Fieri Facias* upon a Judgment *Defendant dies before Execution*, the Writ may be executed upon the Inteſtate's Goods, and Windham ſaid, The Property of the Goods is ſo bound by the *Teſte of the Writ* as that a Sale made of them bona fide ſhall be avoided, to which the Court agreed. 1 Mod. 188. Farrer v. Brooks, Adminiſtrator of Brookes.

to a Stranger it has not that Operation. 6 Mod. 292. Arg. cites Mich. 9 W. 3. Smallcomb. v. Croſs.

S. C. adjudged. 1 Salk. 320. N. B. He who brought the firſt Fieri Facias *told the Sheriff that he was not in Haſte, ſo took out no Warrant, nor left any Fee*, and this inclined the Opinion of the Court more ſtrongly againſt him

18. *Two executions*, one delivered before the other *on the ſame Day*, but *the laſt teſted was deliver'd firſt*. The Sheriff ought to execute that which was firſt delivered to him; But if he executes the laſt the Execution is good; But the other Party has his Remedy againſt the Sheriff; But as to the Party himſelf his Goods are bound by the Teſte. Adjudged. Carth. 419. Mich. 9 W. 3. B. R. Smallcomb v. Buckingham.

1 Salk 320. Carth. 420. ——5 Mod. 377. reports that this was mention'd Per Holt Ch J and that Holt ſaid, that if the *ſecond Fieri Facias had been delivered a Fortnight after*, yet if it *be firſt executed* it ſhall be good, and the other has only his Remedy againſt the Sheriff ——The Court thought that no Wrong was done in this Caſe, becauſe he that had the firſt Writ *never deſired any Warrant*, and was plainly deſigned only as a *Screen* to protect the Party from the ſecond Scire Facias, and Judgment accordingly. 12 Mod. 126. S. C.——Ld. Raym. Rep. 251. Smallcomb v. Croſs and Buckingham. S. C. held accordingly, and that in this Caſe no Action lies againſt the Sheriff, becauſe he who delivered his Writ firſt, would not take a Warrant from the Sheriff to levy the Goods; ſo that it ſeems he had a Deſign only to keep that Execution in his Pocket to protect the Defendants Goods by Fraud. And Judgment for the Plaintiff by the whole Court.

Per Holt this Statute is purely for the Sake of Purchaſors, and

19. If Judgment be entred in Vacation, and Writ taken out againſt the Party's Good *as of the Term before*, yet the Writ ſhall levy the Money of his *Goods in the Hands of his Executors*. Per Holt. 7 Mod. 95. Mich. 1 Ann. B. R. Oades v. Woodward.

in regard to Lands, but makes no Alterations as to Goods, but binds them only from the Delivery of a Writ to the Sheriff. Ibid.

20. An *Execution* was *taken out againſt the Teſtator in his Life-time, and executed after his Deceaſe*, the *Writ was* returnable Octab. Martini, and *executed* on the 16th Day of November, which was *two Days before the Return was out*; The Execution being ſued out before the Teſtator's Death may be executed afterwards without a Scire Facias, as was reſolved in Dr. Needham's Caſe; and it may be executed at any Time before the Return of the Writ, nay, on the very Day that it is returnable,

able, and good; and if it is executed in the Vacation, it ſhall refer to the antecedent Term, and ſo it ſhall if it is executed in Term Time; Per Cur. 8 Mod. 225. Hill. 10 Geo. Anon. And ſays ſo is Cro. E. 181. Parker v. Moſs.

(B. a) At what Time Goods ſhall be put in Execution.

1. IF by Cuſtom of a Vill **a Man may** attach **the Goods of his Debtor, and that thoſe** Goods ſhall be put in Execution **if the Suit paſſes for him, and he** attaches **the Goods accordingly, yet** before the Trial of the Action if another has an Execution againſt the ſame Man thoſe Goods ſhall be taken **in Execution; For he ſhall have all the Property which the Owner had, viz. to have the Goods if the Suit paſſes againſt the Plaintiff, or the Overplus if any be, (and it ſeems that there he may take them preſently if he will pay the Debt if it be recovered, for the Party himſelf might pay it and diſcharge the Goods). Mich. 14 Jac. in the Star Chamber, Per Hobert and Tanfield, and adjudged between** *and Darſon, and Ironmonger* **Defendants.**

2. **If the Sheriff upon a Fieri Facias** againſt J. S. ſeiſes certain Wood **of which J. S. was poſſeſſed, and the** Sheriff pays Parcel of the Money recovered, **and does not** return his Writ, **and after the Sheriff** is remov'd **and another Sheriff choſe, and** after the Writ of Diſcharge **to him directed and** delivered he ſells the ſaid Wood, **this is a lawful Sale, becauſe by the Seiſure, though the Writ be not returned, he is chargeable to the Party. Tr. 3 Ja. B. R. between** *Ayre and Aden,* **the which Intratur P. 44 El. Rot. 308. adjudged.** † **34 H. 6. 36. adjudged; For there a Diſtringas iſſued to the new Sheriff to diſtrain the old Sheriff to expoſe to Sale, which doth not give him any Authority to ſell, but * compels him to do what he might before do by the Law.** Cro. J. 73. pl. 2. S. C. adjudg'd.— Mo. 757. pl. 1045. Adyn v. Ayre. S. C. adjudged that the Sale was good, becauſe the Sheriff was chargeable with the Value.— * Fol. 894.

Yelv. 44. S. C. adjudg'd contra, that the ancient Sheriff cannot ſell the Goods, but it is not ſtated there that the ancient Sheriff had paid any Part of the Money recovered. — 2 Saund. 47. cites S. C. as adjudg'd in Mo. 757. Cro. J. 73. Dalt. Off. Vic. cap. 2. fol. 19. contrary to the Rep. of Yelv. 44. and ſays that the Roll of this Caſe is in Paſch. 44 Eliz. Rot. 318.— S. C. cited 2 Saund. 345: and Hale Ch. J. ſaid that the Roll of it is in Paſch. 44 Eliz. 618.——Mod. 31. cites S. C.—— S. C. cited by Gould J. 2 Ld. Raym. Rep. 1073.——S. C. cited Vent. 319, 320. but adds, (Sed Nota the Court ſaid that if the old Sheriff had returned that the Goods had remain'd in his Hands *Pro Defectu emptorum*, a *Diſtringas* ſhould have gone to have had them delivered to the new Sheriff, and then a *Venditioni Exponas* ſhould have gone to the new Sheriff. See Yelv. 44).——1 Salk. 322. pl. 10. Mich. 3 Ann. B. R. Clerk v. Withers; reſolved that the old Sheriff has not only Authority, but is bound and compellable to proceed in the Execution; For the ſame Perſon that begins an Execution ſhall end it, and a Diſtringas nuper Vicecomitem lies; of theſe there are two Sorts, one is to diſtrain the old Sheriff to ſell and bring in the Money, and the other is to ſell and deliver the Money to the new Sheriff to bring into Court; which plainly ſhews his Authority continues by Virtue of the firſt Writ.——6 Mod. 290. S. C. held accordingly.——11 Mod. 35. S. C. If one Sheriff levies, the ſucceeding Sheriff ſhall not go on with it, but the old Sheriff; For after Goods are once levied a Superſedeas cannot ſtop the Completion of the Execution which a Writ of Error only can do. 11 Mod. 35. pl. 6. Mich. 3 Ann. B. R. Clerk v. Withers.—— Bernard. Rep. in B. R. 81. Mich. 2 Geo. 2. Wilcox v. Pokinghorn accordingly, and ſays that this Point was ſettled in the Caſe of Clerk v. Withers.

† Br. Execution, pl. 11. cites S. C.

3. But **if upon the Fieri Facias the Sheriff** returns that he had ſeiſed the Goods, **but** Non invenit emptores, **and after he is** removed **and a new Sheriff made,** the old Sheriff cannot ſell them after, 4 Le. 20. pl. 66. Mich. 32 Eliz. Conie's

Caſe. S. P. held accordingly, and ſeems to be S. C.

though a Diſtringas iſſues to the new Sheriff to make the old Sheriff to ſell them, and if he ſells them upon this the Sale is not good, for the new Sheriff ought to ſell them. P. 32 El. B. R. Per two Juſtices between *Dod and Couney.*

Per Holt Ch. J. Mich. 3 Ann. The Sheriff may ſell notwithſtanding.

4. If upon a Fieri Facias the Sheriff ſeiſes Goods, but before Sale a Superſedeas comes to him, if the Sheriff after ſells the Goods without a Writ of Venditioni exponas it is void. P. 8 Car. adjudged Per Cur. between *Scarling and King.*

6 Mod. 293. cites D. 99. though 2 Roll Abr. 491. be contra.——See tit. Superſedeas (D) pl. 5. and the Notes there.

Brownl. 33. cites S.C.

5 If a Man leaſes for Years rendring Rent the Reverſion may be extended upon an Elegit during the Leaſe, and the Tenant by Elegit ſhall have a Moiety of the Rent. Hill. 10 Ja. B. reſolved Per Cur. Sir *Thomas Cambell's Caſe.*

6. By 13 *E.* 1. 45. *Execution may be* within a Year *after the Judgment.*

7. If a Man *leaſes* his Chattles for Years, as *Oxon* &c. and after is condemn'd in 10 l. and *Fieri Facias* comes, Execution *ſhall not be thereof made during the Years.* Br. Chattels, pl. 14. cites 22 E. 4. 29.

Noy 51. Burchier v. Wiſeman, S. C. but S. P. does not appear. ——Such Execution ſo made is good; For it was agreed by all the Juſtices that what Acts he does as Sheriff are lawful at all Times before his Diſcharge received or perfect Notice of the new Sheriff. Mo. 186. pl. 333. Mich. 26 Eliz. in Seintjohn's Caſe.

8. A *Fieri Facias was delivered* to the Under-Sheriff 9 *November*, 34 Eliz. and *the ſame Day he made Execution; on the ſame Day a Writ of Diſcharge was delivered to him dated the 6th November.* But becauſe he did not prove that he had Notice of the Writ of Diſcharge before the Execution ſerved, the Court held clearly that he was yet Sheriff, and chargeable to the Plaintiff's Action, he not having returned the Writ nor paid the Money levied to the Plaintiff. Cro. E. 440. pl. 1. Mich. 37 & 38 Eliz. C. B. Boucher v. Wiſeman.

9. Execution was taken out by *Fieri Facias in Trinity Term on a Warrant of Attorney to confeſs a Judgment*, but was *not ſerved till after the Defendant's Death, which was in the Vacation*; and the Court held this not irregular, but that it may be ſo ſerved, the Goods being bound by the Teſte of the Writ. 2 Keb. 257. pl. 1. Mich. 19 Car. 2. B. R. Drinkwater v. Knight.

2 Show. 485. pl. 449. Haughton v Rugby, S. C held accordingly; For the Statute of Frauds was intended only for the Benefit of Purchaſors and Strangers, and not of the Party or his Executors.

10. Execution may be executed *after the Death of the Party*; for the Executor being privy is bound as well as the Teſtator. Comb. 33. Mich. 2 Jac. 2. B. R. Horton v. Ruesby.

11. On a Demurrer it appearing on the Pleading that an Execution was *levied before the Judgment ſigned*, though after the firſt Day of the Term to which the Judgment related, and after the Teſte of the Fieri Facias, yet held naught. 2 Show. 494. pl. 460. Mich. 2 Jac. 2. B. B. Stamp v. Kinſey.

* See 2 Lutw. 925. 929. S. C.

12. Execution *ſued after the Year* * [without a Scire Facias] is not void but voidable by Writ of Error, but till it be reverſed it is a good Juſtification. 3 Lev. 404. Mich. 6 W. & M. in C. B. Patrick v. Johnſon.

See 6 Mod. 184. where it was taken out three Terms after Confeſſion without Entry, and Goods levied & Nulla Bona returned to a ſecond Fi. Fa. by another Plaintiff. Herring v. Crocker.

13. Execution may be *taken out* on a Judgment *before Entry*, if it be the ſame Term, otherwiſe not. Cumb. 462. Mich. 9 W. 3. B. R.

14. A Writ returnable on a Return-Day, which is a *Sunday*, cannot be executed on the Monday, though the Return be kept the Monday. 6 Mod. 148, 159. Paſch. 3 Ann. B. R. Harvey v. Broad. 2 Salk. 626. pl. 8. S. C. held accordingly.

15. After *Writ of Error* brought, if the *Record be not certified* at the Return of it, upon Certificate thereof from the Officer of the Court in which the Writ of Error is returnable, the other may have a *Writ De Executione Judicii* of Courſe, and the Party cannot hinder a new Writ of Error; Per Cur. 6 Mod. 221. Mich. 3 Ann. B. R.

16. If *Ceſſet Executio* were for a Year after the Judgment, yet the Plaintiff within the next Year may take Execution without a Scire Facias. 6 Mod. 288. Mich. 3 Ann. B. R. in Caſe of Booth v. Booth.

17. Execution may be *executed at any Time before the Return of the Writ*, nay on the *very Day* on which it is returnable and good; And if it is executed in the *Vacation* it ſhall *relate* to the antecedent Term, and ſo it ſhall if it is executed in *Term-time*. 8 Mod. 225. Hill. 10 Geo. Anon. and cites Cro. E. 181. Parker v. Moſſe.

(B. a 2) Where one ſhall be in Execution without Prayer.

1. UPON the Reddidit ſe the Bail are diſcharged, even upon the *Reddidit ſe* before a Judge; but the Principal thereupon is not in Execution till the *Plaintiff has made* his *Election* to have him in Execution, and upon ſuch Election there is a *Committitur entered* in the Book in the Office, and the *Entry muſt mention* it to be at *the Requeſt of the Plaintiff*, and all this is ſuppoſed to be in Court, and Committitur is filed with Mr. Brumfield; Per Holt Ch. J. 12 Mod. 583. Mich. 13 W. 3. Watſon v. Sutton. 1 Salk. 272. pl. 3. S. C. accordingly.

(C. a) In what Place it may be executed.

1. IF Land and Damages are recovered in Ancient Demeſne, the Damages cannot be levied upon Land held of the Manor which is Frank-fee; for this is out of the Jurisdiction. 7 H. 4. 29. Fitzh. Diſtreſs, pl. 12. cites 7 H. 4. 28. S. C.—

If a Man recovers Land and Damages in Aſſiſe in Ancient Demeſne, and the Defendant has nothing within the Franchiſe to render Damages; as in London &c. there the Plaintiff may have Debt in C. B. of the Damages and count upon the Recovery, or may remove the Record into Chancery, and ſend it into Bank by Mittimus, and have Sci. Fa. upon it, and ſo have Execution in Bank upon Record of another Court; quod nota. Br. Executions, pl. 75. cites 39 H. 6. 3. 4.

2. Upon a Capias ad Satisfaciendum to the Sheriff of Middleſex to take J. S. if the Sheriff takes him and puts him into Newgate, which is the Common Priſon for Middleſex and London, and after another Writ of Execution comes to the Sheriff of London, though the Sheriffs of London are alſo Sheriffs of Middleſex, and Newgate (where the Priſon is) is the Priſon for both Counties, yet the Priſoner ſhall not be ſaid to be in Execution upon this New Writ in London, nor can the Sheriff of London ſerve it upon him, be-

cauſe

cauſe he is in another County; for when the Commitment is to Newgate by Force of a Writ to the Sheriff of Middleſex, he cannot be ſaid to be in any Reſpect in the County of London; for the Counties continue ſeveral and the Priſon ſeveral in reſpect of the ſeveral Commitments, for there are two ſeveral Sides and one Partition between them. Maſter Parker ſaid to me, that this was ſo reſolved by all the Juſtices upon Reference by the Lord Chancellor out of Chancery P. 16 Ja. in one *Coae's Caſe.* Trin. 16 Jac. B. R. Same Caſe agreed per Cur. upon Habeas Corpus, for the Sides are ſeveral and diſtinct. So in the ſaid Caſe.

3. If a Man recovers againſt another in B. R. Debt or Damages, and he againſt whom the Recovery is in the Priſon of the Fleet, he cannot be put in Execution upon this Judgment in B. R. by a Special Writ to the Warden of the Fleet to retain him in Execution for this Debt without bringing of his Body in B. R. by a Habeas Corpus. Trin. 32 Eliz. B. R. ſaid to be adjudged between *Serjeant and Brook.*

4. So if a Habeas Corpus be granted againſt the Priſoner, and the Warden of the Fleet returns that he is Languidus in Priſona, by which &c. yet he cannot be put in Execution by a Special Writ to ſuch Purpoſe without bringing of his Body to the Bar of B R. Trin. 33 Eliz. B. R. held between *Serjeant and Brook.*

5. Note, that *upon a Teſtatum* a Man may have an Elegit againſt an Abbot *in a foreign County*, where he has Land, *upon Return of Nihil in the firſt County*, but Capias lies not againſt the Lord. Br. Elegit, pl. 1. cites 26 H. 8. 7.

6. If we ſee one againſt whom there is a Judgment of this Court *walk in Weſtminſter Hall*, we may ſend our Officer to take him up if the Plaintiff deſires it, without a Writ of Execution, Per Holt Ch. J. 7 Mod. 52. 1 Ann. B. R. Anon.

(D. a) In what Caſes a Man ſhall be in Execution before Prayer.

* Fol. 895.

1. IN a Debt againſt J. S. if the Defendant be taken upon a Latitat and committed to the Marſhal for the Default of Bail, and after the Plaintiff recovers * againſt him, he continuing in Priſon, yet he ſhall not be in Execution for this Judgment before Prayer of the Plaintiff. M. 4 Ja. B. R. between *Carr and Copping.*

Cro. J. 264. pl. 3. Bellaſis v. Hanford. S. C. but not clearly S P. —— Roll Rep. 104. pl. 43. Belloes v. Hanford, S. C but S. P. does not clearly appear. ——— Ibid. 133. pl 11. Hanford v. Bellowes S. C. & S. P. and Mann Clerke ſaid, that the Uſe is in ſuch Caſes to make an Entry Quod committitur, and then the Marſhal is chargeable with him and not before. ——— After Judgment Defendant came into Court and ſurrendred himſelf in Diſcharge of his Bail, which was entred of Record, but the Plaintiff being demanded if he would pray him in Execution refuſing the ſame the Defendant and his Sureties were all diſcharged. Le. 58. pl. 74. Paſch. 29 Eliz. C. B. Fullwood v. Fullwood.

2. If a Man recovers Damages in Action upon the Caſe againſt J. S. in B. R. the ſaid J. S. being in Cuſtodia Mareſchalli, yet he ſhall not be in Execution upon this Judgment tho' it be within the Year, before Prayer of the Plaintiff, For the Marſhal cannot take notice of every Judgment againſt every Priſoner; But upon Prayer of the Plaintiff a Committitur ſhall be entred upon the Roll, and then he is in Execution. Hill. 12 Jac. B. R. adjudged between *Sir Henry Bellowes and Hanford.*

3. If a Judgment be given againſt J. S. who is in the Fleet a Priſoner there, and after the Warden of the Fleet informs the Court of Chancery that the ſaid J. S. is in Ward of the Fleet for certain Cauſes upon which the Court commands the Warden to detain him in Execution till Satisfaction of the Judgment, yet J. S. is not in Execution upon the Judgment, becauſe this was not at the Requeſt of the Plaintiff but done without his Prayer, for it may be that he will elect another Execution &c. D. 13 & 14 El. B. R. 306. 63.

4. If a Man recovers in Debt and outlaws the Defendant after Judgment, and after within the Year the Defendant is taken by a Capias Utlagatam, he ſhall be in Execution for the Plaintiff before Prayer, becauſe the Outlawry was at the Suit of the Party. 5 Rep. 88. * Garnon's Caſe, adjudged. H. 41 El. B. R. between † *Bonner and Stukely*. M. 43 & 44 El. B. R. per Cur.

* Cro. E. 706. pl. 28. Mich 41 & 42 Eliz. C B. Leighton v. Garnon S. C. —— Where the Outlawry is upon meſne Proceſs, the Party outlawed is in Cuſtody merely at the Suit of the King, and the Plaintiff has no Intereſt in his Body; But where the Outlawry is after Judgment the Party is in Execution for the Plaintiff, Cro. E. 706, 707, pl. 28. in S. C. —— Mo. 566. pl. 772. Layton v. Garnonce S. C. reſolved —— S. C. cited 1 Salk. 280. —— 5 Mod. 201. cites S. C. —— S. C. cited Gibb. 265. and admitted per Curiam. —— S. C. cited Bridgm. 7. —— 7 Mod. 65. cites S. C. —— S. C. cited and admitted per Cur. Gibb. 265.

† Cro. E. 652. pl. 9. Hill. 41 Eliz. B. R. the S. C. but not exactly S. P.

5. But otherwiſe it is if he be taken by Capias utlagatum after the Year, becauſe there he could not have a Capias againſt him. Dubitatur H. 38 El. B. R. between *Norton and Sharpe*.

Cro. E. 467. Nector v. Sharp. —— 5 Mod. 200. cites S. C.

6. But if a Man recovers in Debt and outlaws the Defendant after Judgment, and after within the Year the Defendant is taken by Capias utlagatum, though he be in Execution for the Plaintiff Primafacie, yet he may make a Election that he ſhall not be in Execution for him. M. 43 & 44 El. B. R. per Cur. between *Shaw and Cutteresſe*.

Cro. E. 850. pl. 6. S. C. and Popham and Fenner held that his being taken upon the Capias Utlagatum ſhall not be ſaid to be an Execution for the Plaintiff unleſs the Plaintiff prays to have it ſo; For it is a Writ for the King and is ad recipiendum quod Curia conſideraverit; So though the Plaintiff ſues it out it is not any Election in him to have the Party in Execution till he prays it, and the Court awards it; But Gawdy Contra. —— S. C. cited Arg. 5 Mod. 201.

B. being outlawed after Judgment was taken by Capias Utlagatum, and afterwards pardoned. The Plaintiff brought Scire Facias and had Judgment, and Execution awarded. B. aſſigned for Error that the Sci. Fac. erronice emanavit, becauſe he was in Execution upon the Capias Utlagatum for the Party. But adjudged that he was not in Execution for the Party without Prayer. Mo. 598. pl. 817. Mich. 34 & 35 Eliz. Weſt v. Blackhead.

Defendant was in Cuſtody upon a Capias Utlagatum ſued after the Year; It was agreed that he could not be in Execution at the Suit of the Party without Prayer. 5 Rep. 89. b. Trin. 41 Eliz. C. B. in Froſt's Caſe.

7. If a Man *recovers Debt or Damages againſt a Man who is in Priſon, and* after he *eſcapes*, Action of *Debt lies againſt the Gaoler*; Per Skrene; quod non negatur; and therefore if it be Law it ſeems that the Body is in Execution though the Plaintiff does not pray it; Quære inde. Br. Execution, pl. 139. cites 11 H. 4. 44, 45.

8. A Man was *condemned in Writ of Forger of falſe Deeds, and* therefore *was committed to the Fleet* at the Prayer of the King's Attorney *for a Fine to the King and eſcaped*, and the *Party brought Writ of Debt in the Exchequer againſt the Warden*, and there by ſome it is not Execution for the Party unleſs he had prayed it, and it does not appear there whether he was *impriſoned for Fine of the King within the Year* after Judgment given; For if within the Year, then he remains in Execution for the Party as it ſeems; Contra if *after the Year*; Quære. Br. Execution, pl. 47. cites 7 H. 6. 5.

9. In an Appeal it was ſaid by Vavaſor, and not denied, that if a Man *recovers, and at the Time of the Judgment the Defendant is preſent*, the Juſtices ought to award him to Priſon, and this it ſeems in Action Perſonal, where the Body may be taken in Execution; But Brook ſays, Quære Legem, if the Plaintiff does not demand it; For it may be that he would rather have Fi. Fa. or Elegit. Br. Execution, pl. 105. cites 21 E 4. 73.

Defendant died, and Holt on hearing it ſaid they were inclined to give Judgment for the Plaintiff

10. The Queſtion was if one outlawed after Judgment (on a Ca. Sa. within the Year) and taken on a *Cap. Utlag.* after the Year can be *in Execution* for the Plaintiff *without Prayer?* The Court inclined that it might but (becauſe Serjeant Levins was to argue) Adjornatur. Cumb. 373. Trin. 8 W. 3. B. R. Wolf v. Daviſon.

1 Salk. 319. S. C.——5 Mod. 200. S. C. adjudged for the Plaintiff.

(E. a) Upon Prayer without more.

In what Caſes he ſhall be in Execution upon Prayer before Habeas Corpus ſued by Commititur entred.

1. IF a Man recouers in Bank Debt and Damages againſt J. S. and has Judgment, though J. S. be a Priſoner for other Cauſes in the Fleet, which is the Priſon of the Bank, and the Warden informs the Court of it, and the Court commands him to retain him in Execution till Satisfaction of the Judgment, yet he is not in Execution, becauſe he was not brought to the Bar by Habeas Corpus, and viewed and demanded of the Priſoner if he be the ſame Perſon who is condemned, or not, which it is the Office of the Court to demand of him. D. 13 & 14 El. 306. 63.

2. The ſame Law is in the Chancery. D. 13 & 14 El. 306. 63.

Br. Execution, pl. 81. cites S. C. —Fitzh. Execution, pl. 111. cites S. C.

3. If a Man be attaint of a Treſpas at the Suit of the Party in an Action of Treſpaſs, and after is taken in Execution for the Fine of the King, he at whoſe Suit he was attaint may pray that he remain in Execution for his Damages recovered, and he ſhall not be ſuffered to go at large before Satisfaction of them, becauſe the King comes to the Fine by his Suit. 22 Aſſ. 74.

Br. Execution, pl. 81. S. P. and S. C.——Fitzh. Execution, pl. 111. cites S. C.

4. The ſame Law is if a Man who is attainted of a Diſſeiſin with Force be taken in Execution for the Fine of the King. 22 Aſſ. 74.

* Fol. 896.

5. If a Man recovers Damages in Aſſiſe againſt three, and after one is taken by Capias pro Fine of the King, he ſhall not be in Execution for the Recoveror upon * Prayer for the Damages, becauſe the Execution purſues the Original, which was joint, and he ought to have one Execution againſt all jointly, and cannot have it againſt one only. 15 H. 7. 6. Curia.

6. If Execution by Default be awarded in a Scire Facias upon a Judgment in Debt, and Defendant after the Year and Day, viz. four Years after was in the Fleet for another Cauſe, and by Habeas Corpus was brought into Bank, and being oppoſed by the Court if he was the

the Perſon who was condemned as above, and he grants it, he ſhall be committed in Execution at the Prayer of the Plaintiff, as it ſeems, though it be after the Year and the Day. D. 4 Eliz. 314. 47.

7. If A. recovers againſt B. by Judgment in B. R. and upon this B. renders himſelf to Priſon, and after brings Writ of Error, and has Superſedeas; yet after, upon the Prayer of the Plaintiff, the Court may commit him in Execution though the Record be removed, inaſmuch as he had not found Bail upon his Writ of Error. P. 9 Car. B. R. *Symond's Caſe* was ſuch.

8. A Man was *condemned in C. B. and ſent to the Fleet* in Execution, and he *was alſo attainted of Diſſeiſin with Force in Aſſiſe in Pais, and this Record ſent into Bank by Mittimus*, and the *Plaintiff in the Aſſiſe prayed that the Warden of the Fleet be demanded to be charged with the ſame Priſoner for his Execution alſo*; Per Newton, this *cannot be without Proceſs*. Br. Execution, pl. 54. cites 22 H. 6. 15.

9. *So of a Recognizance before the Mayor of the Staple, or in other Court, which was ſent here by Mittimus*, he ſhall not be put to anſwer to it without Proceſs; for he may plead diverſe Pleas to it. Br. Executions, pl. 54. cites 22 H. 6. 15.

10. *But* per Brown, if it was a *Record of this Place*, the Warden ſhall be charged with his Priſoner by Parol with this Execution alſo, and if he be here in the Hall, he ſhall be arreſted by an Officer of this Place by Command of the Juſtices, and ſhall be put to anſwer to the Record without other Proceſs; *But* if the Record *of another Court* be ſent here, they cannot ſo arreſt the Party, but *award Sci. Fa. or Fi. Fa. as the Caſe requires*. Ibid.

11. And per Wideſlad in another ſuch Caſe as is at the Bar Anno 2 H. 6. Ro. 15. 200 and 300. the Warden of the Fleet was demanded and came, and it was demanded of him if he had ſuch Priſoner, who ſaid that he had; by which he was commanded upon Pain of the Record to keep him &c. But per Portington, this is againſt Reaſon without Anſwer. Ibid.

12. In *Debt* where the *Defendant is taken by Capias for a Fine to the King for the denying of his Deed*, he ſhall not remain for the Execution of the *Party* if he prays it, where he *has taken Fi. Fa.* before; for *though the Fi. Fa. is not returned*, yet it may be that the Sheriff has taken the Goods &c. and when he has Election and elects to take the Goods, he ſhall not have the Body; quod nota. But if the Fi. Fa. be returned Quod nihil habet, then he ſhall have his Body in Execution, and not before, by which the Defendant found Surety for the Fine to the King, and went ſine Die. Br. Executions, pl. 62. cites 15 H. 7. 28.

(E. a. 2) Where one taken for a Fine to the King ſhall remain in Execution for the Party.

1. *ASSISE by two againſt three*, and the *Diſſeiſin found with Force*, by which *iſſued Capias pro Fine*, and the *Defendant is taken*, he ſhall remain for the Damages of the Party *notwithſtanding the Capias and Outlawry upon it be the Suit of the King*, and he *ſhall not have Charter of Pardon allowed before he has made Gree of the Damages*; Per Gaſcoign clearly, quod nemo negavit, and this was ſaid in a Writ of Error to reverſe the Outlawry upon ſuch Capias, by Reaſon that the King had

S. P. be it within the Year or after the Year. Ibid. pl. 150. cites 11 H. 7. 15.

had pardoned the Diſſeiſin with Force before. Br. Executions, pl. 30. cites 7 H. 4. 39, 40.

2. In ſpecial Aſſiſe the Defendant was *found a Diſſeiſor with Force*, by which the *Plaintiff had Judgment to recover*, *and* after the Plaintiff *died*, and after *the Executors made Surmiſe that their Teſtator was not ſatisfied of the Damages, and obtained Certiorari out of Chancery, and removed the Record into C. B. which was granted to the Executors to proſecute the Execution*, and *Capias iſſued upon the Record in Bank pro fine Regis*, by which *he was taken and awarded to the Fleet*, and he prayed to find Surety pro fine Regis, and to go at large, and per Priſot and Billing, he ſhall not remain for the Execution of the Party, becauſe it is *after the Year*; but he is put to Sci. Fa. and e contra if it was *within the Year*; Brook ſays *Quære* tamen, as here, becauſe it is *in another Court, and at the Suit of another Perſon*; quod vide 15 H. 7. 5. Br. Executions, pl. 74. cites 36 H. 6. 23, 24.

3. *And* per Priſot, where the *Defendant is* ſo *taken and impriſoned within the Year* [pro fine Regis] he *ſhall remain* for the Execution of the Party *till the Party will pray other Execution*, and ſo ſee the *Party ſhall not be compelled to take the Body for Execution.* Ibid.

4. Note, that it was agreed by all, that where the *Defendant in Treſpaſs Vi et Armis is convicted, and Capias pro fine Regis is awarded, and he is taken*, by this he * ſhall remain for the Execution of the Plaintiff if he will, *or he may have Sci. Fa. or other Execution* if he will. Br. Executions, pl. 96. cites 4 E. 4. 16.

* S. P. or the Plaintiff may have Fi. Fa. or Elegit, which is a Diſcharge of the Body, and a waiving of it. Ibid. pl 151. cites 13 H. 7. 1.

5. *And if the Defendant eſcapes by Command of the King*, or otherwiſe, the *Plaintiff ſhall have Debt* upon the Eſcape *againſt the Warden*; quod nota; But quære if the *Will of the Plaintiff can be known otherwiſe than by Prayer*, that he may remain for his Execution? and it ſeems that it may, and that the Warden cannot let him go by Command of the King, unleſs the Plaintiff has ſued other Execution of Record; Quære. Ibid.

6. A Man was *condemned in Treſpaſs in the Time of R. 3. and* was *brought to the Bar 1 H. 7. by Capias pro fine Regis*, and *offered Pledges* for his Fine, and the Plaintiff prayed that his Body remain in Execution for his Damages; and per Huſſey, Brian, Starkey, Catesby and Suliard, he ſhall not remain, becauſe it *is after the Year, and alſo it was in the Time of another King*, and therefore *ought to have Sci. Fa.* But Fairf. and Townſ. contra; and M. 2 H. 7. ſuch a Caſe happened, and he did not remain for the Execution of the Party, by Advice of all the Juſtices except Townſend. Br. Executions, pl. 88. cites 1 H. 7. 20.

7. Where *ſeveral* are *convicted of Force* and Arms, and *Capias pro fine is awarded againſt the one*, and *he is taken* pro fine Regis *and impriſoned*, this ſhall not be Execution for the Party, though he prays it; for the *Party ſhall have it according to his Original againſt all, but the King may have it againſt one by his Prerogative*; Per Brian, which all the Juſtices agreed; and after the Year the Party ſhall not have Execution of the Body of the Defendant, but Sci. Fa. Br. Execution, pl. 59. cites 14 H. 7. 15. and 15 H. 7. 5.

8. *And of Indictment before Juſtices of Peace in the County*, the *Juſtices of Gaol-Delivery in the County ſhall award Execution*, Ibid.

9. *And of Indictment of Forcible Entry before Juſtices of Peace, which is removed into B. R.* they *ſhall award Reſtitution as Juſtices of Peace* &c. Ibid.

10. *And* per Frowike, where a Man is *condemned in Bank*, and the Party Defendant *is in Execution for a Fine to the King at the Suit of the Plaintiff*,

Plaintiff, he ſhall remain for the Execution of the Plaintiff, and this *in Treſpaſs.* Ibid.

11. *So in Debt, where the Defendant denies his Deed* he ſhall be fined, and if he be taken by Capias pro fine Regis, there he ſhall remain for the Execution of the Plaintiff. Ibid.

12. H. recovered againſt L. in an Action of Battery, for which a *Capias pro fine iſſued* againſt L. *and alſo a Capias ad Satisfaciendum returnable the ſame Term at one and the ſame Return.* It was ſaid by the Court, that if the *Sheriff in ſuch Caſe takes the Party by a Capias pro fine,* now upon that taking he is in Execution for the Party. Le. 51. pl. 65. Paſch. 29 Eliz. B. R. Hudſon v. Leigh.

13. It was holden by the Court; that *if the Plaintiff ſues an Elegit, then upon the Capias pro fine executed the Defendant ſhall not be adjudged in Execution for the Party,* for he has made his Election of another Manner of Execution, viz. of the Land, and he ſhall never reſort to an Execution of the Body, cites 13 H. 7. 12. And as our Caſe is, there was *an Elegit obtained, but it was not on Record,* nor any Record made of it, and *therefore the Election of the Execution remained to the Plaintiff,* and as to the Point aforeſaid, that ſuch Proceſs ſhall be void as to the King only, not as to the Party. Ibid.

(F. a) In what Caſes Execution with Satisfaction againſt one ſhall ſerve for another.

1. IN Debt upon an Obligation againſt two, if 5 l. Damages be aſſeſſed to be recovered of every of them ſeverally according to the Writ, if the Plaintiff has Execution againſt one (it is intended with Satisfaction) he ſhall not have Execution againſt the other. 14 H. 4. 19. b.

2. If a Recovery be by ſeveral Præcipe's againſt two in a Debt upon an Obligation, in which they are bound jointly and ſeverally, if Plaintiff ſues Execution againſt one (with Satisfaction) he ſhall not have Execution againſt the other alſo. 14 H. 4. 22. b. So in Aſſault and Battery in one Writ by ſeveral Præcipes, becauſe it appears to the Court that it is one and the ſame Treſpaſs. Noy 4. Hitcham v. Murcham.

3. So if he bring a ſeveral Action in one Court againſt one, and recovers, and another Action againſt the other, and recovers, if he ſues Execution againſt the one (with Satisfaction) he ſhall not have Execution againſt the other. 14 H. 4. 22. b.

4. In Treſpaſs againſt three, if one be condemned, and Plaintiff has Execution againſt him with Satisfaction, he ſhall be barred againſt the other. * 14 H. 4. 22. Paſch. 3 Jac. B. R. agreed between *Hickman aud Machin.* * Br. Judgment, pl. 98. cites S. C.

5. So if for a Treſpaſs by two ſeveral Actions are brought againſt each in ſeveral Courts, and recovers againſt them, yet if Plaintiff has Execution againſt one, this ſhall bar him againſt the other. 14 H. 4. 22. b. Br. Judgment, pl. 98. cites S. C.

6. But in this Caſe the Plaintiff may ſue Execution againſt the other, and he is put to his Audita Querela, and by this he ſhall be aided.

7. The ſame Law would be in this Caſe though the Recovery was in one and the ſame Court, it being upon ſeveral Writs; For the Noy 4. Hitcham

v. Murcham, S. C. ruled accordingly, but if after Execution againſt one other [who] upon the Execution is laſt ſued, cannot plead the firſt Execution and the Records are ſeveral, and for this he has no other Remedy but an Audita Querela. Paſch. 3 Ja. B. R. agreed between *Hickman and Machin.*

he ſues the other in an Aſſault and Battery, then he may plead that, and that it was ſo agreed Trin. 3 Jac. between Brown and Wetton, and ſo alſo Mich. 4 Jac.

Cro J. 338. pl. 3. Crawley v Lidgeat, S. C. all the Juſtices delivered their Opinions ſeriatim, that the Execution was not well

8. If two are bound in an Obligation joint and ſeveral, and the Obligee recovers in B. R. againſt one, and has him in Execution, and after recovers againſt the other in Bank, and upon an Elegit has his Goods and the Moiety of his Land in Execution, in this Caſe by this laſt Execution the Plaintiff is fully ſatisfied, and therefore the other who is in Execution by his Body ought to be delivered by his Audita Querela. Paſch. 12 Ja. B. R. adjudged per Cur. between *Cowley and Lydiat.*

taken, and therefore it was awarded that he ſhould be diſcharged. ——— 2 Bulſt. 97. S. C. adjudged that the Plaintiff in the Audita Querela be diſcharged. ——— Godb. 257 pl. 355. S. C. and the Court held the Audita Querela well brought. ——— Hob. 2. pl. 3. Caſus incerti Temporis, S. P. accordingly, and ſeems to intend S. C. ———Roll Rep. 8. pl. 10. S. C. adjudged accordingly. —— S. P. by Holt Ch. J. 12 Mod. 262 Paſch. 12 W. 3.

See tit. Audita Querela (D) pl. 12. and the Notes there.

9. If a Man *recovers Damages againſt two*, and *has Ca. Sa. againſt the one ſerved*, yet he ſhall have other Ca. Sa. againſt the other; but otherwiſe it is if the one ſatisfies the Sum. Br. Executions, pl. 8. cites 33 H. 6. 47. per Danby.

10. If a Man *recovers in Action Perſonal againſt twenty Men*, there *Execution of the Damages againſt the one diſcharges all the others*, ſo that he ſhall not have any more Execution, and therefore in Treſpaſs Releaſe to the one ſhall ſerve the others. Br. Execution, pl. 140. cites 2 R. 3. 9.

(G. a) Without Satisfaction.

Fol. 897. In what Caſes Execution, without Satisfaction, againſt one, will diſcharge others.

Cro. J. 320. pl. 2. Higgens's Caſe, S. P. and ſeems to be S. C. ——

1. If a Man has once Execution againſt the Bail of J. S. he ſhall never have Execution after againſt J. S. the Principal himſelf, for he has made his Election by the firſt Execution. Paſch. 10 Ja. B. R.

2 Bulſt 68. Higgins v. Sommerland, S. C. accordingly. ——

2. So if he once ſues Execution againſt the Principal, he cannot after reſort to an Execution againſt the Bail for the Cauſe aforeſaid. Paſch. 10 Ja. B. R.

——— They ſhall both be retained till Satisfaction. Vent. 315. cites it as reſolved, Paſch. 28 Car. 2 in Caſe of Orlebar v Norris.

But if the Bail being taken in Execution in B. R. pays Part, yet, if the Bail let be at large, Execution may be againſt the Principal afterwards, and this is the conſtant Practice of the Court, and it ſeems that Cro. J. 320. Higgins's Caſe, is to be intended where the Bail were in Cuſtody; Quære well. Sid. 107. Hill. 14 & 15 Car. 2. B. R. Felgate v. Mole.

Cro. J. 320. pl. 2. Paſch. 10 Jac. Higgens's Caſe, S. P. and ſeems to be S. C. ——

3. But he may have Execution againſt one of the Bail, and after have Execution againſt the other alſo. Paſch. 11 Ja. B. R. agreed.

——— If Execution be taken againſt the Bail in B. R. and they pay Part,

Part, yet the Plaintiff may afterwards take Execution againſt the Principal for the Reſidue, the Bail being let at large before the taking of the Principal; And this is the conſtant Practice of this Court. Sid. 107. pl. 18. Hill. 14 & 15 Car. 2. B. R. Felgate v. Mole. ——— Raym. 73. Turner v. Felgate, S. C. but S. P. does not appear. ——— Lev. 95. S C. but S. P. does not appear.

4. If *two are bound in an Obligation conjunctim & diviſim*, and the *Obligee impleads the one and has Execution of his Body, and after impleads the other, and condemns him*, he may have Execution againſt him alſo; For the taking of the Body is good Execution, but it is not Satisfaction, and therefore he may take the other alſo; But if the one ſatisfies the Plaintiff, he ſhall not have Execution after; and therefore this Order, that the Plaintiff upon an Obligation ſhall have *but one Execution, is intended ſuch Execution which is a Satisfaction, and where both are impleaded by one Original by ſeveral Præcipes* &c. Br. Executions, pl. 132. cites 29 H. 8. per tot. Cur.

5. In *Trover* of Plate, Defendant pleads that Plaintiff brought his Action for the ſame Plate againſt J. S. and recovered, ſuppoſing the Converſion to have been by him, and in that Action had Judgment to recover 20 l. for Damages, and had J. S. in Execution for thoſe Damages; and avers it to be for the ſame Goods and the ſame Trover &c. It was urged that this without Satisfaction is no Plea in Bar, any more than *in Debt on Bond againſt two by ſeveral Præcipes.* Judgment and Execution againſt one is no Plea againſt the other without Satisfaction. But per tot. Cur. the Plea is good; for the Cauſe of Action being againſt divers, for which Damages uncertain are recoverable, and he *having Judgment againſt one for Damages certain*, that which was uncertain before is reduced *in Rem Judicatam*, and to Certainty, which *takes away the Action againſt the other*; And the Difference between this Caſe and the Caſe of Debt on a Bond againſt two is, becauſe there every one of them is chargeable with the intire Debt, and therefore Recovery againſt the one is no Bar againſt the other until Satisfaction. Cro. J. 73. pl. 3. Trin. 3 Jac. B. R. Brown v. Wootton.

6. Execution is ſued againſt the *Bail*, yet the Plaintiff may charge the Principal, unleſs it be ſhewn that he was ſatisfied by the Execution againſt the Bail. Cro. J. 549. pl. 9. Mich. 17 Jac. B. R. Freeman v. Executors of Freeman.

7. Two are jointly and ſeverally bound, and Judgment was had againſt one. In Debt againſt the other, he pleaded that *the firſt being in Execution on a Ca. Sa. the Sheriff voluntarily let him go at large.* But adjudged that the Creditor may take out Execution againſt the other; for Execution without Satisfaction is not any Bar, though the Sheriff ſuffered him to eſcape voluntarily, and ſo the Plaintiff intitled to an Action againſt the Sheriff; but if he let him go *by the Licence of the Creditor* then the other had been diſcharged, and it might have been pleaded. Cro. Car. 73. pl. 4. Trin. 3 Car. C. B. Whitacre v. Hankinſon. Cro. J. 531. pl. 14. Paſch. 17 Jac. B. R. Pendavis v. Kenſham, S. P. as to an Eſcape by Permiſſion of the Gaoler, the Court held that it is not any Diſcharge of the Debt, and conſequently the Action lies againſt the other. ——— 5 Rep. 86. b. Blumfield's Caſe, alias, Blumfield v. Urtwick, S. P. held accordingly. ——— Cro. E. 478. pl. 9. Bloſield's Caſe, S. C. held accordingly by Gawdy and Clench, (abſentibus aliis). ——— Ibid. 573. pl. 14. Blumfield v. Roſewith, S. C. Gawdy and Fenner held the Execution well ſued againſt the Plaintiff; and Popham agreed, that where the Suit is by ſeveral Originals or Bill, the taking the one in Execution does not hinder but that the other may be taken in Execution alſo; For non conſtat Curiæ that it is all one Debt, but when they are ſued by one Original and ſeveral Præcipes, he doubted that when the one is in Execution by a Capias, whether the other might be taken by another Capias; for it appears on the Record that it is all but one Debt, and the Entry upon the Record is Quod unica tantum ſiat Executio, and that it is clear, that if one be taken on a Ca. Sa a Fi. Fa. or Elegit, it cannot be awarded againſt the other, and that ſo is 4 E. 4. 38. 5 E. 4. 5. & adjornatur.

8. Plaintiff *takes one of the Principals* in Execution, yet he may afterwards have Reſort againſt the *Bail.* Adjudged; For the Law expects 2 Lev. 195. S. C. the Court held

that the Bail ought to bring in all the reſt of the Defendants. —— Vent. 315 S.C. adjornatur. —— 2 Jo. 75. Aſtrey v. Palfreyman, S.C. adjudged accordingly; and it was ſaid to have been ſo adjudged Paſch. 28 Car. 2. in Caſe of Oliver v. Norris.

pects a compleat Satisfaction. 2 Mod. 312. Trin. 30 Car. 2. B. R. Aſtree v. Ballard.

9. A Difference was taken where a *Scire Facias or Debt* is brought *againſt the Party himſelf*, there a Plea that he was ſued to a Judgment, and the Money levied on a Scire Facias, is good; But a *Co-obligor* can plead nothing but Satisfaction actually made of the Debt. 2 Show. 394. pl. 363 Mich. 36 Car. 2. B. R. Dyke v. Mercer.

(G. a. 2) What ſhall be ſaid an Execution with Satisfaction.

1. *Return irrepleviſable* is no Satisfaction, but I may retain it till I am ſatisfied. Br. Execution, pl. 8. cites 33 H. 6. 47.

2 Saund. 72. S. C. & S. P. cited in Caſe of Underhill v. Devereux, in a Nota by the Reporter, at the End of the Caſe.

2. If the Party himſelf holds the Tenant by Elegit out of the Tenements extended, the Tenant by Elegit may *hold over*; But otherwiſe it is if a *Stranger holds out the Tenant* by Elegit, for there the Tenant by Elegit ſhall not hold over againſt the *Reverſioner*, but is put to his Actionn of Treſpaſs againſt the Sheriff. Where any Interruptions happens in his Enjoyment by the *Act of God* the Tenant ſhall hold over; But not where it is by reaſon of *War*. 4 Rep. 82. b. Mich. 41 & 42 Eliz. in the Court of Wards, in Sir And. Corbet's Caſe.

1 Salk. 323. pl. 10 S. C. and the 4th Reſolution there is accordingly.

3. When the Defendant's Goods are *ſeiſed upon a Fieri Facias* the Debt is thereby diſcharged. 2 Ld. Raym. Rep. 1072. Mich. 3 Ann. Clerk v. Withers.

(H. a) What Thing may be put in Execution.

The Body at the Suit of the King.

Br Executions, pl. 29. cites S. C. that he may have Execution of his Land and Chattels, or of his Body, and that it was ſo held per Cur. but adds, Quod quære; For mirum!

1. IF the King recovers in Scire Facias upon a Recognizance for Surety of the Peace, for the Breach of it he may have Execution by his Body. (It ſeems this is by the Common Law, for he cannot by the Statute). 7 H. 4. 34. Curia.

(H. a. 2) The Body at the Suit of a Common Perſon.

2. If a Man recovers in a Scire Facias upon a Recognizance acknowledged in Chancery he cannot have Execution by Capias, for the Statute of W. 2. gives a Capias in an Account, and 25 E. 3. in Action of Debt, but no Capias is given in a Scire Facias. P. 11 Ja. B. R. adjudg'd between * *Weaver and Clifford.* 8 Rep. 142. *Cleer's Caſe.* adjudged D. *Puttenham's Caſe.* 306. 63. 27 H. 7. Kell. 100. no Capias lies upon a Recognizance in B. R. and there ſaid to be ſo adjudged in 5 H. 7. 24. But I do not find it there.

* See Tit. Eſcape, pl. 2. and the Notes there on S. C. Cro. E. 164. pl. 1. Mich. 31 & 32 Eliz. in Scacc. Ognel v. Paſton, all the Barons held that this Capias is not by either of thoſe Statutes but by the Courſe of the Common Law, and of Chancery, and that Precedents are uſual there after Sci. Fa. and their Courſes are to be maintain'd as of other Courts.—— Mo. 274. pl. 428. Ugnoll v. Paſton. S. C. adjudg'd ——2 Le. 84. pl. 112 S C. largely argued by Counſel and the Barons, and Judgment for the Plaintiff —— Godb. 403. Arg. cites S. C. that there lies no Proceſs of Capias by the Law upon a Recognizance, but Extent or Levari Facias, yet there a Capias was awarded.——8 Rep. 142. a. cites S. C. as reſolv'd that the Award of the Capias ad Satisfaciendum was erroneous ——2 Roll Rep. 212. S. C. cited that Ca. Sa. does not lie upon a Recognizance in Chancery.——3 Keb. 221. pl. 32. Mich 25 Car. 2. B R. in Caſe of **Grimſton v. Wade** the Court doubted no Capias lay on a Recognizance in Chancery, and ſaid that this had been controverted and yet is.——Ibid. 229. pl. 46. S. C. the Court conceiv'd that no Capias lies upon a Recognizanee in Chancery.

3. A Capias lies upon a Judgment in a Scire Facias upon a Recognizance acknowledged by the Bail in an Action in B. R. by the Courſe of the Court. P. 11 Ja. B. R. M. 12 Ja. in the Exchequer Chamber between *James and James* adjudged, which ſee M. 12 Ja. B.

S P. Arg. Mo. 274, 275. pl. 428. — Lev. 225. Mich 19 Car. 2. B. R. Gee v. Fane.

S. P. admitted.——Sid. 339. pl. 3. S. C. & S. P. admitted.——2 Keb. 269. pl. 28. S. C. & S. P. admitted.

4. No Capias lies upon a Judgment in a Scire Facias upon a Recognizance acknowledged by the Bail of one in Bank, becauſe it only binds his Goods and Land by the Recognizance, and this is in a Sum certain. Mich. 10 Car. B. R. between *Rigault and Carrick,* where an Action of Debt was brought upon the Judgment becauſe he could not have a Capias.

See tit. Debt (M) pl. 8. S. C —If a Scire Facias be brought againſt the Bail, and Judgment be, that the Plaintiff be ſatisfied out of the Lands and Chattles of the Bail, a Capias does not lie againſt them. But if Debt be brought as it may be againſt the Bail, it is otherwiſe. Het. 129. Mich. 4 Car. C. B. Anon —Litt. Rep. 238. S. C. in totidem Verbis.

5. So if the Bayle in an Inferior Court acknowledges a Recognizance, that if the Principal doth not pay the Damages and Coſts recovered, or render himſelf to the Priſon, tunc concedit the Damages and Coſts de Terris & Catallis ſuis levari ad opus Querentis, no Capias lies upon this Recognizance, becauſe it does not bind his Perſon. Hill. 10 Car. B. R. per Cur. upon Demurrer between *Seabourn v. Savaker.* Intratur. Trin. 10 Rot. 572.

6. If the Plaintiff in Detinue recovers Damages againſt the Garniſhee he ſhall not have Execution of his Body by this, becauſe he is not Party to the Writ. 7 H. 6. 45. b. adjudged.

Br. Executions, pl. 49. cites S. C —Br Garniſhee &c. pl. 28. cites S. C. and S. P. but Execution ſhall be of Goods and Chattels or Land.

7. If an Inferior Court be held by Charter, and the Bail there acknowledges a Recognizance no Capias lies upon this Recognizance no more than in B. and here there cannot be any Cuſtom. M. 15 Car. Per Berkley.

Fol. 598.

8. If a Feme recovers Damages in a Writ of Dower she shall not have * Execution against the Body by Capias ad Satisfaciendum, because no Capias lies in the Original. 8 R. 2. Execution 164.

2 Le. 84. Arg. S. P. cites 2 H. 4 6.

9. No Capias lies upon a Judgment in a Scire Facias against the Bail upon a Recognizance acknowledged by the Bail in B. R. upon a Writ of Error brought in the Exchequer Chamber the Recognizance being given there by Force of the Statute of 3 Jac. of Executions; for that this Recognizance is not to be guided by the Custom of B. R. but by the Common Law, and the Bail bound only their Goods and Lands and not their Persons, and therefore no Capias lies. Tr. 18 Car. B. R. between *Wildboore* and others, and *Priestand* adjudged per Cur. and Superledeas granted accordingly after a Capias granted, and the Party taken by Force of it. Mich. 1649. adjudg'd accordingly per Cur. and Superlsedeas granted. Intratur.

10. If *Conusance of Pleas* be *granted*, there lies *Capias* and *Distringas* and grand Distress, and Forfeiture of Issues, and after he is convicted he shall be taken by Capias in Execution, and shall be fined, and shall be imprisoned as at the Common Law; For omnia hæc *pertinent ad Cognit' placitorum*; Per Thorp Bass. and Bank. Br. Execution, pl. 121. cites 22 Ass. 61.

S. P. *So where a Vill is condemn'd for not making of Hue and Cry.*

11. In *Case against an Hostler*, the Plaintiff had Judgment. The Plaintiff prayed a Ca. Sa. but it was denied. For it was *Laches only* and not Tort. Br. Action sur Case, pl. 15. cites 42. E. 3. 11.

Br. Execution, pl. 127. cites S. C.

12. In Debt upon Plegiis Acquietandis the *Sheriff returned the Defendant Nihil*, and the *Plaintiff pray'd Capias* and could not have it, because this Action *is in Nature of a Covenant*, and he *shall recover only Damages*. Br. Pledges, pl. 2. cites 43 E. 3. 1.

The Capias upon a Recognizance is not by 25 E. 3. but by the Common Law; For here is a Debt upon Record, and wherefore shall not this Body be subject to it as well as in the Case of a Debt upon a bare Obligation? Per Manwood Ch. B. and said he admits the Rule that where there is no Capias ad Respondendum there is no Capias ad Satisfaciendum, but that ought to be in Cases where there is an Original and Mesne Process before Judgment. 2 Le. 88. pl. 112. 29 Eliz. in Case of Ognell v. Paston.

13. Note, that *after Execution upon Recognizance* the Party shall not have Ca. Sa. The Reason seems to be, because *Capias is not the Process in the first Suit*, but Scire Facias. Br. Execution, pl. 129. cites 48 E. 3. 14.

14. A Man shall not have Ca. Sa. for his Execution but where Capias is the Process in the Original, and not where Process is Distress and not Capias. And upon every Condemnation where Capias is the Process Exigent shall issue upon the first Capias, Per Wich; Brooke says Quære of the Opinion of Wich. Br. Exigent, pl. 54. cites 49 E. 3. 2.

15. Ca. Sa. *shall not be awarded but within the Year*, unless where the *King* is Party; as to have Fine for the principal Suit, Per Browne. Br. Execution, pl. 54. cites 22 H. 6. 15.

16. *Debt upon Arrearages of Account*, the *Defendant said, that such a Day, a Month after the Account, the Auditors committed him to Prison, and so he was in Execution*, and no Plea without *saying, that the Auditors committed him* to Prison *immediately*; For after, viz. if there be a Mesne Instant, their Power is determined; and from thence it seems that if he had been committed immediately it had been good Execution, and so good Bar of Account. Br. Execution, pl. 135. cites 27 H. 6. 8.

* S. P. Per all the Justices. Ibid. pl. 150. cites 11 H. 7. 15.

17. In *Dower* the *Demandant recovered Dower and Damages*, and the Demandant's Attorney said, that the Tenant is in the Hall, and prayed *Ca. Sa.* against him. Per Cur. this *is* * *only grantable where Capias is the Principal in the Original*, quod nota. Br. Execution, pl. 22. cites 2 H. 4. 6.

18. Where

18. Where there is *no Capias* ad Reſpondend' there is no Capias *ad Satisfaciend'*, but that ought to be intended in Caſes where there is an Original, and Meſne Proceſs before Judgment, but where there is no Original, and *no mean Proceſs* before Judgment it is otherwiſe, As in the Caſe of a *Recognizance*, on which a Ca. Sa. will lie, it being a Debt on Record. 2 Le. 88. pl. 112. 29 Eliz. in the Exchequer, per Manwood Ch. B. Ognell v. Paſton.

19. Capias ad Satisfaciend' lies *on a Judgment on a Nonſuit in Debt for Coſts.* Cro. J. 595. pl. 18. Mich. 18 Jac. B. R. Dyer & al' v. Fincham. 2 Roll Rep. 212. Dyer v. Rancham S C. reſolved accordingly.

20. At the *Common Law* a common Perſon could not have taken the Body of his Debtor in Execution for his Debt, but that was given by the *Statute* 25 *E.* 3. 17. Per Doderidge J. Godb. 290. pl. 416. Paſch. 21 Jac. in the Court of Wards, in Sir Edward Coke's Caſe.

21. This *is a Judicial Writ* which *iſſues out of the Record of a Judgment* where there is a Recovery of Debt, Damages and Coſts, or either of them; And by the Writ the Sheriff is commanded to take the Body of the Party and him ſafely to keep, ſo that he hath his Body in Court at the Return of the Writ, to ſatisfy the Plaintiff his Debt and Damages. L. P. R. 249.

22. A Capias *duly ſued* out and returned *may be filed afterwards*; (21 Car. 1. B. R.) For the Filing of it is not of the Eſſence of the Writ, but is that which makes it a Record of the Court. L. P. R. 249.

(I. a) By Capias.

Againſt what Perſon, Execution by Capias lies.

1. **If a Man recovers in** Treſpaſs againſt a Prior, **he cannot have Execution by Capias againſt him.** 21 E. 3. 59. b. So of an Abbot, for it is intended that he is ſufficient; Contra of a Knight; For he may be a Knight and have no Land. Br. Execution, pl. 1. cites 26 H. 8. 7.——S. C cited Mo. 768.——S. P. Arg. Sty. 223. and 253.——So of a Biſhop unleſs his Biſhopprick was out of England. Sty. 223.

2. *Debt againſt Executor who pleaded Plene adminiſtravit*, and *Aſſets is found againſt him*, and upon this Judgment was given of the Goods of the Deceaſed, and upon the Fi. Fa. the *Sheriff returned* * *Devaſtaverunt*, and upon this Capias was awarded againſt the Executor where no Capias lies at firſt; quod nota by Award. Br. Executor, pl. 8. cites 2 H. 6. 12. * S. P. ſo where he pleads a Falſe Plea. Br Executors, pl 23. cites 34 H. 6. 45.

3. Note, In *Debt* againſt an *Executor* who *pleaded Plene adminiſtravit*, it is *found againſt him*, and after *Scire Facias iſſued*, and *he was warned and made Default*, by which it was awarded that the Plaintiff have Execution, and he ſued Ca. Sa. whereupon iſſued Superſedeas Quia Improvide & Erronice &c; For the Ca. Sa. lies not againſt an Executor who pleads ut ſupra. Br. Executions, pl. 12. cites 34 H. 6. 45. Br. Executors, pl. 23. cites S. C.

4. Capias lies not againſt a *Lord* Br. Elegit, pl. 1. cites 26 H. 8. 7. Where a Fine is due a Capias pro Fine lies againſt a Nobleman, as in Caſe of Diſſeiſin made by him, and ſo for a Contempt. Cro. E. 170. pl. 9 Hill. 32 Eliz. B. R Ld. Stafford v. Thynne.——A Capias does not lie againſt a Peer of the Realm unleſs in Caſes of Contempt to the Crown; Per Popham. Mo. 767. in pl. 1063. Mich. 3 Jac. in the Starr Chamber.——Cro. E. 503. Earl of Lincoln v. Flower.

5. A Capias ad Satisfaciendum lies not *againſt Executors or Adminiſtrators* but where a *Devaſtavit* is returned by the Sheriff, or when upon a Fieri Facias de Bonis Teſtatoris, or Anteceſſoris, as the Caſe is, a *Nulla Bona* is returned L. P. R. 250. cites Dal. 71. pl. 44.

It was held, that a Nobleman ſhall be bound with his Bail in a

6. On Execution *on a Statute Merchant*, on the Statute of Acton Burnel, or on the Statute of 23 H. 8. the Body of *a Baron ſhall be taken in* Execution; For by theſe Statutes ſuch Perſons were not exempted. 2 Le. 173. pl. 209. Trin. 29 Eliz. C. B. Harris v. Lord Mountjoy.

Recognizance to render his Body, and that upon the Statute 13 E. 1. if he has not Goods or Lands, his Body ſhall be taken in Execution; For the Law in ſuch excepts only Clerks. 4 Le. 6. 29 Eliz. in C B. Anon.

7. Execution by Ca. Sa. may be ſerved upon a Perſon *in Priſon for Felony*; For though his Body was at the Queen's Pleaſure, yet he ſhall not take Advantage of his own Tort, but ſhall anſwer the Action and Execution of a Common Perſon. Cro. E. 164. pl. 1. Mich. 31 & 32 Eliz. in Scacc Ognel v. Paſton.

8. The Plaintiff may not have any other Execution againſt Defendant being outlawed but a *Capias*, For a *Fieri Facias* he may not have, for the King is intitled to all his Goods, and an *Elegit* he may not have; For by the Outlawry the King is intitled to all the Profits of his Lands; Arg. Goldsb. 180. pl. 115. Hill. 43 Eliz.

Mo. 769. cites S. C. that the Sheriff returned that he could

9. In *Debt or Treſpaſs* a Capias does not lie againſt an *Earl*, *Baron or Baroneſs*; 6 Rep. 52. b. in Counteſs of Rutland's Caſe Mich. 3 Jac. and cites 11 H. 4. 15. b. in Homlne Replegiando againſt the Lady Spencer.

not make Deliverance of the Body becauſe it was eſloigned by the Lady, and thereupon Withernam was prayed and awarded againſt the Lady; but ſays, that there the Book gives the Reaſon, becauſe the Eſloignment to prevent the Execution of the Writ was a Contempt, and that it is there expreſly ſaid, that a Capias will not lie againſt a Lady in Debt or Treſpaſs, where there is not any Contempt.——S. C. cited Hob. 61. by Hobart Ch. J. and ſays it was granted againſt Lady Spencer, becauſe it was an high Injury to the Perſon whom ſhe eſloigned.

10. *At the Suit of a Subject* the Bodies of *Peers ſhall not be arreſted*, and neither Capias nor Exigent lies againſt them. 12 Rep. 95. Trin. 10 Jac. in the Counteſs of Shrewsbury's Caſe.

11. Before Execution the *Defendant is made a Peer of the Realm* Curia adviſare vult what Execution ſhall iſſue. Cro. C. 205. pl. 11. Savil's Caſe.

(K. a) Of Land.

At what Time it may be ſued.

1. IF a Man recovers Damages in Writ of Waſte he ſhall not have Execution firſt of his Land, but the Execution ſhall be generally of that which he has, and if the Sheriff returns that he has Nothing, then the Execution ſhall be of his Land. 18 E. 3. 14. b.

2. A *Man recovered Land againſt J S.* who is *condemned to the King in a Fine*, and the *Sheriff had ſeiſed the Emblements growing upon the ſame Land for the King*; now the Sheriff cannot put the Recoveror in Seiſin of the Land till the Emblements are ſevered. Br. Emblements, pl. 23. cites 18 E. 3.

3. *The*

3. *The King recovered in Quare Impedit againſt a Prior, and ſued Execution againſt J. N.* who *ſaid that after the Judgment the King had ſeiſed all the Poſſeſſions of the Prior and this Advowſon, becauſe he was a Prior Alien*, and War was between France and England, *and leaſed to the Defendant for Years, whlch yet continue, rendering Rent*; *Judgment* &c. and after he ſuffered Judgment by Aſſent; Quære de Rigore Juris; for it is ſaid elſewhere that *Execution ſhall ceaſe during the Term.* Br. Execution, pl. 57. cites 24 E. 3. 39.

4. If a Man has a Judgment given againſt him for Debt or Damages, or be bound in a Recognizance, and dieth his *Heir within Age*; or having *two Daughters, and the one within Age*, no Execution ſhall be ſued of the Lands by Elegit during the Minority, albeit the Heir is not ſpecially bound but charged as Terre-tenant, and ſo againſt an Heir within Age no Execution ſhall be ſued upon a Statute-Merchant or Staple, nor upon the Obligation or Recognizance upon the Statute of 23 H. 8. for it is excepted in the Proceſs againſt the Heir. Neither, if the *Heir within Age endow his Mother*, ſhall Execution be ſued againſt her during his Minority. Co. Litt. 290. a.

(L. a) At what Time it ſhall be ſued.

1. IN Debt if Defendant confeſſes the Action for Part, and for the Reſidue pleads to the Iſſue, by which the Plaintiff has Judgment for that which is confeſſed, yet he ſhall not have Execution till the Iſſue tried, becauſe he is to recover Damages for that which is confeſſed, which ſhall be aſſeſſes upon Trial of the Iſſue. 18 H. 6. 26.

2. But if he releaſes the Damages he ſhall have Execution immediately. 18 H. 6. 26.

3. So if the Plaintiff be after nonſuited in the Iſſue he ſhall have Execution, for now the Cauſe of the Impediment, ſcilicet, the Damages, ceaſes. 18 H. 6. 26.

4. If the Principal after Judgment renders himſelf in Court in Diſcharge of his Bail, and the Plaintiff will not take him in Execution, and all is entered of Record as it ought to be, yet the Plaintiff may after take him in Execution by Capias ad Satisfaciendum, for this was but a Forbearance of him for a Time upon his own Offer; and not a renouncing or releaſing of his Execution when he ſees Cauſe. Hobart's Reports 284.

5. A Man was *awarded to account*, *and Capias ad computandum awarded*, and *came into Court for other Purpoſe*, by which the *Plaintiff* ſhewed this Matter, and *prayed that he remain for his Execution*, and becauſe it was after the Year and Day, he was put to Sci. Fa. Quære if he ſhould have remained if within the Year &c. It ſeems that he ſhould if he confeſſes that he is the ſame Perſon. Br. Execution, pl. 44. cites 21 E. 3. 7.

6. *Waſte* by an Abbot, and *Damages found by Writ of Inquiry* of Waſte *by Default of the Defendant*, and *Quale jus* iſſued, and yet the Plaintiff had Judgment and Execution of the Damages immediately, notwithſtanding it may be that the Quale jus ſhall be found againſt the Plaintiff. Br. Executions, pl. 43. cites 38 E. 3. 27, 28.

7. It is the Courſe in C. B. that in Scire Facias *upon Recovery of Debt, Treſpaſs or Annuity*, at the *firſt Nihil returned* the Plaintiff ſhall have Execution; Per Brian. Br. Scire Facias, pl. 162. cites 2 H. 7. 3.

Co. Litt. 295. b. S. P.

8. A Man does acknowledge a *Recognizance of* 100 *l. to be paid at five Days*. Preſently after the firſt Day he may ſue an Elegit upon the Stat. Weſtm. 2. cap. 18. for 20 l. and have the Moiety of the Land delivered unto him; and when the ſecond Day is paſt he may have another Elegit for that 20 l. and have the Moiety of the Remnant delivered to him, & ſic de cæteris; for they are in Effect *in Nature of ſeveral Judgments in Law.* 2 Inſt. 395.

9. Execution was prayed to be ſet aſide, the *Plaintiff at whoſe Suit being dead after the Execution taken out, but before the Defendant was arreſted*; Sed non allocatur; for now per Cur. he muſt lie till Agreement made with the Executors or Adminiſtrators, but if the Plaintiff had *died before Judgment* or Verdict, he might be diſcharged. 2 Keb. 516. pl 12. Trin. 21 Car. 2. B. R. King v. Milton.

10. In an *Action where Part goes by Default and the other Part is traverſed*, you ſhall not take out Execution till that Part which is traverſed be tried. Mod. 66. pl. 12. Mich. 22 Car. 2. B. R. Anon.

(M. a) At what time it may be.

Upon an Iſſue joined, * Fol 899. and a Trial thereupon, a Verdict was found for the Plaintiff, and the Poſtea was deliver'd to the Clerk of the Judgments to enter the Judgment; but through the Clerk's neglect, Execution was taken out, the Judgment being not entred, upon this the Court was moved that the Judgment might not be entred, becauſe it ſhould have been entred before Execution iſſues forth, and therefore it was ſuggeſted that now it was too late, and prayed to ſuperſede the Execution, becauſe there was no Judgment to Warrant it. But Roll Ch. J. anſwered, that this being but a neglect of the Clerk, Judgment might be well enough entred, though the Execution were iſſued forth, and becauſe the Trial between the Parties is right, therefore let it be entred. Sty. 229. Trin. 1650. Anon.

1. IF a Man recovers in B. R. by award of the Court, and upon this the Roll is ſigned by the Clerk for Judgment, he may have Execution there * immediately before the Judgment entred; For otherwiſe he ſhall be at great Delay, for the Courſe of the Court is not to enter Judgment till the Vacation after, and the Defendant is not at any Miſchief, for he may have a Writ of Error after the ſigning, and before the Judgment entred. Mich. 15 Ja. B. R. between *Smith and Bowles* by all the Clerks this is the Common Courſe of the Court.

Br. Error, pl. 6. cites S. C.

2. A Man brought *Writ of Error upon a Recovery in Debt and did nothing*, by which the *Plaintiff ſued Sci. Fa.* of Execution there, and the *Defendant is returned Nihil twice*, and the Court *entred quod exactus fuit & non Comparuit*; by which *Ca. Sa. iſſued and after Exigent*, and the *Defendant* came and *tendered the Money to the Court to remain there till the Errors be examined*, and prayed Sci. Fa. ad audiendum errores & Superſedeas, and had it; quod nota. Br. Execution, pl. 4. cites 9 H. 6. 13.

3. In *Debt againſt the Heir* the *Defendant confeſs'd the Declaration by Nient dedire, but pleaded Riens per Deſcent except the Reverſion of thirty Acres* in S. *poſt mortem J. S.* The Plaintiff may pray Special Judgment, viz. That he ſhall recover his Debt, and Damages of the ſaid Reverſion, to be levied *Quando acciderit.* D. 373. b. pl. 14. Mich. 22 & 23 Eliz. Anon. and ſays it ſeems that this was the Law before the Stat. W. 2. cap. 18.

4. *Judgment*

4. *Judgment had againſt the Principal*, and afterwards *the Goods of the Bail were taken in Execution*; *but there being no Ca. Sa. taken out againſt the Principal*, and the Matter being referred to be examined by the Secondary, upon his Report *the Execution againſt the Bail was ſuperſeded*; Thereupon *he bsought an Action of Treſpaſs againſt the Plaintiff* in the original Action *for taking his Goods*, *and* upon a ſpecial Verdict found the Bail *had Judgment and Damages*; afterwards he *brought a Scire Facias againſt the ſaid Plaintiff*, *to have Reſtitution of thoſe Goods* which were taken from him upon the ſaid erroneous Execution, and for which he had already recovered Damages in the Action of Treſpaſs; But upon a Motion this *Scire Facias was ſuperſeded*, as being very unreaſonable for him to have double Satisfaction. Raym. 73. Paſch. 15 Car. 2. B. R. Turner v. Felgate.

Lev. 95. S. C. cited Paſch. 15. Car. 2. B. R. by Twiſden and Windham J. to have been adjudged in 6 or 7 Years before But Twiſden ſaid that he was not ſatisfied with this Judgment when it was given in the Time of Glynn Ch. J. nor yet is, to make a Man a Treſpaſſor by Relation; For when the Execution was ſerved there was a Judgment, though afterwards the Execution was vacated.—Keb. 822. pl. 108. S. C. accordingly.

5. Where there are *ſeveral Plaintiffs or Defendants*, and *one of them dies*, *Execution may be ſued by or againſt the Survivor*, upon Suggeſtion of the Death made upon the Roll; *But where there is but one Defendant and he dies*, it is a Queſtion Whether Execution may be *ſued without a Scire Facias*? In Perſonal Actions doubtleſs it cannot; But in Ejectment the Plaintiff ought to have Execution only of the Land recovered; Per Holt Ch. J. and he ſaid that Shelly's Caſe 1 Rep. 93. will not warrant it, becauſe there the *Death was the ſame Day that the Hab' Fac. Seiſinam bore Teſte*, and ſo it was held to be a Death after the Teſte. 2 Ld. Raym. Rep. 808. Mich. 1 Ann. in Caſe of Withers v. Harris.

(M. a. 2) Diſcharged, Superſeded, and ſet aſide.

1. WHERE a *Man is in Execution* in C. B. *upon a Statute Merchant*, *and ſues Audita Querela*, and *pending Imparlance thereof he is outlawed in B. R.* and at the Day ſhews it in C. B. and becauſe he did not purſue the Audita Querela the Court awarded Execution where the Conuſor was in Ward of the Marſhal upon the Outlawry, by which Herleſton came into B. R. and ſhewed the Record of the Execution, and Thorp commanded the Marſhal that he ſhould not permit him to go in Pain of 20 l. which was the Sum of the Statute, and ſaid to the Conuſee, ſue Writ of Chancery comprehending this Matter, ſo that you may have expreſs Warranty thereof, and though the King Pardons him, yet he ſhall remain for this Matter &c. Br. Audita Querela, pl. 23. cites 24 E. 3. 45.

2. If the Creditor, at whoſe Suit a Man is in Execution diſcharges him *by Parol* this is good both as to him, and to the Sheriff, or Gaoler. Poph. 206, 207. Arg. cites 27 H. 8. 24. Jordan's Caſe and that it had been reſolved that if one be in Execution at my Suit, and I go to the Sheriff and command him to diſcharge the Party this is a good Diſcharge though it be by Parol, to which Jones and Doderidge agreed.

3. The Plaintiff was in Execution *at the Suit of the King*, and being no juſt Cauſe therefore, he was delivered by *Superſedeas*. Cary's Rep. 54. cites 1 Eliz. fol. 166. Pyke v. Graunt.

4. On Judgment in *Debt in the Sheriff's Court in London*, the *Defendant was taken in Execution*, afterwards *upon an Habeas Corpus* being ſued

ſued in B. R. the ſaid Execution was returned, and *he was committed to the Marſhal* in Execution; *then the Judgment in London was diſcharged upon a Writ of Error in the Huſtings*, and the Queſtion was How he ſhould be diſcharged of the Execution, for that B. R. had no Record of it but by the Return of the Habeas Corpus, neither had they any Record of the Reverſal of the Judgment in London but what is ſurmiſed only, and they cannot award a Certiorari thither; whereupon it was adviſed that *all Matters here concerning that Execution being diſcharged*, he might be *remitted to London, and there be diſcharged.* Cro. C. 128. pl. 2. Mich. 4. Car. B. R. Cuſack's Caſe.

5. Execution taken *contrary to a Ceſſet Executio* upon Record, the Court will relieve on Motion; Otherwiſe if the Agreement that Ceſſet &c. be *ſubſequent.* Sid. 379. pl. 9. Mich. 20 Car. 2. B. R.

6. The *Party ought to take Notice of a Recipitur upon the Record if enter'd*, and if he takes out Execution after Writ of Error allowed he is in Contempt, otherwiſe not, and the Attorney is *not bound to view the Record to ſee whether a Writ of Error be brought*, but may take out Execution if there is not a Superſedeas, or Notice given to the Party. Sty. 105. Trin. 24 Car. B. R. Winn v. Stebbins.

7. After Verdict for the Plaintiff the *Poſtea was delivered to the Clerk of the Judgments to enter the Judgment, but thro' his neglect Execution was taken out firſt.* Roll Ch. J. held that this being only a Neglect of the Clerk, Judgment may be entred though the Execution was iſſued forth, and becauſe the Trial between the Parties was right; and ordered it to be entred. Sty. 229. Trin. 1650. Anon.

8. On Motion upon Affidavit that *two Writs of Execution were executed upon one Judgment*, the Party moved for a Superſedeas as to the laſt, becauſe there ought not to be two Executions for one Matter but where the Plaintiff is hindered, either by the Death, or Act in Law, that he can have no Benefit of the firſt. Per Roll Ch. J. if the *firſt Writ was returned and filed* there cannot be a ſecond Execution, but otherwiſe there may. Sty. 255. Hill. 1650. Shirley v. Semaine.

9. An Extent upon a *Statute* ſhall not be *avoided* by Entry by *Scire Facias*, becauſe a Tenant by Statute is to hold not only till his Debt and Coſts are ſatisfied, which are certain, but till he be ſatisfied his reaſonable Damages and Charges beſides, which being uncertain muſt be reduced to Certainty by Judgment of this Court; Arg. Show. 44. Trin. 1 W. & M.

10. When Execution is once begun we cannot *ſtay it*, unleſs there appears an Irregularity; Per Holt Ch. J. Cumb. 389. Mich. 8 W. 3. B. R. Langſton v. Grant.

11. Judgment and Execution thereupon was ſet aſide, becauſe *Plea* was *put in before Judgment ſigned.* 12 Mod. 248. Mich. 10 W. 3. Baker v. Chandler.

12. *Scire Facias recited* a Judgment in *Time of the King*, which in Truth was in the *Time of the King and Queen*, and ſo no Judgment to warrant it; and Judgment upon Return of Nihils. Per Cur. In Strictneſs we ought to put them to *Audita Quer'* but we generally relieve them *upon Motion*, and the Judgment upon the Sci. Fa. was ſet aſide, and ordered that the *Money levied by a Fi' Fa'* thereupon ſhould be *refunded.* 12 Mod. 351. Paſch. 12 W. 3.

13. Plaintiff may for his own Security take out a *Ca. Sa. and a Fi. Fa.* but the Ca. Sa. being executed the Fi. Fa. was quaſhed. 8 Mod. 302. Trin. 10 Geo. Stamper v. Hodſon.

Writ of Error on a Judgment in C. B. is no ſtay of Execution

14. If Plaintiff in *Error* can ſhew that the *Writ was ſued out and allowed* before the Execution was ſerved, the Execution muſt be ſet aſide, though the Defendant had no *Notice* of it. 8 Mod. 373. Trin. 11 Geo. Moorfoot v. Chivers.

on a Fi. Fa. already begun to be executed, and in that Caſe if the Sheriff returns want of Buyers the

C. B. may award a Venditioni exponas notwithſtanding the Writ of Error pending. 1 Salk. 147. pl. 12. Mich. 1 Ann. B. R. in Caſe of The Queen v. Naſh.——2 Ld. Raym. Rep. 990. S. C. & S. P. accordingly.

(M. a. 3) By Extendi Facias and Liberate.

What and How.

And of what it may be.

1. *FEALTY and Suit of Court* cannot be extended *at any Value.* Br. Avowry, pl. 85. cites it as ſaid 27 Aſſ. 51. but ſays Quære of Fealty only.

2. If the Extender undervalue the Lands as there is no Remedy at the Common Law, becauſe the *Debtor may help himſelf by Payment* of the Debt, ſo in Conſcience there ought to be *no Relief unleſs* it were done by *Covin.* Cary's Rep. 6. cites 15 H. 7. Duplege's Caſe.

3. *Rent grown due after the Extendi Facias and before the Liberate* awarded is payable by Leſſee to the Conuſor his Leſſor, and not to the Conuſee or to the Queen. Cro. E. 46. pl. 3. Paſch. 28 Eliz. C. B. Playne's Caſe.

4. On Scire Facias after *Judgment on a Recognizance* divers Lands were extended upon an Elegit, but the Plaintiff refuſed to accept the ſame according to the *Extent*, becauſe *valued too high*, and prayed that the Extendors might retain the Lands, and that he might have Execution of their Lands according to the Statute of Acton-Burnel. A Precedent was ſhewn out of Bendl. Rep. 4 & 5 P. & M. as reſolved by all the Juſtices, that on an Execution upon a Recognizance for Debt, if the Land be extended too high the *Plaintiff may pray that the Extendors may retain it* &c. as well as upon an Extent upon a Statute-Staple or Merchant, and that it is within the Equity of the Statute of Acton-Burnel. *But* that *in a Scire Facias upon Bail and Recovery, and Execution* thereupon, *it is otherwiſe.* And of that Opinion were all the Court here, that the Plaintiff had Time enough upon the Return of the Writ to pray it, and awarded that the Extendors have the Land at the Rate, and pay the Debt. Cro. J. 12, 13. pl. 16. Paſch. 1 Jac. B. R. Molineaux v. Lacon.

5. An Extent ought always to be by *Inquiſition*, and the Sheriff himſelf without an Inquiſition cannot *execute* it; and if an Action is brought upon it, it ought to ſet forth that it was by Inquiſition. Cro. J. 569. pl. 9. Paſch 18 Jac. B. R. Garraway v. Harrington.

It ought to be by Inquiſition, and returned by the Sheriff, otherwiſe it is void and does not give any Title to the Plaintiff, although the Sheriff delivers him the Land upon it. Adjudged and affirmed in Error; for otherwiſe non Conſtat quando the Extent ſhall end. Jenk. 318. pl. 14. cites S. C.

6. *Execution of* an Extent *is* when the Goods are appraiſed and the Writ returned; Per tot. Cur. Cro. C. 150. pl. 3. Hill. 4 Car. B. R. in Caſe of Audly v. Halſey.

Jo. 202. pl. 3. S. C. & S. P. accordingly.

7. Upon an Extent *upon a Statute-Staple* the Sheriff cannot ſeiſe the Land, but can only extend it, and the Conuſee ſhall have the Profits; But he may ſeiſe the Goods, yet the Property remains in the Party, and the Sheriff cannot uſe them, nor can the Conuſee till a Liberate. Jo. 204. Hill. 4 Car. in a Nota at the End of the Caſe of Awdley v. Halſey.

If Feoffment be after the Extent before the Liberate ſued, the Feoffee ſhall avoid it, becauſe he is the Party grieved by it; Per Jones J. Lat. 274.

8. When the Writ of Liberate is ſued it has *Relation* to the Writ of Extent, and they are quaſi but one Extent, and the Goods are ſo bound by the Extent and Appraiſement that the Conuſor has not any more Property in them but Secundum quid, and not Simpliciter; for it is *a Conditional Writ* to deliver them to the *Conuſee* if he will accept them, and when he *accepts them they are bound ab Initio.* Cro. C. 150. pl. 3. Hill. 4 Car. B. R. in Caſe of Audley v. Halſey.

9. An *Office* is *extendible* in Law or Equity; Decreed. Chan. Caſes 39. Trin. 15 Car. 2. Jones v. Done.

10. Extents have been held good that have been made *upon Goods actually levied by Virtue of a Fieri Facias and in the Sheriff's Cuſtody*, the Extent coming *before a Bill of Sale made*, ſo as the Property was not altered; Arg. 2 Show. 481, 482. pl. 443. Trin. 2 Jac. 2.

But if one will turn it on the Extendors as over-valued, he muſt ſay ſo the firſt Day of Return, or not at all; Per tot. Cur. Mo. 753. pl. 1039. Hill. 1 Jac. Anon.

11. If Extendors *value the Lands too high* they ſhall be obliged to hold the Lands at the extended Value, and pay the Money; if they value it *too low* the Defendant may tender the Money and ſtay the Extent, or may at any Time tender what remains unpaid; Arg. 2 Chan. Caſes 183. Mich. 2 Jac. 2. in Caſe of Hale v. Thomas.

12. A *Copyhold* is not to be ſeiſed on a Recognizance; Per Holt Ch. J. 7 Mod. 38. Trin. 1 Ann. B. R. Anon.

13. The Extent is only a Seiſure into the King's Hands, and there muſt be another Award of the Court, viz. a *Liberate* to deliver over to the Plaintiff. 6 Mod. 298. Mich. 3 Ann. B. R. Clerk v. Withers.

(M. a. 4) By Elegit. In what Caſes. And How.

The Reaſon of this Law is becauſe it was not reaſonable that one Creditor ſhould run away with all. Arg. Hardr. 25. cites 2 Inſt. 394. (But I do not find this Reaſon there.)

1. *AT the Common Law* where *a Subject* ſued Execution upon a Judgment for Debt or Damages, he *ſhould not have the Body of the Defendant, or his Land in Execution, (unleſs* it were *in Special Caſes)* and the Reaſon of the Law was, that the Body in Caſe of Debt ſhould not be detained in Priſon, but be at Liberty, not only to follow his own Affairs and Buſineſs, but alſo to ſerve the King and his Country when Need ſhould require; nor to take away the Poſſeſſion of his Lands in that Caſe, for that would hinder the following of his Huſbandry and Tillage, which is ſo Beneficial to the Common-Wealth, whereof you may read at large in Sir William Herbert's Caſe. *But* by the Common Law he ſhould have Execution in that Caſe *only of his Goods and Chattles, and* of his *Corn and other preſent Profit that grew upon his Land*, to which Purpoſe the Law gave him two ſeveral Writs to be ſued within the Year, one a *Levari Facias*, whereby the Sheriff was commanded, Quod de Terris & Catallis ipſius A. Levari Facias, and the other called a *Fieri Facias*, which alſo was only de Bonis & Catallis. 2 Inſt. 394, 395.

2. But

2. But by 13 *Ed.* 1. *cap.* 18. *When Debt is recovered or* * *knowledged in the King's Court, or Damages awarded,* That is, by Judgment in an Action of Debt, or any Action wherein Damages are recovered. 2 Inſt. 395. * That is, by Recognizance acknowled in any Court of Record that has Power to receive the ſame. 2 Inſt. 395.

If two do acknowledge a Recognizance of 100 l. quilibet eorum in ſolido, that is, jointly and ſeverally, the Conuſee may ſue ſeveral Scire Facias's againſt the Conuſors upon this Recognizance. 2 Inſt. 395.

A ſpecial Recognizance may by expreſs Words bind the Lands of the Conuſor in one County only. 2 Inſt. 395.

It ſhall be from hencefore in the Election of him that ſueth for ſuch Debt or Damages to have a Writ, that the Sheriff * *Fieri Faciat of the Lands and Goods;* This Election the Executors or Adminiſtrators of the Plaintiff or Recognuſee ſhall have, albeit they be not named; and ſo likewiſe ſhall the Succeſſor of the Conuſee have alſo; but the Executors ſhall not have Execution of the Judgment or Recognizance in the Time of the Teſtator within the Year, without ſuing a Scire Facias; but otherwiſe it is of a Statute &c. 2 Inſt. 395.

When the Plaintiff or Conuſee prays an Elegit, the Entry is Quod Elegit ſibi Executionem fieri de omnibus Catallis, & medietate Terræ; and the Writ of Elegit is, Ac cum idem H. juxta Statutum inde editum, (meaning the Statute) elegerit ſibi liberari pro prædict' 20. libris omnia Catalla, & medietatem Terræ ipſius R. And therefore after the Suing out of the Elegit, the Plaintiff that has a Judgment in an Action of Debt cannot have a Capias &c. 2 Inſt 395.

* Here under theſe Words is alſo the Writ of Levari Facias included. 2 Inſt. 395.

Or that the Sheriff ſhall deliver to him all the Chattles of the Debtor, ſaving only his Oxen and Beaſts of his Plough, The Mayor and Aldermen of London take a Recognizance of 250 l. to the Chamberlain of the City of London and his Succeſſors, according to the Cuſtom for Orphanage Money; in this Caſe the Chamberlain for the Time being may ſue out a Precept in the Nature of an Elegit to a Serjeant at Mace, and Miniſter of that Court to do Execution upon this Act; And albeit the Words of this Statute are, Quod Vicecomes liberet; yet being a beneficial Law, by Equity it is extended to every other immediate Officer to every other Court of Record. 2 Inſt. 395.

If the Chattles be ſufficient to pay the Debt and ſo may appear to the Sheriff, whereby he may ſatisfy the Debt, then he ought not to extend the Land for the Reſidue; and all this appears by the Writ of Elegit framed upon this Act. 2 Inſt. 395.

And the one half of his Land, This is to be underſtood of the Half of ſuch Land as the Defendant had at the Time of the Judgment given, or of the Recognizance acknowledged, unleſs it be conveyed away by Fraud and Covin to deceive his Creditors contrary to the Statutes in that Caſe provided. 2 Inſt. 395. Rem^r extendibile. Semble. Gouldst. 120.

And upon theſe Words, Medietatem Terræ ſuæ, the Sheriff extended a Term for Years, and the like. 2 Inſt. 396.

It is to be obſerved, that the General Word of this Act does not take away the Priviledge which the Law gives to any Perſon; and therefore no Elegit upon this Act ſhall be ſued againſt the Heir of the Conuſor during his Minority. 2 Inſt. 396.

Upon the equal Conſtruction of theſe Words, if the Conuſor be ſeiſed of Blackacre, Whiteacre, and Greenacre, and after the Judgment given, or Recognizance knowledged, infeoffs A. of Whiteacre, and B. of Black-acre, and retains Green-acre to himſelf, in this Caſe he may have the Moiety of Green-acre, and never intermeddle with the Reſt; but he cannot extend the Moiety of the Acre in the Hand of any Purchaſor, except he extend alſo the Moiety of all the Land ſubject to the Judgment or Recognizance, and if he omit any, the Extent ſhall be avoided in an Audita Querela; for where it is ſaid in Books that each Purchaſor ſhall have Contribution in that Caſe, the Meaning is, that ſuch Extent of Part ſhall be avoided, and all the Land extended and equally charged; and ſo it is if Green-acre deſcend to an Heir, the Moiety thereof may be only extended, without dealing with any of the Reſt; ſo likewiſe if there be two or more Conuſors, the Lands of them all muſt be extended; and hereof you may read at large in Sir William Herbert's Caſe, all which are juſt and righteous Expoſitions. 2 Inſt. 296.

Until the Debt be levied upon a * *reaſonable Price or Extent;* The Elegit framed upon theſe Words ſaith, Tenendum ut liberum Tenementum quouſque debitum Prædict' inde fuer' levatum; and yet whenſoever the Party pay and ſatisfy the Debt of Record, he ſhall enter into his Lands; and ſo it is when the Tenant by Elegit is ſatisfied by the ordinary Extent, the Tenant of the Land may enter. But if it be in reſpect of any caſual Profit to avoid the Extent, he muſt have a Scire Facias in reſpect of the Uncertainty. 2 Inſt. 396.

* Per Rationabile pretium does refer to Goods and Chattels, and Rationabile Extentum referreth to Lands. 2 Inſt. 396.

And

And hereby is implied, that this Appriſement and Extent upon the Elegit muſt be found by Enqueſt of 12 Men, and ſo returned of Record. 2 Inſt. 396.

And therefore without an Inquiſition he cannot ſell them, which was agreed by all the Juſtices, and ſo is Dyer, fol 100. Cro. E. 584 in pl. 13. Mich. 39 & 40 Eliz. B. R. in the Caſe of Palmer v. Humphrey ——— 4 Rep 74. a. b Palmer's Caſe. S. C. held accordingly.

That ſhall be ſaid a reaſonable Extent which is found by the Oath of 12 Men, and returned by the Sheriff, and filed; and there can be no Re-extent granted upon Surmiſe, that it is more than the Half in Value, or the like, becauſe it extends only to a Chattel in Lands; but before the Extent be filed, the Court may examine the Cauſe, and if there be found Fraud, Deceit, or Partiality, they may ſtay the Filing of that Writ, and grant a New. 2 Inſt. 396.

But ſee 22 R. 2. 165. in Dower, and in Caſe of Freehold in Hill. 13 E. 2. fol. 74. b. the Caſe of the Hoſpital of T. a Scire Facias granted for the Surpluſage upon a Return in Value, and delivered to the Sheriff by Habere Facias ad valorem, for that it concerns an Inheritance, and ſo it was adjudged. Note the Diverſity, the Tenant by Elegit may for reaſonable Cauſe hold over the ordinary Courſe of the Extent, by a reaſonable Conſtruction upon this Statute. 2 Inſt. 396.

The Words of the Writ of Elegit (as has been ſaid) are, Tenendum ut liberum Tenementum &c. becauſe this Statute gives him Remedy by Aſſiſe &c. but he has but a Chattel, and no Freehold; and therefore it is ſaid, Si ejiciatur; And the Writ ſays Similitudinary, Ut liberum Tenement.' in reſpect of the Aſſiſe &c. 2 Inſt. 396.

And if he be put out of that Tenement he ſhall recover by a Writ of Novel Diſſeiſin, and after by a Writ of Re-diſſeiſin if need be.

This Branch does give the Aſſiſe to the Tenant by Elegit, and yet his Executors or Adminiſtrators ſhall have it by the Equity of this Act, and ſo ſhall the Executors or Adminiſtrators of Tenant by Statute Merchant, and Tenant by Statute Staple. 2 Inſt. 396.

I have ſeen a Record of a Judgment in the Reign of E. 2. that the Aſſignee of a Tenant by Elegit ſhould not have an Aſſiſe by the Purview of this Statute. 2 Inſt 397.

Tenant by Statute Merchant of Lands, which the Conuſor had in the Right of his Wife, brought an Aſſiſe upon this Statute, the Tenant pleaded Ancient Demeſne &c. and ſo found &c. and yet the Plaintiff had Judgment; And the Reaſon of the Judgement given in the Record is this, Licet Manerium Prædict' ſit de antiquo Dominico Coronæ, & Tenementa in eodem manerio exiſtentia per Parvum Breve tantum Placitabilia, & prædict' Ranulphus Huntingfeld in Cognitione prædict' quam fecit præd' J. in Statuto obligavit Tenementa præd' in ſumma ejuſdem cognitionis, quæ quidem obligatio naturam eorundem Tenementum non mutat, nec eſt ad præjudicium Domini, aut exhæredationem tenentium, ex quo Tenementa illa per Obligationem præd' ſolummodo onerata ſunt ad certum Tempus, poſt quod Tempus reverti debent præd' Radulpho & Uxori ſuæ exonerata, Tenend' ut Prius &c. Conſideratum eſt &c. 2 Inſt. 397

By this Judgment three Things are to be obſerved; 1ſt. That Lands in Ancient Demeſne may be extended by the Statute de Mercatoribus, Anno 13 E. 1. 2dly, That Ancient Demeſne is no Plea in Aſſiſe brought by Tenant by Statute-Merchant upon this Statute. 3dly, That in an Aſſiſe of Novel Diſſeiſin (which is feſtinum remedium) Ancient Demeſne ſhall be tryed by the Recognitors of the Aſſiſe. 3 Inſt. 397.

3. Execution was had *upon a Recognizance* by Elegit. Br. Execution, pl. 42. cites 38 E. 3. 12.

S. P. That Tertenants in Scire Facias upon Recognizance were returned warned, and the Plaintiff had Elegit. Br. Elegit, pl. 6. cites S. C.

4. In *Attachment upon a Prohibition* the *Plaintiff* recovered Damages *againſt a Prior, and prayed Elegit* for Execution, and could not have it, *but had Scire Facias* 21 E. 3. 40. and upon Confeſſion he recovered Damages as he counted. Br. Damages, pl. 146. cites 7 H. 4. 1.

5. In Quare Impedit Elegit *iſſued againſt him who had two Manors*, the Sheriff *may deliver the one Manor* to the Plaintiff *in Name of the Moiety of all*, and is not bound to deliver the Moiety of every Manor; Per Littleton J. Br. Elegit, pl. 14. cites 12 E. 4. 2.

S. P. and the ſame in Writ of Partition made where there are two Parcenors and two Manors, the Sheriff may aſſign the one to the one, and the other Manor to the other. Br. Dower, pl. 72. cites S. C.

6. *So of two Acres*; and this ſeems to be where they are *of equal Value*. Ibid.

7. Though the *Statute of Weſtm. 2. cap. 18. does not give Elegit by expreſs Words, unleſs of Land by theſe Words (Medietatem Terræ ſuæ &c.)* yet all the Writs of Elegit, as appears in the Book of Entries fol. 4. and

and 37. and in the Judicial Regiſter are nine Precedents, whereof every Writ mentions, Quod liberet Medietatem Terrarum & Tenementorum ſuorum, and therefore by this Word *Tenementum* it appears that the Statute was intended of Lands and Tenements, and therefore *Rent* &c. may be taken in Execution by Elegit as well as Land. And in the Book of Entries fol. 137. the *fourth Part of an Houſe* was taken in Execution by Elegit, and yet Houſe is not Land. Br. Elegit, pl. 13.

8. Upon a *Teſtatum* a Man may have Elegit in a foreign County. Br. Execution, pl. 1. cites 26 H. 8. 7.

9. Before the Statute Weſtm. 2. cap. 18. the Land of the Creditor was not ſubject to Execution for a Debt even upon a Judgment, and by that Statute a Moiety only is made liable, but *by the Statute* 13 *E.* 1. *de Mercatoribus, and* 27 *E.* 3. *cap.* 9. *and* 23 *H.* 8. *cap.* 6. *in Caſe of Statutes Staple and Merchant, all the Lands of the Cognizor, which he had at the Day of the Acknowledgement thereof, ſhall be extended in whoſe Hands ſoever they ſhall afterwards come*, whether *by Feoffment or otherwiſe.* 3 Rep. 12. a. Mich. 26 & 27 Eliz. in Scacc. per Cur. in Sir William Harbert's Caſe.

10. *Two Perſons had each* of them *a Judgment againſt one* in Debt, *he who had the firſt* Judgment *ſued an Elegit, and had the Moiety of the Lands delivered* in Execution. Afterwards *the other ſued out an Elegit.* The Court held that *he ſhall only have a Moiety of that Moiety* which he had at the Time of the Writ swarded, but adviſed the Sheriff to return that Special Matter. Cro. E. 482. pl. 17. Trin. 38 Eliz. C. B. Huit v. Cogan.

Ibid. at the End of the Caſe ſays, Vide 10 E. 2. Execution, that the intire Moiety ſhall be delivered.

11. Execution by Elegit ought to be *by Inquiſition*, ſo that where a *Term* is to be extended the Commencement of it muſt be recited. 4 Rep. 74. b. Hill. 39 Eliz. B. R. Palmer's Caſe.

12. An Extent was made of *two Parts of a Rent-charge.* It was holden by all the Court to be good; for although by the Act of the Party the Tenant ſhall not be liable to two Diſtreſſes, yet by an Act of Law he may, and this Act of the Sheriff is an Act of Law. Cro. E. 742. pl. 18. Hill. 42 Eliz. B. R. Wotton v. Shirt.

13. Sale and *Delivery of a Leaſe to the Plaintiff himſelf* upon an Elegit is no Sale by Force of the Writ delivered in Extent, which being reverſed the Party ſhall be *reſtored* to the Term itſelf. Cro. J. 246. pl. 4. Trin. 8 Jac. B. R. Goodyer v. Ince.

Brownl. 107 S. C held accordingly. — 2 Brownl. 208 S. C. but S. P. per tot. Cur. does not appear. ——— Yelv. 179. Goodyer v. Junce, S. C. & S. P. held accordingly and Noy ſaid that it had been ſo adjudged in the Caſe of one Robotham and alſo of one Morrell.

14. It was argued [agreed] by the Court that upon an Elegit the *Sheriff ought to deliver the Moiety by Metes and Bounds*, and *if* it be ſo that *the Conuſor be Joint-tenant, or Tenant in Common*, then it *ought to be ſo ſpecially alleged* and contained in the Return. Hutt. 16. Trin. 13 Jac. Anon.

Brownl. 38. Hill. 15 Jac. Anon S. P. and ſeems to be S. C. —— If a Sheriff delivers the Moiety of a Houſe without Metes and Bounds the Return is ill, and ſhall be quaſhed for Uncertainty; Per Holt Ch. J. Carth. 453. Trin. 10 W. 3. B. R. in Caſe of Pullen v. Birkbeak.

15. An Elegit does not lie of the *Glebe Land* of a Parſon or Vicar no more than of a Church-Yard; eſt ſolum Deo conſecratum, Jenk. 207. pl. 36.

16. The *Bailiff of a Liberty* may make an Inquiſition and Extent upon an Elegit by Warrant from the Sheriff; Reſolved. Cro. C. 319. pl. 13. Trin. 9 Car. B. R. Sparrow v. Matterſock.

17. Upon a *ſecond Elegit* only a *Moiety of the remaining Moiety* ſhall be extended; Arg. Hard. 26. cites 38 Eliz. C. B. Cogan v. Hunt, and 9 Jac. C. B. * Burnham's Caſe.

* 2 Brownl. 96, 97. Burnham v. Bayne, S. C. & S. P. agreed by all the Juſtices.

18. *But* where the *ſame Perſon had two Judgments the ſame Term againſt the ſame Perſon*, and took out two Executions upon his two Judgments, viz. two Elegits, it was adjudged that the two full Moieties being taken thereupon was good, becauſe both Judgments were in the ſame Term, which is but one Day in Law, and ſo of equal Date. Hardr. 27. Mich. 1655. in Scacc. Attorney-General v. Andrew.

19. If the Sheriff upon Inquiſition on Elegit returns that Defendant has 20 *Acres in D. and* 20 *Acres in S.* and he *delivers the* 20 *Acres in S.* for the Moiety of all, the whole is void; for he ought to deliver the Moiety of the 20 Acres in each Vill; and this may be avoided in Evidence in *Ejectment* for the Lands. Lev. 160. Hill. 16 & 17 Car. 2. B. R. Stamford (Earl) v. Needham.

Sid. 239. pl. 11. S. C. but ſtates it that the Inquiſition found that Defendant had 20 Acres where in Truth he had only 10; but that the Court held that this could not be tried in Ejectment, but that the Party grieved may file a Declaration, and General Iſſue ſhall be taken, and if upon the Evidence it appears that more than a Moiety of the Land, which the Party had, is delivered, the Extent is void. —— Note that Hill. 23 & 24 Car. 2. B. R. Hale Ch. J. delivered his Opinion, that ſuch Extent of more than a Moiety is not void nor can be avoided after ſuch Extent filed. Ibid.

20. Elegit *not taken out within a Year and a Day* after the Judgment, but there being Continuances on the Roll may be taken out at any Time without ſuing out a Sci. Fa. Carth. 283. Mich. 5 W. & M. in B. R. Seymour v. Greenvill.

21. Upon Elegit the Sheriff *delivered more than a Moiety*, as appeared by the Return of the Inquiſition; Per Holt Ch. J. the Return is not void but voidable by Writ of Error or Audita Querela. Carth. 453. Trin. 10 W. 3. B. R. Pullen v. Birkbeak.

Holt ſaid, that what ſtuck with him moſt was the Acceptance and Length of Time, (viz nine Years) for the Sheriff returned that he had delivered the Land in Execution, which imports an Acceptance. 12 Mod. 361. and 366. S. C. & P. per Holt as to the Acceptance. But afterwards 368. per Cur. without the Solemnity of an Argument on the Bench, this clearly is a void Extent, it appearing on the very Return filed, that more than a Moiety is extended, and without all Doubt what is extended beyond the Moiety is without Authority, and therefore void; and ſince that cannot be ſevered from the reſt it ſpoils all, and is the ſame Thing as if nothing at all had been extended; and though the Plaintiff did accept it, yet he had no Means to get actual Poſſeſſion, or to defend his Poſſeſſion againſt the Owner of the Land, and ſo it is ipſo facto void, and needs no Judgment or Audita Querela to avoid it, becauſe it is directly againſt the Statute of Weſtm. 2. cap. 18. by which an Elegit is given, and the right Diverſity is where the Inequality appears on the Return, and where not. So the Sci. Fa. reciting this ſpecial Matter is very proper, and an Award of Execution was granted per tot. Cur. in Caſe of Pullen and Purbeck. —— 2 Salk. 563. pl. 2. Putten v. Purbeck, S. C. and the Court held the Execution void. —— Ld. Raym Rep. 346. S. C. but becauſe ſo many Years were elapſed the Court would not intermmeddle. —— Ibid. 718. Hill. 13 W. 3. S. C. and after ſeveral Arguments at the Bar the Court held it a plain Caſe that the Executson was void, and that the Plaintiff have a new Execution. —— Sid. 91. pl 12. Mich. 14 Car. 2. B. R. in Caſe of Berry v. Wheeler. S. P. per Curiam, that the Extent of more than a Moiety is void.

22. This Sort of Execution was not at Common Law, but *created by Weſtm. 2. cap.* 18. as appears by the Statute; Per Shower; Arg. 12 Mod. 357. Paſch. 12 W. 3. in Caſe of Pullen v. Purbeck, cites 1 Inſt. 394. 3 Co. **Sir William Harbert's Caſe**, the Common Proceſs was only a Fi. Fa. or Levari.

23. If there be *two Judgments* for 100 l. each, and *Elegit on one*, and Inquiſition *finds* he has 20 *Acres*, *and* 10 of them *are extended*, aud then an Elegit is ſued upon the other, and Inquiſition finds he has 20 Acres, and thereupon the *other* 10 Acres *are extended*, no Audita Querela lies; Per

Per Holt Ch. J. at which Sir Bartholomew Shower at the Bar ſhook his Head; whereupon Holt ſaid on his Word it was true. If there be two Judgments, and the Defendant is ſeiſed of 20 Acres, and a Moiety of them is extended upon one, and an Extent goes upon the other, and Inquiſition thereupon finds him ſeiſed of 20 Acres, without any Notice of the former Extent, and hereupon the other Moiety is extended, this is well though in Truth a Moiety of the remaining Moiety ought to be extended; Per Holt. 12 Mod. 357. 361. Paſch. 12 W. 3. in Caſe of Pullen v. Purbeck.

24. It was ſaid by *Holt Ch. J.* that *he was not ſatisfied with the Opinion of my Lord Coke* on Weſtm. 2 *that at Common Law no Scire Facias lay on a Judgment in a perſonal Action till Weſtm.* 2. for the Words (Sive alia quæcunq' irrotulata) came after (contractus & conventiones) and therefore cannot be conſtrued of Judgments, but the Law has been otherwiſe taken, and I muſt ſubmit; it is plain it lay on a Judgment in Annuity. 2 Salk. 600. pl. 9. Mich. 1 Ann. B. R. in Caſe of Withers v. Harris.

7 Mod. 67. S. C & S. P. by Holt Ch. J. but ibid. 69. Powell J. ſaid, that the Law had been taken according to Ld. Coke's Opinion ever ſince; and Holt Ch. J. ſaid, that he ſubmitted to Ld. Coke's Opinion though he ſaw no Reaſon for it.

(M. a. 5) Actions by or againſt Tenant by Elegit.

1. IF Tenant by Elegit *commits Waſte*, Action of *Account* lies againſt him, and *not Writ of Waſte*; Quod nota. Br. Elegit, pl. 7. cites 21 E. 3. 2, 3.

2. The *Debtor ſhall have Venire Facias ad computandum for the Waſte of the Recoveror* and ſhall recover Damages for the Surpluſage, *as well againſt the Aſſignee and the Executor, as* againſt the *Creditor* himſelf. Br. Elegit, pl. 20. cites tit. Elegit, in the old Tenures

3. *And if* Tenant by Elegit *aliens in Fee*, he in *Reverſion ſhall have Aſſiſe* againſt the Alienor and the Alienee by the Equity of the Statute of Weſt. 2. cap. 21. which ſays, Quod vivente altero illorum of the Guardian or Termor locum habet Aſſiſa &c. Ibid.

4. *So of the Alienation of the Executors or of the Aſſignee* of the Tenant by Elegit. Ibid.

(M. a. 6) Where there are ſeveral Judgments, which of them ſhall have the Precedency.

1. A *Had Judgment againſt J. S. in* an Action of *Debt Anno* 3 *Jac.* and B. *had a Judgment in Debt againſt the ſaid J. S. Anno* 4 *Jac. A. brought a Scire Facias upon his Judgment* againſt the ſaid J. S. *and had Judgment* likewiſe therein, and *B. afterwards had Judgment in Scire Facias alſo. A.* 10 *Jac. had an Elegit*, and the *Sheriff* impanelled a Jury, and *delivered the Moiety of the Lands in Execution, but he did not return his Writ*; And thereupon B. endeavoured to have an Elegit upon his Judgment, and to turn A. out of Poſſeſſion; but per Coke, *if B. ſhould*

ſhould turn J. S. out of Poſſeſſion by Virtue of his Elegit, A. may have a new Elegit, becauſe his Judgment is Prior to the other. Roll. Rep. 77 pl. 18. Mich. 12 Jac. B. R. Brett v. Foſter.

2 The *Plaintiff had a Moiety of the Lands delivered unto him in Poſſeſſion by an Elegit upon a Judgment given Craſtino Trin'*; the *Defendant claimed by an Extent on a Statute acknowledged in the ſame Term, but before the Judgment was given.* The Reporter ſays he heard that it was adjudged that the Plaintiff had the better Title, being in Poſſeſſion under a Judgment; And all the Term is but one Day in Law. Lat. 53. Paſch. 1 Car. Gerrard v. Norris.

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N. B. The Reſidue of Tit. Execution will be contained in the ſubſequent Volume.